



NINTH JUDICIAL COMMITTEE

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March 9, 1993

Mr. Joseph Berger
The New York Times
White Plains, New York

RE: Story Angles

Dear Mr. Berger:

Thank you again for meeting with me yesterday and for affording me an opportunity to introduce you to our critique of Andrew O'Rourke and the "screening process" that produced his nomination.

We well understand your need for an "angle" for this story--now that O'Rourke has declined to pursue the recommendation of Senators D'Amato and Moynihan.

STORY #1: Mr. O'Rourke's stated reasons for not pursuing his life-long ambition of a federal judgeship will not stand up under scrutiny. Such scrutiny by the media is an important predicate for developing further stories about Mr. O'Rourke, as well as about other judicial nominees.

Since Senators D'Amato and Moynihan have resubmitted the names of other judicial nominees who, like Mr. O'Rourke, were not confirmed last year--among them, Michael Kavanaugh--a timely story could be written as to what is actually required of such candidates "the second time 'round". Specifically, do former judicial nominees, who have previously been "screened", submit to rescreening--including by the ABA?

Indeed, since Senators in other states have undoubtedly made similar resubmissions of judicial nominees, a story answering this question is national in scope and a good prelude to a piece about the screening process itself.

STORY #2: Mr. Kavanaugh's pursuit of a federal judgeship is (in contrast to Mr. O'Rourke) a "now happening" story. As pointed out by our critique (p. 22 (fn. 35); p. 30 (fn. 41); p. 43 (Q16)), Mr. Kavanaugh was Mr. O'Rourke's running-mate in 1986. The fact that the defeated 1986 GOP gubernatorial ticket of O'Rourke-Kavanaugh should be rewarded with two federal judgeships as a "consolation prize" of two federal judgeships should be viewed as a shocking reflection of the political realities which replace bona fide qualifications. Indeed, as pointed out by our critique (p. 41, fn. 61), Mr. Kavanaugh is "not even admitted to practice in federal courts".

STORY #3: Senator Moynihan's failure to protect the people of New York from unabashed political patronage is a newsworthy story. Such patronage, if not known to Senator Moynihan prior to our critique, was unequivocally made known to him by us in the context thereof.

Senator Moynihan's disinterest in the findings of our critique, the hard work of a pro bono citizens group from the State he represents, and his failure to show any leadership on the serious issues raised should be exposed as the betrayal of the public trust it is. Such exposure is essential where, as here, Senator Moynihan postures himself publicly as an advocate of a quality, depoliticized judiciary and where, as here, he himself transmitted the names of Mr. O'Rourke and Mr. Kavanaugh (on the same day no less) to the President¹.

STORY #4: The "3-1" arrangement between Senators Moynihan and D'Amato for recommending federal judges is a story worthy of scrutiny by the press--particularly because it is uniformly reported as something good and "in the public interest" and because it is proclaimed by Senator Moynihan's office as showing that Senator Moynihan puts judgeships above "political" considerations.

A strong case can and should be made that such arrangement has had a most pernicious result in removing an critical "check" on the kind of patronage reflected by the O'Rourke-Kavanaugh nominations. Particularly in the context of the number of federal judgeships which are or will become vacant in the Second Circuit, this story impacts upon all New Yorkers, as well as other areas of the country where such bipartisan senatorial arrangements exist.

¹ In a different context, Senator Moynihan's commitment to the integrity of the confirmation process was highlighted in the enclosed article entitled "Beyond Question", which appeared in a recent issue of The New Yorker.

STORY #5: In view of the 115 federal judicial vacancies reported by Stephen Labaton's front-page article in yesterday's New York Times, it is essential to ensure that something is done about the gross breakdown of the screening process which our critique documents.

To date, there is no evidence of any Senate investigation of the process--or that subsequent to our May 18, 1992 call for a moratorium of judicial confirmations, any constructive steps were taken to safeguard the public from confirmation of unfit federal judicial nominees. In that connection, we refer you not only to the January 18, 1993 piece "George's Choice", appearing in The New Yorker, but reiterate that we have extensive files chronicling the "cover-up" of this dangerous situation by the Senate Judiciary Committee, the Senate leadership, the American Bar Association, the Association of the Bar of the City of New York, the Federal Bar Council, etc. For present purposes, let us just say that Senator Moynihan's response to us is no anomaly.

STORY #6: Today's NYT story on White House Council Bernard Nussbaum by Stephen Labaton is relevant to the fact that individuals involved in the "cover-up" of the screening process have reached the pinnacle of power. Last May, Mr. Nussbaum, then President of the Federal Bar Council--an organization concerned with the federal judiciary in the Second Circuit--received from us a copy of our critique of Mr. O'Rourke, whose nomination was for a Second Circuit judgeship. The incalculable consequences of Mr. Nussbaum's refusal to demonstrate the leadership that his office demanded can be gleaned from the aforementioned New Yorker article, "George's Choice". So that the record is absolutely clear, the confirmation of Dennis Jacobs--the subject of that article--was perfectly preventable had Mr. Nussbaum spoken up--as we urged him to do--in support of a moratorium of judicial confirmations pending investigation of the screening process. Considering the kind of response that Mr. Nussbaum instead mailed us, we find it ironic that the NYT should photograph him with a sign in the background reading "It's Ethics...Stupid!".

We note that Mr. Nussbaum's lack of judgment and concern for appropriate professional credentials have, not surprisingly, reflected adversely upon the new Administration. Indeed--unmentioned by today's NYT article, Mr. Nussbaum headed the "Judicial Cluster" for the Clinton Transition Team, which was responsible for the Zoe Baird nomination.

If Mr. Nussbaum believed Ms. Baird qualified to be Attorney General--and Kimba Wood, thereafter--we shudder at who he will view as qualified to be a federal judge.

Mr. Joseph Berger

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As to the President and Mrs. Clinton's views on judicial qualifications, we enclose, FYI, a copy of the April 3, 1992 NYT piece "Clinton Fills Many Arkansas Judgeships With His Allies" by Neil Lewis--which we do not find at all heartening.

Due to lack of time, the remaining stories--which we consider to be equally, if not more, important--will be sent tomorrow.

Again, my deepest appreciation for your time and careful consideration.

Yours for a quality judiciary,



ELENA RUTH SASSOWER
Coordinator, Ninth Judicial Committee

Enclosures

But Mr. Clifford, it turned out, did not wish to part with his \$1,926,000, because, his lawyers told the court, "Mr. Clifford is emotionally attached to these long-held securities." The securities, Mr. Clifford said, were in "companies which I have represented or upon whose Board of Directors I have served."

The civil-court judge, Justice Stephen G. Crane, was unmoved. In a decision filed on December 29, 1992, he noted that the purpose of civil-forfeiture actions such as this one was to "strip an alleged criminal of ill-gotten gains and preserve assets to compensate victims," and rejected Clifford's attempt to modify the freeze in any way. If disbursement of "the vast sums Mr. Clifford gives to his family members" were to be permitted, "a sluice, not a loophole, would be opened" in the law, the judge said.

Brushing aside Mr. Clifford's stated emotional attachment to his nearly two million dollars in stocks in Washington, the judge decided that with this money and a sum of more than four hundred thousand dollars that Mr. Clifford earned in 1991 he should be able to make do. As for the attorneys' fees, the judge declined to make any ruling until he learned more about them.

So Mr. Clifford lost on all counts. But Justice Crane's cruellest blow may have been his observation that, on the basis of his review of the evidence, there was a "substantial probability" that Mr. Clifford would be convicted in the criminal case against him. That bad news was compounded last Tuesday when the judge in the criminal case, Justice John A. K. Bradley, rejected Mr. Clifford's claim that his age, eighty-six, and ill health prevented him from going to trial, as scheduled, on February 15th.

BEYOND QUESTION

THE Senate does not keep records on this sort of thing, but it is believed that until last week no committee had ever voted to confirm a Cabinet nominee *before* questioning him. That is what happened to Senator Lloyd Bentsen, who, having done no more than make an opening statement, was confirmed as Treasury Secretary by the Senate Finance Committee on Tuesday. In the opinion of one sardonic congressional staffer who was present, this is a

DAVID STOIEN

APPLE OF THE TIMES

THE *Times's* newest Washington bureau chief dresses well for posh interviews.

"It wouldn't do to look like a grease monkey," he once wrote. He enjoys wearing brightly striped or checked shirts from Harvie & Hudson, in London, because they cheer him up on gloomy days. An unabashed Anglophile and a Continental-style gourmand, he carries a pepper mill when he travels.

He owns a stone cottage in the Cotswolds, and makes cultural pilgrimages to Paris and London.

R. W. Apple, Jr., is called Johnny by his friends. The initials stand for Raymond Walter, but that name was banished at birth. His father was called Johnny—after Johnny Appleseed—when he played football at Wittenberg College, in Ohio. Apple, Jr., took the name to Princeton. He was expelled; he graduated from Columbia, magna cum laude; and he was snapped up, after two jobs, by the *Times*. "The New York *Times* is an important newspaper," he says in a stout voice. "Washington's movers and shakers are conscious of that, and wish to be well regarded by it. That is both an opportunity and a snare."

Apple swivels happily in his chair. He does not seem wary of his status, or displeased by it. On one wall of his office, which is long and commodious, are six framed maps of French provinces from Napoleon's time. Three indicate the origins of Apple's favorite wines; three his favorite after-dinner drinks (Armagnac, Cognac, Calvados). "In this city, social position is entirely related to one's work," he says. "It's a lot like being an ambassador. You are ambassador one day,

and the next, if you decide to go home, nobody notices very much."

Johnny Apple looks like a saloon-era tough customer, and maybe he is. He has a tight, round face, a barrel chest, and a quick, bowlegged walk. He will wing through the bureau, tapping desks, giving silent reporters the thumbs-up sign. In repose, he cultivates a deliberate, courtly air, and when he smiles broadly you can't see his teeth. He has had a reputation at the *Times* for being tempestuous and quick to blow his own horn, and will admit now to a stately kind of curmudgeonhood.

Apple says his favorite dish is sauerkraut and sausages. For lunch, he eats plenty of salad. "Washington is not my favorite restaurant

town," he says. Adjectives he applies to the city are "inbred," "intense," "greedy." He has served here for seven out of thirty years with the paper, but says he was surprised that he got the top job, because the tradition of a writing bureau chief, cultivated by Arthur Krock and James Reston, and carried on by Tom Wicker and Max Frankel, had lately been abandoned. His immediate predecessors acted principally as managers.

Apple thinks that the Inaugural frenzy this week is unique, and a little distasteful. "I loke and hype," he called it last week, and until recently his paper has reflected that view. Apple will attend no theme festivals, no balls, no promenades. He will watch the parade with diplomats and friends at the Canadian Embassy. "We're in the same business," he says. "Gossip and information." And the rest of the day? "Working!" cries Apple, of the *Times*. "What else!" —ADAM PLATT



useful innovation, and will no doubt be considered by other committees as they undertake future confirmation hearings, since getting the vote out of the way right at the start makes the ensuing conversation much more relaxed.

Late in the morning, eleven of the twenty senators on the Senate Finance Committee were in their places on the dais. Senator Bentsen, who had chaired the Senate Finance Committee for the last six years, was sitting at the witness table in front of his old colleagues. His wife was sitting just behind him, and behind her the committee room was full of spectators. Everyone was waiting a little impatiently for the other committee members to arrive.

Senator Robert Dole, who is known for his sense of nihilistic mischief, turned to an aide and said, "Why not vote now?"

"I hear the suggestion that a vote be taken now, and I think it is a gracious suggestion," declared Senator Daniel Patrick Moynihan, who is the new chairman of the committee, and who, like Mr. Dole, is known to be impatient with cant. "I'm going to take the inspired suggestion of the Republican leader if I have the concurrence of the ranking." ("We had a quorum," Mr. Moynihan explained later, "and we didn't want to lose it.")

Mr. Moynihan then asked the clerk to call the roll. The other senators, looking a little unsure of themselves, one by one voted to confirm. When all present had voted aye and proxies from several of the missing senators had been collected, Senator Moynihan looked around at the empty chairs and, after pondering for a few seconds, announced that the vote was unanimous. (Senator Bill Bradley, arriving late at the hearing, looked thunderstruck when an aide leaned forward and whispered in his ear, "You've already voted.") Then Senator Moynihan rose from his chair and, facing Senator Bentsen, began to clap his hands slowly. The other senators looked at each other, rose, and applauded, and the audience got to its feet, too.

Senator Bentsen, whose testimony was to form the basis for determining whether or not he was qualified to run the I.R.S., the Customs Service, the Secret Service, and the Bureau of Alcohol, Tobacco and Firearms, to serve as the

government's paymaster, and to have his name printed on the nation's currency, had not yet been asked a question. After sustained applause, everyone sat down again. Senator Moynihan called the committee to order, and the confirmation hearing got under way. To Mr. Bentsen it must have seemed a surreal experience, like a sort of positive lynching. Confirm him now! We'll have the hearing later!

ASHES TO ASHES

THE other day, the lethal effects of secondhand smoke were everywhere in the news. The Environmental Protection Agency concluded that passive smoking really does cause cancer, fatal to three thousand people a year. As a result, some altruists have stopped blowing smoke into the atmosphere, as mass murder was never their intention, while some non-altruists, too terrified to identify themselves, remain fond of cigarette smoke and prefer to live alongside it in one form or another.

A woman in East Setauket, after hearing the news from the E.P.A., promised her husband and children that she would never smoke in the house again. Instead, she said, every single night for a month she would watch Jean-Paul Belmondo smoke in Jean-Luc Godard's 1959 film "Breathless." Within ten seconds after the film begins, she explained, there is a closeup of Belmondo wearing a dark hat with a brim and smoking a very white cigarette into the camera. Two minutes later, Belmondo is smoking and driving in the countryside ("*J'aime beaucoup la France*," he says to himself), and soon thereafter comes the moment the woman loves best: Belmondo with one hand on the steering wheel, the other hand aim-

ing a pistol out the window, and a Gitane adhering to his sumptuous lower lip. How does he keep it there? Is this a special French talent? Belmondo also manages to balance a cigarette between his lips, exhale smoke, and talk to Jean Seberg—who died of barbiturates, not of secondhand smoke inhalation. ("*Je ne suis pas spécialement beau, mais je suis un grand boxeur*," he is saying to her.)

Some people talk about secondhand smoke with enduring affection. An American who grew up in Cannes in the thirties, a son of famously glamorous parents (both chain-smokers), said that he longed to have people smoke in his presence. He said that it made him sick to see young women forced to stand outside office buildings in the freezing cold, puffing pointlessly into the sky. He also said that cigarette smoke was one of his early-childhood memories. "Always I was smoked at by my parents," he said. "Wherever they were, there were clouds of smoke, even when they were gazing down on me in the crib."

Did they take him to the beach and smoke?

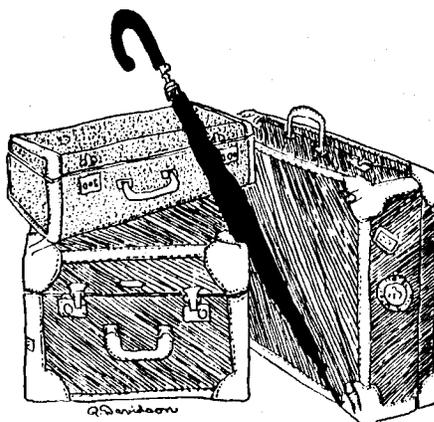
"No. Nanny did the beach."

A cosmetics executive in midtown Manhattan, when she was asked about her views on secondhand smoke, picked up a Marlboro Light and tapped her foot impatiently. As she lit up, she asked, "Is it going to make people outlaw me, lock me in a little box to smoke alone until I die?"

An Englishman who has smoked compulsively for decades in cities all over the world pointed out that A.S.H., Action on Smoking and Health, in London, had endorsed the bad news about passive smoke on the same day the E.P.A. made its announcement. "Maybe they got together to terrorize the whole world in one day," he said. "Maybe the three thousand Americans die from *other* weird stuff. They can't prove that the smoke is responsible. The claim gives prigs and bores and Fascists the right to be horrid."

Was there anywhere in the world where smoking would feel safe?

"On my first trip to America, my favorite place was North Carolina. In Winston-Salem, there were cigarettes everywhere. Every room had bowls of them on every surface. I thought I might settle there." ♦



Clinton Fills Many Arkansas Judgeships With His Allies

By NEIL A. LEWIS
Special to The New York Times

LITTLE ROCK, Ark., April 1— In his 12 years as Governor, Bill Clinton has named several dozen lawyers to the state bench, and while he has used that authority to sharply increase the number of blacks and women in the courts, he has also used the appointments to reward his political allies.

Through all of this, lawyers here say that Mr. Clinton, a lawyer himself, has shown little interest in the role of courts in society and has left no discernible philosophical stamp on the state's judiciary.

Although Arkansas law provides that all judges be elected, the Governor must appoint lawyers to complete unexpired terms when a judge resigns or retires. These appointees, empowered by incumbency, often are then elected to the bench.

Several well-connected lawyers who insisted that their names not be used said the Governor's wife, Hillary, who is also a lawyer, plays a largely unseen but important role in determining who is appointed to important court seats. Many people in the legal community here say they believe the Clintons' record at home suggests that Mrs. Clinton might be involved in naming judges to the Federal bench, if Mr. Clinton becomes President.

In addition to his appointments to the state courts, during his many years in office Mr. Clinton has named all but a handful of the

several hundred officials who serve on state regulatory boards and commissions.

According to a review of these appointments as well as interviews with supporters and critics of the Governor, the single dominant feature apparent in Mr. Clinton's selections seems to be whether the candidates fit into the Governor's network of friends and political allies.

"Almost all of these lawyers he

Few signs of a judicial philosophy.

nas put on the bench have some political connection or are just friends of the Clintons," said one judge who insisted on anonymity although he does not owe his job to the Governor.

John Ruston Pagan, a law professor at the University of Arkansas at Little Rock and a state Senator, said he was dismayed by what he perceived as Mr. Clinton's apparent indifference on questions of judicial philosophy. He said, for example, that he has often talked with the Governor about legislation affecting the courts.

"I have never heard him express any opinion about legal philoso-

phy," Professor Pagan said. "We talked for hours at the Governor's mansion one night, and he talked extensively about the role of the courts on a procedural level, but I haven't ever heard the Governor express any views about the proper role of courts in society."

At the same time, though, Professor Pagan, a Democrat who is regarded as independent of the Governor, said Mr. Clinton had made some "stellar appointments" to the state's top two courts.

No black lawyer has ever been elected to the seven-member Supreme Court or the six-member Court of Appeals, the state's second-highest court. But Mr. Clinton has appointed at least five blacks to those courts as interim judges for unexpired terms that can last as long as seven years.

Mrs. Clinton, like her husband a graduate of Yale Law School, has made particular efforts to insure that more women are named to the bench. Several lawyers said that was consistent with her position as a chairwoman of an American Bar Association committee devoted to increasing the number of women judges. Mrs. Clinton is a senior partner in the Rose law firm, one of the most influential law firms in the state.

At least two lawyers who asked not to be named — one a man, another a woman — said in interviews that they dealt directly with

Mrs. Clinton and not the Governor when they were being offered interim judgeships. Betsey Wright, who served for several years as a top political aide to Governor Clinton, said she often sought Mrs. Clinton's help when selecting judicial appointees.

As many politicians do on both the state and national level, Mr. Clinton has often used the courts to reward his friends and political allies. One notable example came when he named Webb Hubbell to be acting Chief Justice of the State Supreme Court for six months in 1984. Mr. Hubbell is the senior partner at the Rose law firm and a close friend of the Clintons.

Using the courts for patronage became a problem for Mr. Clinton in 1986, when he named Beth Coulson, a lawyer in Perryville, to the Court of Appeals. Mrs. Coulson's name had not been among a list of 11 women judged qualified to serve on the court that the State Bar Association submitted to the Governor's office.

Mrs. Coulson's husband, a wealthy oil dealer, was an important supporter of the Clintons, one of the Governor's biggest contributors. During her term, Judge Coulson wrote a letter on court stationery to the Workmen's Compensation Board, urging it to rule in favor of one of her former clients. She later apologized for a lapse of ethics but was soundly defeated when she ran for another judicial seat.