NINTH JUDICIAL COMMITTEE

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FAX COVER SHEET

5/8/92 — DATE

3:15 p.m. — TIME

TO: ALLIANCE FOR JUSTICE
Att: George Kassouf

FAX NUMBER: 202-265-2150

This fax consists of a total of 2 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.

FROM: Elena Ruth Sassower, Coordinator

MESSAGE:

We believe that our submission to the Senate Judiciary Committee documents that Mr. O'Rourke's nomination marks more than a descent "toward mediocrity". It is a plummetting to outright unfitness.

The gross failure of the screening process (see, inter alia, pp. 29-38) requires a halting of confirmations presently before the Senate Judiciary Committee. In that connection we draw your attention to an editorial appearing in yesterday's New York Times:

> "For the Senate, the lesson is to stop confirming the Administration's nominees on the assumption that the White House will eventually get its way; and to press hard for justices with proven respect for judging, for Congress and for the legislative process."

We look forward to working with the Alliance.

Elena Ruth Sassower

Now It's the Bush Court

Clarence Thomas and David Souter, the two Supreme Court Justices appointed by President Bush, have just made moderates of Sandra Day O'Connor and Anthony Kennedy, two Reagan appointees. The newest Justices tipped the balance in a 5-to-4 decision stripping another right of access to the Federal courts for prisoners who believe their rights have been denied.

Justices O'Connor and Kennedy, who had been part of Chief Justice William Rehnquist's wrecking crew in earlier cases involving state prison inmates, felt compelled to file dissenting opinions. They charged, rightly, that the Court had carried its deconstruction too far.

If politics were all that mattered, the decision in Keeney v. Tamayo-Reyes would be an achievement for the Administration: another payment on Mr. Bush's pledge to remake the Federal judiciary and crack down on criminals. But since justice and craftsmanship also matter, the case is an embarrassment. It should embarrass even Mr. Bush, who boasts that he appoints only justices who don't "legislate from the bench."

Jose Tamayo-Reyes, a Cuban refugee who speaks little English, was accused of a barroom murder. He pleaded to manslaughter but later contended that garbled translations misinformed him about the charge and led him to think he was agreeing to stand trial. A Federal appeals court said he was entitled to a Federal court hearing not limited to the evidence his apparently negligent attorney had offered in Oregon's state courts. That accorded with a 1963 Supreme Court decision Congress adopted when it amended the habeas corpus law in 1966.

Monday's ruling overturns the 1963 precedent and holds that the defendant, while entitled to a day in Federal court, is stuck with his lawyer's inadequate evidence.

Justice Byron White's opinion is full of reasons Congress might want to deny Mr. Tamayo-Reyes the kind of hearing he seeks — but gives no comprehensible reason for not abiding by Congress's 1966 judgment. Justice White, the Chief Justice, Justice Antonin Scalia and the Bush appointees are legislating from the bench.

This sorry case holds many lessons. Despite their dissents, Justices O'Connor and Kennedy must bear the burden of earlier votes that weakened habeas corpus and paved the way for the latest excess of judicial activism. Congress needs to assert its constitutional function and legislate fair habeas rules so clearly that the Court cannot misinterpret them.

For the Senate, the lesson is to stop confirming the Administration's nominees on the assumption that the White House will eventually get its way; and to press hard for justices with proven respect for judging, for Congress and for the legislative process.

**** TRANSMISSION REPORT 1992-05-08 14:23 ****

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