



NINTH JUDICIAL COMMITTEE

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FAX COVER SHEET

11/17/92

9:00 a.m.

DATE

TIME

TO: SENATE JUDICIARY COMMITTEE
ATT: Harriet Grant, General Counsel

FAX NUMBER: 202-224-9516 (tele: 202-224-5225)

This fax consists of a total of 9 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:

Dear Ms. Grant:

Your prompt attention to our October 22nd fax would be especially appreciated since we have been waiting patiently for a response.

*Elena Ruth
Sassower*

Ex "JJ"



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By Fax and Mail
202-224-9516

November 17, 1992

Harriet Grant, General Counsel
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Information Request

Dear Ms. Grant:

Kindly apprise us whether--and in what way--changes were made in the relationship between the ABA and the Senate Judiciary Committee following the Committee's June 2, 1989 hearing on "The Role of the American Bar Association in the Judicial Evaluation Process".

We note that at the outset of the June 2, 1989 hearing, Chairman Biden made the following statement:

"Four months ago, almost to the day, on February 2d [sic], I outlined in this hearing room a series of steps to examine the role of the American Bar Association in the judicial evaluation process, and to provide the ABA with the Judiciary Committee's views on whether and how its role should be changed.

I began by asking my colleagues on this Committee to send me their recommendations on how the role of the ABA should be clarified and improved, if they thought it should be, and my colleagues did just that. They sent me their recommendations." (6/2/89 hearing, at p. 1)

We would appreciate a copy of those recommendations--as well as any resolutions thereafter adopted by the Senate Judiciary Committee.

November 17, 1992

We are particularly interested in recommendations and resolutions relative to the ABA's policy of only providing the Senate Judiciary Committee with ratings of the judicial nominees, without accompanying explanation. Chairman Biden's own statement during the hearings was as follows:

"I believe a report, and not simply a rating itself, should be submitted, but that is my personal view. A more detailed report, I might add, would not mean a loss of confidentiality. Indeed...more factual information I think would be helpful and could be supplied." (6/2/89 hearing, at pp. 2-3)

We would also like to know whether steps were taken to ensure that the ABA would properly investigate deficiencies in the operations of its Standing Committee on Federal Judiciary--and take appropriate corrective action. In that regard, we enclose a pertinent portion of the exchange between Senator Arlen Specter and Harold R. Tyler, Jr., then Chairman of the Standing Committee on Federal Judiciary, which appears at pages 85-87 of the hearing transcript.

On another subject, we have had no response to our October 22nd fax to you, a copy of which we enclose for your convenience. Please let us know when we can expect to receive that requested information.

Yours for a quality judiciary,



ELENA RUTH SASSOWER
Coordinator, Ninth Judicial Committee

Enclosures: 6/2/89 hearing transcript, pp. 85-7
10/22/92 ltr-fax

committee rule and talk to the press. And, of course, the Bork-lette thing was the primary offensive thing that fall.

No one else, to my satisfaction, had occasion to be talking to this particular reporter than the person who admitted that it happened. And then as Robert Raven says, he claimed that he didn't use the offensive "Bork-lette" phrase.

I can only tell you that—I guess I can be accused of being subjective—that I am satisfied that it didn't make sense that anybody else had really talked to this particular reporter, except that individual.

Senator SPECTER. Judge Tyler, I recall our exchange during the course of the hearings, I guess, on Justice Kennedy.

Judge TYLER. Right.

Senator SPECTER. And, candidly, I did not find it entirely satisfactory from the point of view of my sense as to what action the committee took.

Judge TYLER. Well, there have been more actions since. I guess it would come better, in a way, but since you addressed this to me, you are right. At that time, we hadn't had the action that we had beginning in the year of 1988.

First of all, in the year 1988, pursuant to my request, the then president of the ABA—and I believe president-elect Raven, as he was then, reflected on this and confirmed the authority of the president of the ABA, who appoints members of our committee, as you know, to fire people who are found to be violating our rules, which would include speaking to the press, saying anything.

The only person under our rules, as I think you will recall, is the chair, and that has been made clear to our committee in various ways since our last discussion during the Kennedy hearings. You are quite right about that.

The other thing, of course—the then president of the ABA and I composed a statement which we put in what we call our back-grounder or booklet which came out, as you know, the latest edition, in 1988. Now, one could say that is precatory and, of course, it is.

The difficulty, of course, is we cannot guarantee, certify, as you have been good enough to recognize even today, and you have in the past. I live in apprehension that we will have an episode in the future. I hope I am wrong. I would be less than candid if I didn't tell you that.

You know, where the pressure is liable to come the most, for obvious reasons, I assume, is if we have another Supreme Court nomination. But, now, I think the members of the committee with whom I serve and have served for a little over two years now understand this.

It is perfectly true that the individual who has admitted talking to the committee hasn't been fired. I find it difficult myself, and, I assume, the officers of the ABA, particularly two years later, to say we should suddenly fire him now.

Senator SPECTER. Was it against the rules of the committee at that time to talk to the press?

Judge TYLER. Yes. The only person who is supposed to talk to the press is the chair.

Senator SPECTER. Well, if it was at that time against the rules of the committee to talk to the press—

Judge TYLER. It was.

Senator SPECTER [continuing]. Why wasn't action taken at that time, or why isn't action taken now to impose the sanction?

Judge TYLER. Because of the problem, first of all, that when we went into this, the cat was out of the bag, number one. It was a very unfortunate episode because, as this Committee has said to me in the past at least twice, it does damage our credibility. That is number one.

Number two, we could never pin down the facts. In other words, we could never be sure that he was wrong as to what he said. Third, he promised he wouldn't talk again, and the ABA president at the time wasn't prepared quite then to discharge him.

Senator SPECTER. Was an inquiry made by the ABA of the reporter as to what conversation occurred?

Judge TYLER. No. To my knowledge, no, and I will tell you why. I am probably at fault. I didn't feel that the reporter, in complete good conscience, would want to talk about this and would want to reveal her source. And I didn't want to get involved in our problem, frankly.

Maybe I was wrong. I will accept that, but I—we went through quite a bit of soul-searching. We were going to remove—and the president of the ABA at the time did agree that if the Ginsburg nomination went forward, whether or not that member was correct in what he was telling us, he would not have anything more to do with our work on the Ginsburg nomination.

Of course, no sooner had we determined that—I think it happened on the Friday before the Saturday when Judge Ginsburg withdrew his name. Maybe we should have done more, but what has been done is done.

And what I would respectfully say—and I say this with fervor because I have confessed to you on the record and off, these leaks are very damaging to our work, your view of our work, the Executive's view of our work.

And I know that perhaps we can look at it this way. We now have a clear-cut confirmation by the ranking officials of the American Bar Association that this is the function and responsibility and privilege, if you will, of the president when he finds out, with the help of the Chair and the other members of the committee, that the committee rules are violated about talking. That person can be discharged.

Senator SPECTER. Well, Judge Tyler, I think that this conversation is very important and I do not think that we are beating a dead horse.

Judge TYLER. I am sorry?

Senator SPECTER. I say I think that this conversation is important to go into the specifics of the Bork-lette comment in terms of having the rules clearly established because your committee members will read this transcript, and future committee members will read this transcript.

Judge TYLER. Right.

Senator SPECTER. You are on the record as having said that you find someone who talks to the media that you are going to find

them. You are not going to get into a credibility contest as to who said what to whom if there is any disclosure that there was a conversation.

Your approach to it today is significantly different, in my opinion, both as to the words and the music as to what you are saying than when we talked about it last time.

Judge TYLER. Yes, because things have happened since.

Senator SPECTER. Well, okay. I think things have happened and there has been a very profound reaction by this Committee to it, and I think it is worth another moment of my own evaluation as to how you handled it in the past.

The CHAIRMAN. Senator, I don't want to interrupt you, but your time is up. It is fine by me, but we have kept Senator Humphrey waiting. If he is willing to yield a few more minutes, it is fine by me. Senator Humphrey, you can have as much time as you want at that point. It is up to you.

Senator HUMPHREY. Go ahead.

Senator SPECTER. I thank my colleague. I am just going to finish up on this one point and I will come back.

The point that I think is important to make, Judge Tyler, is at least my own view, and you have confirmed it in part, of the inadequacy of the prior inquiry. It is true that if you called the newspaper reporter that there may well have been a reluctance to talk to you, but I think it indispensable that that call should have been made.

At least the effort should have been undertaken. The absence of the effort raises some inference as to the seriousness with which the committee and its chairman viewed the incident, or the likelihood of having anything productive come of it. I think the questions have to be asked.

Now, the reporter was known and the reporter had not disclosed the source, but had quoted a specific comment, and I think that the reporter should have been contacted and should have been said, whom did you talk to. They are not going to answer that question, probably. Did you talk to one person or more than one person? They probably wouldn't answer that question. Do you stand by your story, and are you sure that the person used the word "Bork-lette?" I think that question would be answered. The reporter whose name is on a story with a by-line is going to say, yes, I was accurate. They are going to stand by what they had said.

Well, it may be that I have pursued it too long. I frankly don't think so because that one point has been talked about more by this Committee on the record and off the record than anything else. It has given more rise to a feeling of unfairness as to what happened to Judge Bork in terms of the ABA activity and what was happening to Judge Ginsburg.

When we rehash this and go into it in some detail, it is not an academic exercise in terms of feelings for the past and in terms of setting the record straight for the future.

Judge TYLER. Well, I accept that, and I accept the spirit in which it is made. And I have already told you that one of my regrets is that this all occurred practically in the first week of my watch as chair, and maybe I have learned a lesson. I will tell you that.