NATIONAL COMMITTEE FOR CONSTITUTIONAL INTEGRITY

7490 Lake Hazel Road
BOISE, IDAHO 83709
208-362-0342

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Please address reply to:
John B. Minnick
11509 Sturbridge Court
Fredericksburg, VA 22407

The Honorable Joseph R. Biden, Chairman
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Subject: Confirmation Hearing on the Nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court: Separation of Powers v. Delegation of Powers or The Rule of Law v. The Rule of Men.

Dear Mr. Chairman:

Some audiences may not get excited about separation of powers, especially yours. On the other hand, some do, especially ours.

Whatever happened to the Subcommittee on Separation of Powers? Why was it dropped? What are you trying to hide?

Your committee's line of questioning and Judge Thomas's responses disclose an effort to perpetuate judicial legislation not sanctioned by the Constitution.

In any case, please accept this letter as our statement in opposition to confirmation of Judge Thomas to be an Associate Justice of the Supreme Court on the grounds that he has exhibited not only a disdain for the principle of separation of powers but also a total misconception of our constitutional system of checks and balances.

Please also include this letter in the public record of the hearing on his nomination and give him a copy.

Definition and Reasons for Separation of Powers

Separation of powers means keeping our powers of government separate and distinct so that one branch shall not exercise the powers nor perform the functions of the other two or either of them. See also, James Madison's definition. 1 Ann. 435-436.

Separation of powers is not only the basis for the rule of law (as distinguished from the rule of men), but also it is the foundation of American freedom and democracy under the Constitution and Bill of Rights.

We, the people, have three powers of government vested in us by operation

of natural law. That is we have legislative, executive and judicial powers. Each one of our natural powers of government is vested by the Constitution in a separate and distinct branch. In the absence of a specific article on separation of powers, the only way to keep our powers of government separate and distinct is not to give any away.

The principal reason for keeping our natural powers of government separate and distingt is a simple matter of the rules. That is, the rules of one branch do not work in the other two or either of them.

For example, the legislative branch(Congress)operates under the rules of parliamentary procedure including Jefferson's Manual. The rules of parliamentary procedure do not work in the executive nor in the judicial branch.

The executive branch (the President and his Departments) operate under administrative rules and regulations including executive orders. Administrative rules and regulations do not work in the legislative nor in the judicial branch.

The judicial branch (the Supreme Court and lower federal courts) operate under rules of court subject to the rules of evidence. Rules of court and evidence do not work in the legislative nor in the executive branch.

A second reason for keeping our natural powers of government separate and distinct is really a matter of function. That is, the function of the legislative branch is to make laws in pursuance of the Constitution. Cf., Const., Art. VI, second paragraph. It is the function of the executive branch to enforce laws made in pursuance of the Costitution. The function of the judicial branch is to apply the laws made in pursuance of the Constitution.

The third reason for keeping our natural powers of government separate and distinct is essentially a matter of policy. That is, the legislative responsibility of Congress is to make national policy. The executive responsibility of the President and his Departments is to enforce national policy (not to make it!). The judicial resonsibility of the Supreme Court and lower federal courts is to apply national policy (not to make it!).

When all three branches get involved in making, enforcing and applying national policy under the wrong rules, we, the people, become unduly burdened by unregulated bureaucracy, astronomical public debt fueled by deficit spending, and perennial budgetary imbalances to the detriment of local, state and national economy.

Historical Analysis

When both sides were deadlocked during Virginia's ratification convention, John Marshall took the position that "this Constitution" would ensure regulated democracy. His position took for granted that our powers of government would remain separate and distinct. the deadlock was broken

and Virginia ratified the Constitution by ten votes.

During the initial debates of the First Congress under the Constitution, James Madison declared that the principle which separates our powers of government "is the most sacred principle of the Constitution, indeed of any free constitution." 1 Ann. of the First Congress 116.

The documentary history of American government shows conclusively that the Constitution, Bill of Rights and our constitutional system of checks and balances are all based upon the principle of separation of powers.

Flagrant Violations of the Principle of Separation of Powers

Congress has violated the principle of separation of powers time and time again, but the most flagrant violations occurred in 1946 and 1949. Public Law 404, 79th Cong., 2d Sess., Ch. 324, June 11, 1946, Sec. 2 (c), 60 Stat. 237; and Public Law 72, 81st Cong., Ch. 139, May 24, 1949, Sec. 102, 63 Stat. 104. Public 404, supra, now 5 USC 551, et seq., is known and cited as the Administrative Procedure Act. Public Law 72, supra, amended Title 18, entitled Crimes and Criminal Procedure, and Title 28, entitled Judiciary and Judicial Procedure, of the United States Code. Title 28 is also known as the Judicial Code of the United States.

Public Law 404 Administrative Procedure Act

Public Law 404, Section 2 (c), supra, gave the executive branch the power to "prescribe law or policy" by regulation without sanction of a constitutional amendment. Likewise, the Administrative Procedure Act, Public Law 404, supra, gave the executive branch a wide range of judicial functions without sanction of a constitutional amendment. See also, the Attorney General's Manual on the Administrative Procedure Act (1947). Making law and policy are functions of the legislative branch. Performing judicial functions is the responsibility of the judicial branch. Public Law 404, supra, contains two flagrant violations of the principle of separation of powers even though members of Congress knew or had reason to know better.

Legislative History

In 1935, the Supreme Court held the National Industrial Recovery Act unconstitutional because among other things it violated the principle of separation of powers. That is, the NIRA gave legislative powers to the executive branch with out sanction of constitutional amendment. Schecter v. United States, 295 U.S. 495 (1935). President Roosevelt immediately appointed a blue-ribbon commission to study the problem of administering the Federal Government. His letter transmitting the Commission's report to Congress pointed out among other things that if Congress continued to delegate powers of government it would create a "fourth branch" not

sanctioned by the Constitution. Members of Congress ignored the warning and passed the Administrative Procedure Act, Public Law 404, supra. President Truman signed it into law.

Public Law 72
Technical Amendment

An obscure technical amendment added to the Judicial Code of the United States gave legislative powers to the Supreme Court without sanction of a constitutional amendment. Public Law 72, supra, Section 102, 63 Stat. 104, now 28 USC 2071. President Truman signed it into law. Making law is the function of the legislative branch. Public Law 72 contains a flagrant violation of the principle of separation of powers.

Historical Analysis

The judicial power of the United States is defined in Article III, Section 2, of the Constiution. After describing the Court's jurisdiction, the second sentence of the second paragraph of Secdion 2 goes on to provide that the Court shall have appellate jurisdiction both as to law and fact "with such exceptions, and under such regulations as the Congress shall make." That particular check on the Court's otherwise unlimited judicial power was given away by the 1949 technical amendment without sanction of a constitutional amendment. The 1949 technical amendment is a deliberate and flagrant violation of the principle of separation of powers. Mebers of Congress should have known better.

The Judicial Code of the United States was enacted by the First Congress of the United States in pursuance of the Constitution. Cf., Const., Art. VI, second paragraph. Subsequent amendments developed the substantive rules governing the practice and procedure in the Supreme Court. Such rules were made pursuant to the legislative power reserved to Congress by the express proviso contained in the second sentence of the second paragraph of Section 2 of Article III of the Constitution. The 1949 technical amendment gave the substantive rule-making power to the Court without sanction of a constitutional amendment.

Subsequent History

After the Court was empowered to make its own substantive rules governing its practice and procedure, it discarded the old rules made by Congress and adopted new rules of its own without sanction of a constitutional amendment.

The old rules made by Congress in pursuance of the Constitution became an integral part of the supreme law of the land by operation of the definition in the second paragraph of Article VI. The new rules promulgated by the Court do not form any part of the supreme law of the land nor are they sanctioned by the Constitution.

Among the old rules discarded by the Court were the rules relating to evidence. Since the Court was given appellate jurisdiction both as to law and fact, rules of evidence are necessary and advisable.

In place of the old rules relating to evidence, however, the Court substituted new rules based on oral argument. The new rules do not meet the constitutional definition of the supreme law of the land nor are they sanctioned by the Constitution.

Destruction of Our Constitutional System of Checks and Balances

Our constitutional system of checks and balances is based upon the principle of separation of powers. When our powers of government are not kept separate and distinct, our costitutional system of checks and balances breaks down.

Public Law 404, supra, which gave legislative powers and judicial functions to the executive branch not only violated the principle of separation of powers, but also broke down our constitutional system of checks and balances without sanction of a constitutional amendment.

Public Law 72, supra, which gave legislative powers to the Supreme Court not only violated the principle of separation of powers, but also broke down our constitutional system of check and balances without sanction of a constitutional amendment.

Those two laws as signed by President Truman destroyed our constitutional system of checks and balances. The destruction has been compounded by Congressional and Presidential acquiescence in the exercise of executive powers by the judicial branch. The destruction has been compounded further by the exercise of all three powers of government by Congress.

Judicial Legislation Not Sanctioned By the Constitution

As demonstrated above, Congress gave its constitutional legislative responsibility to the Supreme Court without sanction of a constitutional amendment. Likewise, when the Court was given the power to make its own substantive rules, it discarded the old rules made by Congress. Acting under its newly delegated authority, the Court adopted new rules to govern its substantive practice and procedure. The new rules do not fit the constitutional definition of the supreme law of the land, nor are they sanctioned by the Constitution.

Among the old rules discarded by the Court were the rules relating to evidence. The new rules are based on oral argument without reference to the rules of evidence. In legal effect, the 1949 technical amendment of the Judicial Code opened the door to judicial legislation not sanctioned by the Constitution. Moreover, laws not made in pursuance of the Constitution, even though signed by a President, cannot qualify nor be substituted as constitutional amendments. In any case, since the Court is operating under substantive rules not sanctioned by the Constitution, some, if not all, of the Court's recent opinions have no constitutional validity whatsoever.

The most flagrant piece of judicial legislation not sanctioned by the Constitution is the infamous case of Brown v. Board of Education (and related cases), 347 U.S. 483 (1953).

Brown Revisited

At the outset it should be noted that Brown and the related cases were treated as if they had been brought under the new rules even though those rules were not published until after the fact.

The official public record of Brown and the related cases shows on its face that the entire legislative history of public education in the United States was not only left out of the picture, but also totally ignored. The scenario was such that nine justices of the Supreme Court and all of their law clerks, including now Chief Justice William Rhenquist, the Attorney General of the United States and his Staff, the Solicitor General of the United States and his Staff, the Attorneys General of the several States and their Staffs, and private counsel and their associates all failed or otherwise neglected to look in the indexes to the United States Code, Statutes at Large and the Congressional record to find out what the law was and when, how and why it was made. In any case, the laws of the United States made in pursuance of the Constitution for such cases were not raised, briefed, cited, argued, presented or otherwise put in issue. At this juncture, it should also be noted that Congress specifically reserved the power to enforce the Fourteenth Amendment by appropriate legislation and that it did. Under the circumstances, the Court did not have jurisdiction to decide the issue.

The record shows further that the plaintiffs filed a stipulation of equality. Accordingly, the case was moot on its facts. It was also moot because the City of Topeka, Kansas had ended separate Schools. Chief Justice Earl Warren denied defendant's motion for dismissal. In United States v. Grant, 345 U.S. 629, 632, Associate Justice Felix Frankfurter reaffirmed the general rule that the defendant in a moot case is entitled to dismissal as a matter of right.

The record shows further that Chief Justice Earl Warren was dissatisfied with the first round of argument and ordered the cases to be set down for reargument. His order, however, arbitrarily limited the inquiry to the ten-year period immediately following ratification of the Fourteenth Amendment, 1868-1878. The issue was not resoved until 1890. Third Morrill Act, 51st Cong., 1st Sess., Ch. 841, August 30, 1890, 26 Stat. 417, now 7.USC 323; 109 Cong. Rec. 6332-6351, 6369-6371; see also, Act to admit the State of Oklahoma (1906), 34 Stat. 271.

The record also reveals that the Solicitor General of the United States advanced false and misleading arguments in response to questions put by Associate Justices Reed and Jackson. That is, the Solicitor General argued that Congress had not acted upon the question of separate schools in public education. His argument was false because Congress had acted after nearly a quarter of a century of debate on the issue. Third Morrill Act, supra;

see also, 109 Cong. Rec. 6371; and the Act to admit the State of Oklahoma, supra. The Solicitor General then compounded his own error by arguing that because Congress had done nothing (which was false), the Court had concurrent jurisdiction to do something (which was doubly false). The principle of separation of powers does not admit concurrent jurisdiction to do anything.

Perpetuation of Judicial Legislation
Not Sanctioned by the Constitution

Members of Congress have demonstrated a predilection to perpetuate judicial legislation not sanctioned by the Constitution as evidenced by the progeny generated by Brown and the related cases. Presidents have perpetuated judicial legislation not sanctioned by the Costitution by signing such measures into law. All of which indicate Congressional abdication of its legislative responsibility.

Abdication of Constitutional Responsibility:
Creation of an Unmanageable Form of Government

Instead of maintaining a regulated democracy based separation of powers as sanctioned by the Constitution, Congress has created a "fourth branch" of government not sanctioned by the Constitution based on delegation of powers. That is, Congress has created an unregulated bureaucracy which has mushroomed out of proportion to our ability to deal with it. In short, the end result of flagrant violations of the principle of separation of powers is a government out of control. In legal effect, Congress has created an unmanageable form of government not sanctioned by the Constitution.

Separation of Powers v. Delegation of Powers

Congress has turned the American dream of regulated democracy based on separation of powers into a nightmare of unregulated bureaucracy based on delegation of powers.

Separation of powers means the rule of law and not of men.

Delegation of powers means the rule of men and not of law.

Separation of powers is the foundation of American freedom and democracy under the Constitution and Bill of Rights.

Delegation of powers circumvents American freedom and democracy by violating the principle of separation of powers, destroying our constitutional system of checks and balances, and perpetuating judicial legislation not sanctioned by the Constitution.

Separation of powers not only provides us with the key to our constitutional system of checks and balances, but also is sanctioned by the Constitution.

Delegation of powers is not only the key to the destruction of our constitutional system of checks and balances, but also it is not sanctioned by the Constitution.

The Trillion Dollar Question

If confirmed, how can Judge Thomas conscientiously give his oath to support and defend the Constitution against all enemies, foreign and domestic, without reservation or purpose of evasion if he knew or had reason to know that the Supreme Court is operating under substantive rules of practice and procedure not sanctioned by the Constitution?

If your Staff had granted my request to be heard, that is the final question I wold have asked.

Arbitrary and Capricious Discrimination

Failure to grant my request to be heard is tantamount to arbitary and capricious discrimination.

Statement for the Record

Your Staff informed me that I could file a statement for the record and for the Senators to read.

Please include this statement in the public record of the hearing on the nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court and give him a copy.

Please also distribute copies among the members of your Committee.

Respectfully presented,

John B. Minnick, Co-Chairman
Individually and on behalf of the
National Committee for Constitutional Integrity

P.S. This statement was typed with one hand on an IBM one-handed keyboard. Please pardon the erasures, strike-overs and typos.