NINTH JUDICIAL COMMITTEE

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By Hand

June 14, 1992

Max Frankel, Executive Editor
The New York Times
229 West 43rd Street
New York, New York 10036

Dear Mr. Frankel:

We are writing to you to request a meeting to discuss the shocking and shameful suppression of an important story of local, regional, and national concern.

The enclosed critique represents the culmination of six-months' work by a local grass-roots citizens' group. It documents the unfitness of Westchester County Executive Andrew O'Rourke for the federal judgeship to which he was nominated by President Bush, following recommendation by Senator D'Amato.

Your reporters/editors, including William Glaberson of the Westchester Bureau, have refused to report on our critique--despite the fact that it was submitted to the Senate Judiciary Committee and Senate Majority Leader Mitchell last month and despite the fact that Mr. O'Rourke is the highest-elected official in Westchester County and was the Republican standardbearer on the gubernatorial ticket against Mario Cuomo in 1986.

We believe that but for our critique, Mr. O'Rourke's nomination to sit on the bench of the Second Circuit, Southern District of New York would have already been confirmed--endorsed as it was by both the American Bar Association and the Association of the Bar of the City of New York.

Based upon our critique--an extraordinary, perhaps unprecedented document in and of itself--we have called for the following decisive action--which individually and collectively have merited but not received any coverage by the Times:

(a) rejection of Mr. O'Rourke's nomination by the Senate Judiciary Committee;

(b) retraction by the American Bar Association and the Association of the Bar of the City of New York of their favorable rating of Mr. O'Rourke's nomination;

(c) investigation into the failure of the screening process and the procedures employed, inter alia, by the Justice Department, the American Bar Association, and organizations of the bar; and

(d) a moratorium on Senate confirmation of all pending judicial nominations.

In view of the fact that twice in the past month The New York Times ran editorials opposing knee-jerk confirmation of judicial nominees, we expected the Times to be especially interested in our chronicling of the judicial nomination process.

If you do not consider newsworthy the unique pro bono efforts of a New York citizens' group--which have pierced the barrier of "confidentiality" attached to the "screening" process, exposed a public figure on the New York scene, and have the potential to impact upon the upcoming presidential and senatorial elections--we believe we are entitled to an explanation as to the standard of coverage for a newspaper which advertises itself as "All the News That's Fit to Print".

Yours for a quality judiciary,

Elena Ruth Sassower

ELENA RUTH SASSOWER
Coordinator, Ninth Judicial Committee

Enclosures:
(a) critique and compendium of Exhibits
(b) 5/18/92 ltr to Senate Majority Leader Mitchell
(c) 5/19/92 ltr to ABA President D'Alemberte
(d) 6/2/92 ltr to Senate Majority Leader Mitchell
(e) 6/11/92 ltr to Senate Judiciary Committee
(f) NYT editorials:
"Now It's the Bush Court", 5/7/92
"Replacing Judge Johnson: Try Harder", 5/31/92

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.

Replacing Judge Johnson: Try Harder

Frank Johnson of Alabama, a revered figure in the Federal judiciary, is moving at age 73 to semi-retired status and a reduced workload on the U.S. Court of Appeals for the 11th Circuit.

One of the courageous, principled judges who desegregated the Deep South in the 1960's, Judge Johnson has been called "irreplaceable." Yet a replacement is needed; that need cannot be filled by a nominee who lacks breadth and opposes the core of what Judge Johnson stands for.

The nominee is Edward Carnes, a 41-year-old Alabama assistant attorney general. He caught the Bush Administration's attention for his effectiveness in getting condemned prisoners executed and in rallying prosecutors to curtail state prisoners' access to Federal courts.

Appointed by President Eisenhower, Judge Johnson rose to the Court of Appeals in 1979 after a quarter-century of bringing Supreme Court anti-discrimination rulings to bear on recalcitrant institutions. He desegregated Montgomery's public transit systems and cleaned up state mental health and prison systems as well as jury selection. He faced down Gov. George Wallace and nobly endured ostracism by his community and church. His mother's home was bombed.

Elevating Mr. Carnes, however, would reward a decade of honing a single legal skill as head of the state's death penalty enforcement arm. It's not hard to succeed at this work, especially with the support of a Supreme Court that invokes technicalities against death row inmates. Mr. Carnes is overqualified for his current job but not ready for the leap to the appeals court that covers Alabama, Georgia and Florida.

Mr. Carnes denies what other students of capital punishment know — that too many murder defendants are represented by inexperienced, underpaid, even incompetent lawyers. Mr. Carnes also denies what Judge Johnson recognized — that the race of the victim often determines which convicted murderers get the death penalty. Unfortunately, the Supreme Court rejected that view in a 5-to-4 decision that Mr. Carnes finds persuasive.

Senator Joseph Biden, Judiciary Committee chairman, found the nominee's defense of all-white juries to be his most dismaying drawback. Never once has Mr. Carnes challenged his state's policy of sustaining convictions by prosecutors who systematically challenged potential jurors who were black.

The committee approved the nomination anyway, but the Senate need not. It can vote no, and send a signal for someone closer to Frank Johnson's standard.