
CENTER FOR INDIVIDUAL FREEDOM

901 N. Washington Street, Suite 402 • Alexandria, VA 22314 • (703) 535-5836 • (703) 535-5838 (fax) • www.cfif.org

April 28, 2004

BY HAND DELIVERY:

The Honorable George V. Voinovich, Chairman
The Honorable Harry Reid, Vice-Chairman
The Honorable Daniel Akaka
The Honorable Blanche Lincoln
The Honorable Pat Roberts
The Honorable Craig Thomas
United States Senate Select Committee on Ethics
220 Hart Senate Office Building
Washington, DC 20510

**re: Ethics Complaint Against Senator Edward M. Kennedy
of Massachusetts and former Senate Staff Members
Olatunde C.A. Johnson and Melody C. Barnes**

Dear Senators:

We hereby formally submit this complaint against Senator Edward M. Kennedy of Massachusetts and former Senate Staff Members Olatunde C.A. Johnson and Melody C. Barnes. This complaint concerns unethical conduct that was the subject of a prior complaint filed by Judicial Watch, Inc., on December 2, 2003, under provisions of the Senate Ethics Manual, “against Senator Edward M. Kennedy of Massachusetts for improper conduct reflecting upon the United States Senate and the general principles of public service.” (A copy of the ethics complaint filed by Judicial Watch is attached as Exhibit A.)

This complaint contains additional information, as well as new ethical concerns regarding the conduct of former Senate Staff Members Olatunde C.A. Johnson and Melody C. Barnes. For this reason, we leave it to the discretion of the Committee as to whether this complaint should be considered separately or in conjunction with the earlier Judicial Watch complaint.

As outlined below, through their conduct, Senator Edward M. Kennedy, Olatunde C.A. Johnson, and Melody C. Barnes have engaged in “improper conduct reflecting on the United States Senate” and behavior that is contrary to the “generally accepted standards of conduct” for a Member of the United States Senate, his staff, and staff members of a standing committee of the U.S. Senate. *Senate Ethics Manual*, SELECT

United States Senate Select Committee on Ethics

April 28, 2004

Page 2 of 7

COMMITTEE ON ETHICS, UNITED STATES SENATE, 108TH CONGRESS, 1ST SESSION, Appendix E, at 432-33 (2003 ed.). As a result of their actions, described herein, we request that the U.S. Senate Select Committee on Ethics conduct a thorough and immediate investigation of these matters and take appropriate disciplinary action under Senate rules.

On April 17, 2002, Ms. Johnson was serving on the staff of the U.S. Senate Committee on the Judiciary as Judiciary Counsel to Senator Kennedy, a member of the Committee. Ms. Barnes was Senator Kennedy's Chief Counsel.

On that date, according to a Memorandum written by Ms. Johnson to Senator Kennedy, Ms. Johnson received a telephone call from Elaine R. Jones, Esq., President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., in which Ms. Jones asked Senator Kennedy, through Ms. Johnson, to delay Senate Judiciary Committee consideration of any judicial nominees to the U.S. Court of Appeals for the 6th Circuit until after a pending legal challenge to the University of Michigan's affirmative action admission policies was decided by that court — a case in which Ms. Jones represented Defendant-Intervenors as counsel.

Ms. Johnson memorialized Ms. Jones' call and request in a Memorandum to Senator Kennedy dated April 17, 2002, and, in that same Memorandum, recommended how Senator Kennedy should proceed. (A copy of the Memorandum is attached as Exhibit B, along with an article published by *The Washington Times* on April 8, 2004, which confirms Ms. Johnson wrote the Memorandum and includes an unredacted copy of the Memorandum.¹)

According to the Memorandum, Ms. Jones asked the “[Senate Judiciary] 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.” In addition, Ms. Jones requested specifically that “the Judiciary Committee consider scheduling Julia [Smith] Gibbons, the uncontroversial nominee to the 6th Circuit[,] at a later date,” the Memorandum said.

Ms. Jones sought to delay the confirmations of any new judges to the U.S. Court of Appeals for the 6th Circuit because, according to Ms. Johnson's Memorandum, “[t]he 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.” Such a

¹ Ms. Johnson used the shortened familiar form of her name, “Olati,” in addressing the Memorandum.

delay was all the more urgent and important because “[r]umors have been circulating that the case will be decided in the next few weeks,” the Memorandum said. In other words, Ms. Jones believed she would win her pending case before the *en banc* 6th Circuit as it was composed on April 17, 2002, and, therefore, wanted to make sure that no new judges would be confirmed in order to protect an anticipated favorable outcome for herself and her clients.

The ethical ramifications of Ms. Jones’ request and conduct were not lost on Ms. Johnson. After all, Ms. Jones was intentionally attempting to influence the outcome of a pending case in which she was counsel by covertly seeking to manipulate the composition of a federal appellate court. Ms. Johnson explicitly noted these ethical concerns in her Memorandum to Senator Kennedy, and was joined by Ms. Barnes, Senator Kennedy’s Chief Counsel, in questioning the propriety of delaying judicial confirmation proceedings to affect the outcome of a particular pending case. Nevertheless, Ms. Johnson and Ms. Barnes disregarded their ethics concerns and recommended that Senator Kennedy and the Judiciary Committee delay consideration of Judge Gibbons’ confirmation. Ms. Johnson wrote: “Melody 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.”

On their face, these facts alone evidence unethical behavior and improper conduct reflecting on the U.S. Senate based upon the unethical actions of both Ms. Johnson and Ms. Barnes. After all, these facts demonstrate that Ms. Johnson and Ms. Barnes abused their positions on the staff of the Senate Judiciary Committee in an attempt to manipulate the consideration and outcome of a pending case.

Further facts about Ms. Johnson elevate the seriousness of her improper conduct.

Prior to joining the Judiciary Committee staff as Senator Kennedy’s Judicial Counsel in September 2001, Ms. Johnson was a staff attorney for the NAACP Legal Defense and Educational Fund, Inc., where her superior was Ms. Jones. *See* NAACP LEGAL DEFENSE AND EDUC. FUND, INC., *Annual Report 2000*, at page 23; NAACP LEGAL DEFENSE AND EDUC. FUND, INC., *Annual Report 2001*, at page 28. In that capacity, Ms. Johnson represented the organization and individuals in a variety of civil rights cases before courts across the country.

Most notably, among the cases in which Ms. Johnson served as co-counsel was *Gratz v. Bollinger*, Nos. 01-1416, 01-1418, 01-1433 & 01-1438 (6th Cir.), the constitutional and statutory challenge to the University of Michigan’s affirmative action

admissions policies — the very same case that motivated Ms. Jones to call her former colleague, Ms. Johnson, on the staff of the Senate Judiciary Committee on April 17, 2002, and request that Senator Kennedy intervene to delay the confirmations of any judges to the U.S. Court of Appeals for the 6th Circuit. The briefs filed by the NAACP Legal Defense and Educational Fund list both “Olatunde C.A. Johnson” and “Elaine R. Jones” as “Attorneys for Defendant-Intervenors” in the *Gratz* case and were filed with the 6th Circuit on July 31, 2001,² less than two months before Ms. Johnson joined Senator Kennedy’s staff. (Copies of the briefs are attached as Exhibit C.³)

The revelation that Ms. Johnson was a lawyer who participated in the University of Michigan affirmative action case, representing Defendant-Intervenors on behalf of the NAACP Legal Defense and Educational Fund, raises grave ethical concerns about Ms. Johnson’s conduct. In recommending that Senator Kennedy delay confirmation hearings for a specific judicial nominee to the 6th Circuit in order to manipulate the composition of that court and influence the outcome of the *Gratz* case, Ms. Johnson clearly engaged in improper conduct reflecting on the United States Senate. Specifically, Ms. Johnson exploited her position as Judiciary Counsel for Senator Kennedy, recommending that he abuse his authority as a Member of the United States Senate, in order to directly impact a pending case in which Ms. Johnson had a direct interest and stake as a lawyer.

In joining Ms. Johnson’s improper request and directly expressing her consciousness of guilt, Ms. Barnes also acted improperly. As the Memorandum makes clear, Ms. Johnson’s and Ms. Barnes’ recommendation to Senator Kennedy to obstruct confirmations to the U.S. Court of Appeals for the 6th Circuit did not arise from any political, ethical, substantive, or philosophical objection to confirming those nominees. The recommendation from Ms. Johnson and Ms. Barnes was not even made under a

² The briefs are “Dated: July 30, 2001,” but the Court’s docket sheets record them as being filed on July 31, 2001.

³ The briefs were filed on behalf of the Defendant-Intervenors/Appellants (No. 01-1438) and Defendant-Intervenors/Appellees (Nos. 01-1416, 01-1418, 01-1433), and were downloaded and printed from the website of the NAACP Legal Defense and Educational Fund, Inc., via the following Internet addresses (URLs): (1) the Final Brief for Defendant-Intervenors’/Appellants (No. 01-1438), (visited Apr. 22, 2004) <http://www.naacpldf.org/pdfdocs/gratz_brief001.pdf>; (2) the Final Reply Brief for Defendant-Intervenors’/Appellants (No. 01-1438), (visited Apr. 22, 2004) <http://www.naacpldf.org/pdfdocs/gratz_brief002.pdf>; and (3) the Final Brief for Defendant-Intervenors’/Appellees (Nos. 01-1416, 01-1418, 01-1433), (visited Apr. 22, 2004) <http://www.naacpldf.org/pdfdocs/gratz_brief003.pdf>. (Please note that the misspelling of “brief” — using the “e” before the “i” — in these Internet addresses (URLs) is intentional and necessary to access the documents.)

pretense of furthering the Senate's constitutional "advice and consent" duty. Instead, Ms. Johnson and Ms. Barnes acted solely out of an improper desire to directly influence the outcome of a pending judicial matter, a case in which Ms. Johnson had a direct interest, and at the request of Ms. Johnson's former superior and co-counsel.

Just as Ms. Johnson and Ms. Barnes would be guilty of improper behavior if they conspired to bribe a juror or have improper *ex parte* contact with a judge in order to influence a pending legal case, they acted improperly in seeking to abuse the judicial confirmation process in order to achieve the same ends — manipulating a court and influencing the outcome of a case.

Regardless of whether their attempt to manipulate the judiciary and influence a pending case achieved its intended goal, which will be discussed below, Ms. Johnson's and Ms. Barnes' improper effort has "reflect[ed] on the U.S. Senate" in a way that has brought disrepute upon the body.

As staff members of the United States Senate reporting directly to Senator Kennedy, Ms. Johnson and Ms. Barnes were acting as agents of the Senator, who is and remains responsible for the actions of his staff. Moreover, evidence suggests that Senator Kennedy had full knowledge of the improper actions of Ms. Johnson and Ms. Barnes through the Memorandum to him dated April 17, 2002. Additional facts raise serious questions about what actions Senator Kennedy took in response to his staff's improper request.

The Memorandum from Ms. Johnson dated April 17, 2002, was addressed directly to Senator Kennedy and copied to a number of other senior members of his staff. In the upper right hand corner, above the date, the word "Bag" is printed. This appears to be a direction to another staff member to place a copy of the memo in Senator Kennedy's "take home bag" for his personal review.⁴ Given the "Bag" notation on the Memorandum dated April 17, 2002, it is likely that Senator Kennedy personally reviewed Ms. Johnson's and Ms. Barnes' recommendation to abuse the judicial confirmation process in order to affect the outcome of a pending case. Furthermore, Ms. Barnes and Ms. Johnson, as the Senator's Chief Counsel and Judiciary Counsel respectively, must be considered senior members of the Senator's staff. As such, it is likely that their correspondence and recommendations would merit Senator Kennedy's personal attention.

⁴ A memorandum dated February 4, 2003, from an unknown staffer to Senator Kennedy seems to confirm this conclusion. "[Redacted] put a memo in the bag on Monday evening," the memorandum reads. *Memorandum to Senator (Kennedy)*, February 4, 2003. It goes on to continue a discussion that apparently began in the "Monday" memorandum.

What action did Senator Kennedy take after reviewing Ms. Johnson's Memorandum? While there is no publicly available record of his actions, and he has refused to publicly discuss the subject, Judge Gibbons was not confirmed until July 29, 2002, nearly two months after the U.S. Court of Appeals for the 6th Circuit issued a 5-4 decision upholding the University of Michigan's affirmative action admissions program as used by the law school. And, according to *The Washington Times*:

"For all of 2001 and 2002, the average wait between hearing and confirmation was 33 days excluding recesses. Judge Gibbons waited 81 days. In that two-year period, 101 nominees were confirmed; only four waited longer than Judge Gibbons. Of those, three were deemed 'controversial' by Democrats and stalled for months while Judge Gibbons was described as 'uncontroversial' and won unanimous approval."

Charles Hurt, "Legal Scholars Troubled Over Democrats' Memo," *The Washington Times*, March 19, 2004, at A03.

Based on this evidence, serious ethical questions arise about whether Senator Kennedy acted on Ms. Johnson's and Ms. Barnes' recommendation to obstruct the confirmation of new 6th Circuit judges in order to manipulate the composition of that court and influence the outcome of a pending case. Commenting on the Memorandum to Senator Kennedy and the timing of Judge Gibbons' eventual confirmation, Senator Orrin Hatch, Chairman of the U.S. Senate Committee on the Judiciary said, "It appears that some have attempted to put their thumbs on the scales of justice." Charles Hurt, "Special Interest Control Cited," *The Washington Times*, November 19, 2003, at A03.

Thus, through their unethical behavior, Senator Kennedy and former Senate Staff Members, Ms. Johnson and Ms. Barnes, have clearly brought disrepute on the U.S. Senate. They have clearly engaged in "improper conduct which reflects on the Senate" by violating "generally accepted standards of conduct." Ms. Johnson's actions were taken in order to affect the outcome of a pending case in which she had a direct interest as co-counsel. Certainly, the United States Senate cannot allow its Members and Staff to use their official positions to unethically interfere in the impartial administration of justice. By the same token, if facts and circumstances differ from those expressed in the April 17, 2002, Memorandum and those inferred by Judge Gibbons' delayed confirmation, those facts and circumstances can only emerge from a thorough investigation.

For the foregoing reasons, we respectfully request that the United States Senate Select Committee on Ethics fully investigate the aforementioned actions of Senator Kennedy, Ms. Johnson, and Ms. Barnes. Ms. Johnson can be reached at her current place

United States Senate Select Committee on Ethics

April 28, 2004

Page 7 of 7

of employment by mail at the National Headquarters of the American Civil Liberties Union, 125 Broad Street, 18th Floor, New York, NY 1004, or by telephone at (212) 549-2500. Ms. Barnes can be reached at her current place of employment by mail at The Raben Group, 1050 17th Street, N.W., Suite 1200, Washington, DC 20036, or by telephone at (202) 466-8585.

Sincerely,

Jeffrey Mazzella
Executive Director
Center for Individual Freedom
901 N. Washington Street
Suite 402
Alexandria, VA 22314
(703) 535-5836

Enclosures

cc: The Honorable Edward M. Kennedy
Robert L. Walker, Esq., Chief Counsel and Staff Director
Olatunde C.A. Johnson, Esq.
Melody C. Barnes, Esq.
Judicial Watch, Inc.