

Subject: "Judicial scandal" -- By: Robert Novak

Date: 5/17/2004, 1:07 PM

From: Elena Ruth Sassower <judgewatchers@aol.com>

To: rayhern@nytimes.com

Organization: Center for Judicial Accountability, Inc.

Dear Mr. Hernandez,

Please advise expeditiously as to the status of my May 11th written proposal to you regarding NY Senator and Senate Judiciary Committee member Charles Schumer. Meantime, today's column by Robert Novak as to the manipulation of the confirmation of a "noncontroversial" Circuit Court of Appeals nominee by a then democratically-controlled Senate Judiciary Committee is relevant. As Neil Lewis does the "lion's share" of Times reporting about the Senate Judiciary Committee and federal judicial nominations, please also pass it on to him.

Thank you.

Elena Sassower

----- Original Message -----

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Judicial scandal

Robert Novak

WASHINGTON -- Today, on the 50th anniversary of the May 17, 1954, school desegregation decision, the U.S. Civil Rights Commission -- frozen by ideological deadlock -- will debate something important. Shall it investigate whether the Senate's judicial confirmation process was perverted two years ago to influence a landmark civil rights case?

Documentary evidence is overwhelming. The NAACP Legal Defense Fund secretly requested that confirmation of a federal appeals judge nominated by President Bush be delayed until the court ruled in favor of affirmative action. The Senate, then under Democratic control, granted the delay. But the document is a powerful senator's private communication. His Republican colleagues, professing that ladies and gentlemen don't read each other's mail, have ignored the evidence.

The Civil Rights Commission, created by Lyndon Johnson's 1957 civil rights act, has long been a laughingstock. A Republican commissioner's attempt to launch an investigation of the judicial confirmation scandal seems certain to fail because of the commission's implacable four-to-four split between liberals and conservatives. It is even questionable whether the commission has jurisdiction here. However, the effort will cast some sunlight on what has the makings of a genuine scandal but has received little public attention.

On April 17, 2002, Olati Johnson, then working for Sen. Edward M. Kennedy as a Senate Judiciary Committee lawyer, sent an e-mail letter to Kennedy. She told her boss of a telephone call that day from Elaine Jones of the NAACP Legal Defense Fund (who once was Johnson's superior at the civil rights organization). The call involved Bush's nomination to the 6th Circuit Court of Appeals in Cincinnati of Federal District Judge Julia S. Gibbons, a Tennessean who is considered conservative.

Johnson described Gibbons as "uncontroversial," but Jones wanted her nomination held up. Johnson told Kennedy: "Elaine would like the Committee to hold off on any 6th Circuit nominees until the University of Michigan case regarding the constitutionality of affirmative action in higher education is decided by the en banc (full) 6th Circuit." The memo added that "if a new judge with conservative views is confirmed before the case is decided," the new judge could "review the case and vote on it."

Johnson wrote that she and Melody Barnes, then the Judiciary Committee's chief counsel, "are a little concerned about the propriety of scheduling hearings based on the resolution of a particular case." It added: "Nevertheless, we recommend that Gibbons be scheduled for a later hearing." So, Gibbons was not confirmed for three months -- during which period the 6th Circuit upheld the Michigan program by a 5 to 4 vote.

Why did this perversion of the judicial process not arouse Republican outrage? Because the incriminating e-mail is one of thousands of internal messages downloaded last year from Democratic computers by Republican staffers, revealing a carefully calculated strategy of blocking Bush's judicial nominations. The Democrats went on offense, changing the subject from the conspiracy unveiled by the memos to alleged impropriety of their disclosure.

It worked. The sanctity of senatorial communications trumps the substance of the Democratic abuse in the view of Senate Judiciary Committee Chairman Orrin Hatch, who is backed by Senate Majority Leader Bill Frist. They forced the resignation of two young Republican staffers who had uncovered the memos, which were then buried.

However, outsiders will not let the issue die. The Center for Individual Freedom, a conservative legal action group, filed a complaint with the Senate Ethics Committee. Peter N. Kirsanow, a Washington lawyer and Republican member of the Civil Rights Commission, on April 13 suggested a commission staff study. Kirsanow told this column the commission should investigate how a party to major civil rights litigation tried to skew the outcome. Asked about this at his April 20 news conference, Sen. Kennedy refused comment and stalked off.

The next step is an attempt today by Kirsanow to bring the matter before the Civil Rights Commission. He will ask the commission's longtime liberal chairman, Mary Berry, to recuse herself because she serves on the board of the NAACP Legal Defense Fund. That is unlikely in the extreme, but the extraordinary perversion of the Senate's constitutional duties will be put on the public record for the first time.

<http://www.townhall.com/columnists/robertnovak/rn20040517.shtml>

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