

CENTER *for*
JUDICIAL
ACCOUNTABILITY



Box 69, Gedney Station • White Plains, New York 10605-0069
TEL: 914/997-8105 • FAX: 914/684-6554

By Priority Mail

January 23, 1994

Professor Stephen L. Carter
Yale Law School
127 Wall Street
New Haven, Connecticut 06511

RE: The federal judicial nomination/confirmation process

Dear Professor Carter:

I have learned from newspaper and television interviews with you that you are working on a book on the federal appointment process and what you term "the confirmation mess". It was in that connection that I called your office earlier this month, leaving a detailed message with your secretary, Marsha Mayfield.

Thereafter, in a follow-up call, Ms. Mayfield indicated to me that you had been "tied up" with final exams. Consequently, and so as not to further delay--since I understand your book is in its final stages--I am taking the liberty of forwarding to you directly a sampling of the primary source materials we have to offer you. These shocking materials will either dramatically reinforce conclusions you have already drawn--or will require you to revise same so as to accord with our fully-documented and profoundly troubling evidentiary presentation.

At the outset, I must state that these materials were provided to the National Commission on Judicial Discipline and Removal, of which you were a member. Our July 14, 1993 transmittal letter, which quoted from pages 83-5 of the Commission's Draft Report relative to the "prophylactic" importance of a sound nomination/confirmation process, stated:

"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 Committee¹, 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 [1992]--and a call to the Senate leadership to halt 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)

...

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..."

Thereafter, upon receiving a letter from the Commission's Deputy Director, William Weller, indicating that the critique had not been circulated to the Commission members, we wrote a second letter, dated July 22, 1993, in which we quoted yet another portion of the Draft Report (p. 66). We requested that our critique be provided to each Commissioner, further noting that:

"...no one from the Commission's staff has as yet communicated with us either about the critique or about the additional information, subsequently obtained..."

We also offered to travel to Washington for the Commission's public meeting of July 28, 1993.

¹ The Center for Judicial Accountability, the organization indicated by the above letterhead, is the successor to the Ninth Judicial Committee.

In fact, on July 28, 1993, I did travel to Washington for the Commission's final meeting, sitting in the "audience" as the sole member of the public. Although I was not permitted to participate with any testimony, perhaps you will remember my presence throughout the 7-hour session.

Since I do not believe that you ever saw a copy of our documented critique--or the other materials enclosed with our initial July 14, 1993 letter to the Commission--they are being transmitted herewith for your review.

These materials should suffice to convince you of the enormity of our investigation of the screening process--and of our dramatic findings. Yet, it must be emphasized that they represent only the first installment of what we have documented. Indeed, the most sickening part of the amazing story of our critique and of our call for a moratorium based thereon is the response we received from the Senate Judiciary Committee, the Senate leadership, the American Bar Association, and the Association of the Bar of the City of New York--among others. Indeed, our further documentation establishes not only the outright "cover-up" that thereafter followed, but the steadfast refusal by those charged with protecting the public to take even the most elementary corrective steps to correct the dangerous situation which our critique established.

As reflected by our correspondence--a small sampling of which I also enclose--our vigorous efforts in the summer of 1992 to secure a moratorium of confirmations of judicial nominees pending official investigation of the screening process included communications with those leading the opposition to the Senate confirmation of Edward Carnes to the Court of Appeals for the 11th Circuit. Their failure to embrace our critique--as a propitious "non-partisan" opportunity to block the Carnes confirmation on the basis of a demonstrably flawed screening process--is inexplicable except as a reflection of the powerful forces working to keep the confirmation process the sham that it is. Indeed, the Senate Judiciary Committee has refused to respond to our specific inquiries as to recommendations and changes adopted in connection with its June 2, 1989 hearing on "The Role of the American Bar Association in the Judicial Evaluation Process."

Please call me to arrange a meeting at which we can personally discuss our findings and provide you with copies of our breath-taking correspondence file. For your information, our biographic credentials appear at the end of the critique.

In the event you do not wish to pursue the evidence presented by our critique, its compendium, and the other materials we have enclosed, we would most appreciate your returning same to us.

Yours for a quality judiciary,



ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability

Enclosures:

- I. Materials Transmitted to the National Commission on Judicial Discipline and Removal:
 - (a) Critique and Compendium of Exhibits
 - (b) 5/18/92 letter to Senate Majority Leader Mitchell
 - (c) 6/2/92 letter to Senate Majority Leader Mitchell
 - (d) Letter to the Editor, "Untrustworthy Ratings?",
New York Times, 7/19/92
- II. "Court Nominee Splits Advocates of Civil Rights",
New York Times, 6/11/92
 - 6/12/92 fax to Congressman John Roach/Black Caucus
 - 6/12/92 fax to Congressman John Conyers/Black Caucus
 - 6/17/92 fax to Ron Stroman, House Gov't Operations
- III. "Credentials Gap: The Case of the Missing Cases",
New York Magazine, 6/22/92
- IV. "Waiting For Clinton, Senators Hold Up Court Confirmations", New York Times, 9/1/92
 - 9/14/92 fax to Congressman John Conyers

NYT

A14 L

THURSDAY, JUNE 11, 1992

Court Nominee Splits Advocates Of Civil Rights

Strong Opposition Meets Death Penalty Backer

By MARTIN TOLCHIN
Special to The New York Times

WASHINGTON, June 10 — The Congressional Black Caucus has begun a campaign to defeat a nominee for the Federal appeals court in Atlanta because he favors the death penalty.

The nomination of Edward E. Carnes to fill the seat of Judge Frank M. Johnson Jr. on the United States Court of Appeals for the 11th Circuit has divided civil rights proponents in a dispute that recalls the intensity of the one over Clarence Thomas's nomination to succeed Thurgood Marshall on the United States Supreme Court.

Mr. Carnes, who is head of the Capital Litigation Division of the Alabama Attorney General's Office, represents the state in appeals from convictions of capital crimes. His critics say that Mr. Carnes, 41 years old, has zealously sought to sustain those convictions despite evidence that blacks were systematically excluded from Alabama juries, which they say thereby deprives some defendants of a fair trial.

Mr. Carnes's supporters, who include a number of strong civil rights proponents, said he was merely doing his job, noting that it was his responsibility to defend the trial judges' decisions. They said that he had worked to end the exclusion of blacks from juries and that his overall record portrayed a fair man untainted by racism.

Battle in Senate

The Senate Judiciary Committee last month approved Mr. Carnes's nomination by a vote of 10 to 4, with four liberal Democrats in opposition. It is now headed for what is expected to be an intense battle on the Senate floor.

The nomination is tangled in racial politics that could affect the re-election prospects of Southern senators, especially Democrats who have benefitted heavily from black votes, including Wyche Fowler Jr. of Georgia, Richard C. Shelby of Alabama and Terry Sanford of North Carolina. Mr. Fowler, who has not yet taken a position on the nomination, was upbraided last month in an editorial in *The Atlanta Journal and Constitution* that asked, "Where's Senator Fowler on Carnes?"

Nan Aron, executive director of Alliance for Justice, which opposes the nomination, said it could become a political touchstone in much the way that the Thomas nomination had. "There's no question that this will affect the re-election of senators who face the voters this year," she said.

Two leaders of the 26-member black caucus, Democrats John Conyers Jr. of Michigan and John Lewis of Georgia, have scheduled a meeting on Thursday with Senator George J. Mitchell of Maine, the majority leader, to oppose the nomination. "We're going full tilt on this," said Mr. Conyers, head of the Government Operations committee, adding that he thought the chance of defeating the nomination was excellent.

Praise for Nomination

But Senator Howell Heflin, the Alabama Democrat who sponsored Mr. Carnes, said, "The people who have been in the pit with him support him." Judge Johnson, who is revered by civil rights advocates, has called Mr. Carnes a "very good" choice as his successor. The nomination was also praised by several civil rights leaders in Alabama, including State Representative Alvin Holmes, chairman of the Affirmative Action Committee of the Black Caucus of the Alabama Legislature.

Mr. Carnes's strongest supporter is Morris Dees, director of the Southern Poverty Law Center, who has argued that despite advocating the death penalty, "Ed Carnes has an outstanding record on civil rights," including his successful prosecution of state judges for racist misconduct. The prosecutions led to two judges being removed from the bench in the last few years.

"For once we have a nominee who is not a country club lawyer who has served corporate interests," Mr. Dees said in a letter to Joseph E. Lowery, president of the Southern Christian Leadership Conference. "For once, we have a nominee who has fought the Klan and who has fought racist judges."

Mr. Lowery was not persuaded, and his group opposed Mr. Carnes's nomination, as did the National Association for the Advancement of Colored People and several other civil rights groups.

The Congressional Black Caucus, in opposing the nomination, asserted that "Mr. Carnes played a major role in an effort to protect a pattern and practice by Alabama prosecutors of using peremptory strikes to remove blacks from trial juries."

This contention is strongly disputed by Rosa Davis, chief of the Appeals Division in the Alabama Attorney General's office, who said, "Mr. Carnes played a major role in trying to get district attorneys not to use peremptory challenges to blacks."

David Barber, the Birmingham District Attorney, wrote Senator Joseph R. Biden Jr., the Delaware Democrat who is chairman of the Judiciary Committee, that "at least as early as the early to mid-1980's, Mr. Carnes in talking with district attorneys, including me, spoke out against the use of peremptory strikes in a racially discriminatory way." A similar letter was sent by Robert L. Rumsey, Talladega district attorney.

Mr. Conyers countered that Mr. Carnes "never once refused to pursue a case where racially discriminatory strikes were at issue."



NINTH JUDICIAL COMMITTEE

Box 70, Gedney Station
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FAX COVER SHEET

6/12/92

1:30 p.m.

DATE

TIME

CONGRESSMAN JOHN LEWIS/ BLACK CAUCAS
ATT: Mr. Ronald Roach, Press Secretary

TO:

202-225-0351 (tele: 202-225-3801)

FAX NUMBER:

4

This fax consists of a total of _____ pages, including this cover sheet. If you do not receive the indicated number of pages, or if there is a question as to the transmittal, please call (914) 997-8105.

Elena Ruth Sassower, Coordinator

FROM:

Dear Mr. Roach:

As discussed, enclosed is a copy of our May 18, 1992 letter to Senate Majority Leader Mitchell--which Senator Mitchell should have properly apprised the members of the Black Caucus of when they met with him yesterday.

Our critique fully justifies our call for a moratorium on Senate confirmation of judicial nominations. It is, therefore, uniquely valuable as you seek to block the Carnes confirmation--and other similiarly troubling nominations coming before the Senate.

Please be sure to also review our June 2nd letter to Senator Mitchell which not only updates our critique, but underscores the need for immediate and dramatic action by the Senate leadership.

Perhaps it will be from the House of Representatives that leadership will emerge!

*Elena Ruth
Sassower*



NINTH JUDICIAL COMMITTEE

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FAX COVER SHEET

6/12/92

3:00 p.m.

DATE

TIME

CONGRESSMAN JOHN CONYERS, JR./ BLACK CAUCUS
ATT: Mr. Bob Weiner, Press Secretary

TO:

202-225-5460 (tele: 202-225-5051)

FAX NUMBER:

4

This fax consists of a total of _____ pages, including this cover sheet. If you do not receive the indicated number of pages, or if there is a question as to the transmittal, please call (914) 997-8105.

Elena Ruth Sassower, Coordinator

FROM:

Dear Mr. Weiner:

I read the article entitled "Court Nominee Splits Advocates of Civil Rights", appearing in yesterday's New York Times, wherein Congressman Conyers is quoted as saying, "We're going full tilt on this."

Enclosed is a copy of our May 18, 1992 letter to Senate Majority Leader Mitchell--which Senator Mitchell should have properly apprised the members of the Black Caucus of when they met with him yesterday.

Our critique fully justifies our call for a moratorium on Senate confirmation of judicial nominations. It is, therefore, uniquely valuable as you seek to block the Carnes confirmation--and other similiarly troubling nominations coming before the Senate.

I look forward to hearing from you.

Elena Ruth Sassower



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FAX COVER SHEET

6/17/92

4:10 p.m.

DATE

TIME

Ron Stroman, Deputy General Counsel
House Government Operations

TO:

202-225-4784 (tele: 202-225-5051)

FAX NUMBER:

2

This fax consists of a total of _____ pages.

Elena Ruth Sassower, Coordinator

FROM:

Dear Mr. Stroman:

Enclosed is a copy of the "Intelligencer" page from the June 22nd issue of New York magazine (p. 7). Ours is the lead piece!

We believe our critique presents a fantastic opportunity to halt the otherwise inexorable confirmation of judicial nominees by putting the blame where it rightfully belongs--upon the Justice Department and the White House.

Indeed, it is Congress' obligation to call for such moratorium. As set forth in our June 11, 1992 letter to the Senate Judiciary Committee (with a copy to Senate Majority Leader Mitchell):

"...the public interest is in immediate danger in a manner analogous to that presented by the discovery that medical screening had failed to prevent transmission of contaminated blood to a patient. There is no question but that such discovery would result in an immediate emergency halt of all blood transfusions--until the source of contamination was isolated and safeguards put in place.

We have documented that our judicial nominating process has been infected by a contaminated legal screening process which has resulted in "approved" ratings of unfit nominees for life-time federal judgeships. Our findings present an issue of emergency national concern."

Elena Ruth Sassower

The New York Times

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NEW YORK, TUESDAY, SEPTEMBER 1, 1992

Waiting for Clinton, Democrats Hold Up Court Confirmations

By NEIL A. LEWIS

Special to The New York Times

WASHINGTON, Aug. 31 — In the latest battle in the war for ideological control of the Federal courts, the Democrats who control the Senate have begun to delay confirming some of President Bush's nominees for major judgeships to preserve the vacancies for Gov. Bill Clinton to fill if he is elected President.

The action is the outcome of a sharp behind-the-scenes debate in which many Democrats have argued that the Senate should go further and stop approving any of Mr. Bush's judicial nominations in the waning months of an election year.

It is a debate with politics, notions of good government and judicial ideology in the mix. For more than a decade, Senate Democrats have complained that they have been largely powerless to stop President Ronald Reagan and President Bush from substantially shifting the Federal courts in a more conservative direction with hundreds of their nominations.

Although the Democrats control the Senate, which confirms judicial appointments, they have balked for the most part at rejecting the President's choices on straightforward ideological grounds. But with Mr. Clinton leading in opinion polls, the Democrats are considering how much they should slow down or even stop the confirmation process to preserve many of the court vacancies until after the inauguration.

If Mr. Clinton wins the election, the

Continued on Page B6, Column 4

Waiting for Clinton, Senators Hold Up Court Confirmations

Continued From Page A1

approximately 50 judgeships for which Mr. Bush has nominated candidates could be filled by Democratic — and presumably more liberal — nominees.

Although it is one of the more subtle political issues this year, it is one with long-term effect because the judges have lifetime tenure and their impact will extend well beyond the election.

Senator Joseph R. Biden Jr., the Delaware Democrat who heads the Judiciary Committee, suggested in an interview that he would be selective as to which of the Bush Administration nominees would be considered before Election Day.

But he said it would be both wrong in terms of governance and impractical to shut down the confirmation process.

Concern About Backlogs

Although Mr. Biden has complained about the conservative direction of the courts, he said it was necessary to continue to process nominees for courts that are backed up because of the judicial vacancies.

"Some of the courts in this country are in desperate shape with great backlogs," he said.

But several senators said that they believed that Mr. Bush and Mr. Reagan before him had filled the courts with conservative ideologues and that the Democrats had no obligation to allow it to continue this fall.

"It's just baffling why we are still considering Bush's choices this late in the game," said a senior aide to a Democratic Senator, summing up an increasingly common sentiment among Democrats in the Senate.

Although none of the Senators urging a shutdown in the process would be quoted, Representative John Conyers Jr., Democrat of Michigan, said he recently led a Congressional delegation to complain to the Senate majority leader, George J. Mitchell of Maine, who has continued to schedule floor votes on judicial nominees.

"We told him it was very unsettling, even incredible, that the Senate should continue to consider these people as if it were business as usual," Mr. Conyers said. Mr. Mitchell responded through a spokesman, saying he had relied on the judgment of Senator Biden.

It appears that Mr. Biden and his fellow Democrats will be more willing to confirm nominees at the district court level, the trial courts where judges are largely bound by precedent and have little ideological leeway. It is those courts that typically have the greatest backlogs.

Nominees for the nation's 13 circuit courts of appeal, the level below the Supreme Court, are undergoing greater scrutiny, especially those who are identifiable as conservatives.

Both the pace and the selection of which nominees are being considered has upset White House officials. C. Boyden Gray, the White House counsel, said in an interview, "It looks as if they will leave in October without confirming 57 nominees."

Mr. Gray expressed dismay over the number of confirmations. But Mr. Biden insisted the Senate's pace of confirmations had not changed and criticized the Administration for what he said was its slow pace in sending its nominations to the Senate for years.

It is not raw numbers that are at stake, but the more ideologically sensitive posts on the appeals courts. The best example of how the issue is being

Seeing a chance to change the courts' direction.

played out involves John G. Roberts Jr., the deputy solicitor general in the Bush Administration. Mr. Roberts has been nominated to fill the seat on the Court of the Appeals for the District of Columbia Circuit left vacant by Clarence Thomas, who joined the Supreme Court last fall after a stormy confirmation hearing.

Mr. Roberts is in many ways typical of the nominees of the Reagan-Bush era. Viewed as a staunch conservative, he is 37 years old, meaning he could serve for as long as four decades on a court widely viewed as second in importance only to the Supreme Court. He has been the top priority of the White House in behind-the-scenes negotiations with Senator Biden.

Mr. Biden, who would not discuss the Roberts nomination, has not scheduled a hearing before the Judiciary Committee for Mr. Roberts, making confirmation before the election increasingly unlikely.

The issue of judicial confirmations has always been wrapped up in politics, never more so than in an election year. In summer 1980, Ronald Reagan, then a Presidential candidate, asked Senator Strom Thurmond of South Carolina, the ranking Republican on the Judiciary Committee, to try to block all nominations to save the vacancies for him if he was elected.

Mr. Thurmond said at the time it was the right thing to do and only a few district court judges were confirmed.

The judiciary committee has recently concluded hearings on several candidates and a floor vote is scheduled next week in what is expected to be a contentious debate on the nomination of Edward E. Carnes to the 11th Circuit Court of Appeals in Atlanta.



NINTH JUDICIAL COMMITTEE

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FAX COVER SHEET

9/14/92

12:45 p.m.

DATE

TIME

REPRESENTATIVE JOHN CONYERS, Jr.
Att: Sherille Ismail, Counsel

TO: _____

202-225-4784 (tel: 202-225-5126)

FAX NUMBER: _____

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Elena Ruth Sassower, Coordinator

FROM: _____

MESSAGE:

Dear Mr. Ismail:

Despite the courageousness of Congressman Conyers in being quoted by the Sept. 1, 1992 New York Times, editorials are condemning the attempt to halt judicial confirmations--espoused by the Congressman--as "playing politics".

Our critique to the Senate Judiciary Committee--documenting the failure of the screening process--offers Congressman Conyers a non-partisan reason for seeking a halt to judicial confirmations--and an opportunity to champion the public interest.

Please advise us how your review of our case study of the O'Rourke nomination is progressing. I am planning to be down in Washington on Thursday--and would be most appreciative of the opportunity to meet with you. Kindly let me know if an appointment with you or another member of Congressman Conyer's staff can be arranged.

Elena Ruth Sassower