NINTH JUDICIAL COMMITTEE

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FAX COVER SHEET

5/19/92 — DATE
3:10 p.m. — TIME

TO: THE NEW YORK TIMES
ATT: MR. NEIL LEWIS

FAX NUMBER: 202-862-0340 (tele: 202-862-0399)

This fax consists of a total of 6 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

Dear Mr. Lewis:

Enclosed is our letter to Senate Majority Leader George Mitchell--as well as a copy of the NYT May 7, 1992 editorial--which inspired us to call upon Senator Mitchell to call for a moratorium on confirmation of judicial nominees.

Your review of our critique to the Senate Judiciary Committee--which we will send you by priority mail--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.

Presently, we are mobilizing support from leaders of the bar and public interest groups. We are also, inter alia, calling upon the ABA to reconsider and retract its "favorable" rating of Mr. O'Rourke.

We look forward to working with you on this precedent-setting story.

Elena

Also enclosed is a copy of your frightening June 4, 1991 article which foreshadowed the serious situation that has emerged from the Justice Department's pressure and intimidation.

Bar Group Told to Stop Rating Judges

By NEIL A. LEWIS
Special to The New York Times

WASHINGTON, June 3 — The Justice Department has told the City Bar Association in New York that it should get out of the business of evaluating who becomes a Federal judge in New York, something it has done since at least 1920.

Underlying the dispute is a long effort by President Bush and President Reagan before him to push the Federal courts in a more conservative direction, an effort occasionally hampered by outside groups passing on candidates' qualifications.

The department said it is telling prospective Federal judges to cooperate only with the American Bar Association, which two years ago agreed to change the standards by which it evaluates judicial nominees under pressure from the Administration.

Candidates for the Federal bench have been told to avoid submitting to evaluation by the New York group, officials have acknowledged. Fifteen Federal judgeships are vacant in New York now.

'Policy Seeking to Intimidate'

The American Bar Association was heavily criticized by conservatives a few years ago for its negative reviews of some candidates, and Attorney General Dick Thornburgh threatened to exclude the association from the process.

But association officials agreed to revamp their evaluation procedures and standards and have been allowed to retain a role in the process.

Conrad K. Harper, the president of the New York association, said that the Justice Department under Mr. Thornburgh has "adopted a policy seeking to intimidate candidates who wish to participate in evaluations by local bar associations." Mr. Harper said that candidates have been told their nominations would not be put forward if they agreed to an evaluation by the New York group.

He cited a letter from Murray G. Dickman, who oversees judicial nominations for Mr. Thornburgh, warning the New York group that the national association "has sole responsibility for evaluating Federal judicial candidates." Mr. Dickman told the New York association: "Your interference in the constitutional process of selecting and appointing Federal judges must end."

Slightly More Liberal

Mr. Dickman today acknowledged having told candidates to avoid cooperating with the New York association. He said that the department has an agreement with the national association and does not want to complicate matters by having local bar groups provide additional formal evaluations of the Administration's choices.

He said that many bar groups long to have a say on who gets to be a Federal judge and that it would be wrong to make an exception for the Association New York group, among the most active local bar groups in the nation, has long taken a formal interest in evaluating prospective judges.

In evaluating Federal judges, the New York association has generally been slightly more liberal than the national association.

Mr. Harper said that in a meeting last year with Justice Department officials, his group was asked to submit data comparing its judgments on nominees with the national association's over the last 15 years. He said the two associations offered similar judgments except on some recent nominees who declined to submit to evaluation by the New York group.

Staff members on the Senate Judiciary Committee and others have said that the national association has become more amenable to the Administration's choices since being threatened with being removed from the process. Sheldon Goldman, a political science professor at the University of Massachusetts who has studied judicial nomination patterns, offered a statistical analysis in the magazine Judicature showing the national association's evaluations have been higher for President Bush's choices than for any of his recent predecessors.

Ralph I. Lancaster, who heads the national association's evaluation committee, has denied being intimidated by the Administration.

9th Judicial Chattee

Att: Mr. Neil Lewis
202-862-0340

THE NEW YORK TIMES **EDITORIALS/LETTERS** THURSDAY, MAY 7, 1992

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.