

U. Michigan scandal

Memorandum

TO :

SENATOR (Kennedy)

Bag

April 17, 2002

FROM :

SUBJECT :

Call from Elaine Jones re Scheduling of 6th Circuit Nominees

Elaine Jones of the NAACP Legal Defense Fund (LDF) tried to call you today to ask that the Judiciary Committee consider scheduling Julia Scott Gibbons, the uncontroversial nominee to the 6th Circuit at a later date, rather than at a hearing next Thursday, April 25th. As you know, Chairman Leahy would like to schedule a hearing next Thursday on a 6th Circuit nominee because the Circuit has only 9 active judges, rather than the authorized 16. (These vacancies are, as you know, the result of Republican inaction on Clinton nominees). Senator Leahy would also like to move a Southern nominee, and wants to do a favor for Senator Thompson.

Talk about political!!

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 6th Circuit. This case is considered the affirmative action case most likely to go to the Supreme Court. Rumors have been circulating that the case will be decided in the next few weeks. The thinking is that the current 6th Circuit will sustain the affirmative action program, but if a new judge with conservative views is confirmed before the case is decided, that new judge will be able, under 6th Circuit rules, to review the case and vote on it.

LDF asked Senator Leahy's staff yesterday to schedule Richard Clifton, an uncontroversial nominee to the 9th Circuit, before moving Gibbons, but they apparently refused. The decision has to be made today (or by early Thursday morning) since the hearing will be noticed on Thursday.

[redacted] and I are a little concerned about the propriety of scheduling hearings based on the resolution of a particular case. We are also aware that the 6th Circuit is in dire need of additional judges. Nevertheless we recommend that Gibbons be scheduled for a later hearing: the Michigan case is important, and there is little damage that we can foresee in moving Clifton first. (It should be noted that Clifton was nominated three months before Gibbons and that Clifton's seat, and not Gibbons', has been designated a judicial emergency.) Elaine will ask that no 6th Circuit nominee be scheduled until after the Michigan case is decided. This may be too much to promise: we only have three uncontroversial circuit court nominees left and two of these are from the 6th Circuit.

Recommendation: Let Elaine know that we will ask Senator Leahy to schedule Gibbons after Clifton. Given the dearth of uncontroversial nominees, however, the Committee will probably have to hold a hearing for Gibbons on May 9th even if there's yet no decision in the Michigan case.