NINTH JUDICIAL COMMITTEE

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FAX COVER SHEET

5/18/92 (DATE) 1:15 p.m. (TIME)

TO: THE NEW YORK TIMES/EDITORIAL PAGE
ATT: MR. JACK ROSENTHAL

FAX NUMBER: 212-556-3628 (tele: 212-556-1234)

This fax consists of a total of 5 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 were surprised--and disappointed--not to have had any response to our fax of Friday, May 15th, which was sent to afford you "lead time" on a breaking story.

We would appreciate your passing this on to the appropriate news desk--if that's where it should be directed.

Enclosed is our today's letter--mailed and faxed to Senate Majority Leader George Mitchell--as well as a copy of your May 7, 1992 editorial, "Now It's the Bush Court"--which inspired us to call upon Senator Mitchell to call for a moratorium on judicial nominations.

Your review of our critique to the Senate Judiciary Committee will leave no doubt but that we are fully justified in calling upon Senator Mitchell to take the drastic action urged in our letter to him.

Please call us to let us know to whom our critique should be delivered.

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.