
CENTER FOR INDIVIDUAL FREEDOM

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March 18, 2004

The Honorable John Ashcroft
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear General Ashcroft:

In a March 11 letter, members of the Senate Judiciary Committee requested that you name a “professional prosecutor” to investigate whether two former Senate staffers transgressed criminal laws by accessing memoranda detailing Democratic tactics regarding the confirmation of President Bush’s judicial nominees. By focusing solely on how the memos were obtained, such an investigation would ignore the content of the memos, which themselves may evidence criminal wrongdoing. We write today to urge you to consider an additional focus.

It is essential that any investigation into this matter include a careful examination of the content of the documents and the conduct which they depict. Based on the handful of memos disclosed to date and reports describing others, there is probable cause to believe that Democratic members of the U.S. Senate and their staffs engaged in improper behavior and violated the public trust.

For example, a memo from a staff member to Senator Edward Kennedy, describes a request from Elaine R. Jones, NAACP Legal Defense Fund President and Director-Counsel. According to the memo, Jones asked that Kennedy intervene to delay consideration of all nominees to the U.S. Court of Appeals for the 6th Circuit, including that of Judge Julia Smith Gibbons, until the then-pending University of Michigan affirmative action cases had been decided.

Jones was a named counsel representing the defendant-intervenors in the case challenging the university’s undergraduate admissions policy. According to the memo, Jones believed that “the current 6th Circuit will sustain the affirmative action program, but if a new judge ... is confirmed before the case is decided, that new judge will be able ... to review the case and vote on it.”

While it is unclear what action Kennedy took — and he has answered no questions on the subject — the memo raises far more than an inference of public corruption. Even the author of the memo recognized that the request was inappropriate, writing that he/she and another staffer “are a little concerned about the propriety of scheduling hearings based on the resolution of a particular case. ... Nevertheless, we recommend that Gibbons be scheduled for a later hearing.”

In addition, according to FoxNews.com, “One memo recounts how Sen. John Edwards of North Carolina, [then] a presidential candidate, allegedly urged [then-Judiciary Committee Chairman Patrick] Leahy to delay a vote on one Bush nominee, supposedly because trial lawyers' groups and the NAACP would, if the vote occurred, curtail campaign spending for Democratic candidates in North Carolina.”¹ This allegation, if documented by the referenced memo and supported by relevant facts, would represent a clearly impermissible *quid pro quo* arrangement of campaign support for legislative action (or inaction).

Moreover, Manuel Miranda, a former Counsel to Senate Majority Leader Bill Frist who has reviewed some of the documents, filed a complaint with the Senate Select Committee on Ethics. His complaint states that the thousands of memos that have not been made public show “a violation of the public trust in the judicial confirmation process on the part of Democratic senators on the Senate Judiciary Committee... This includes evidence of the direct influencing of the Senate's advice and consent role by the promise of campaign funding and election support in the last midterm election.”² To date, no investigative body has moved to confirm or dispel his credible eyewitness report of the evidence.

These and other troubling details have emerged from just a tiny snapshot of the more than 4,760 memos currently in the custody of the Senate Sergeant-at-Arms. Based on this limited glimpse, news reports, and Miranda’s complaint, public trust in the activities of the Senate Judiciary Committee cannot be restored without an investigation that is independent of the U.S. Senate. If the Senate is incapable of thoroughly investigating how the memos were accessed — which it has conceded by referring the matter to you — then it is even less capable of probing the content of the memos. In addition, the sheer volume of potential evidence and the necessity of protecting the rights of all argue strongly for a professional investigation.

Therefore, we urge that any probe into the memos include an extensive examination of their content and a full investigation into any illegal activities that they may depict.

Sincerely,

/s/

Jeffrey Mazzella
Executive Director

¹ *Memo Fireworks Consume Judiciary Panel Hearing*, FoxNews.com, February 12, 2004. (Visited March 16, 2004) <<http://www.foxnews.com/story/0,2933,111261,00.html>>.

² *Former Frist staffer files ethics complaint over Democratic tactics*, Associated Press, February 6, 2004. (Visited March 17, 2004) <<http://www.signonsandiego.com/news/politics/20040206-1602-judiciarymemos.html>>.