



April 28, 2008

Hon. Patrick Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Hon. Arlen Specter  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Re: Fourth Circuit

Dear Senator Leahy and Senator Specter:

I am writing on behalf of People For the American Way and our hundreds of thousands of members nationwide in opposition to the further consideration of the highly controversial nominations of Steve A. Matthews and Robert J. Conrad, Jr. to the United States Court of Appeals for the Fourth Circuit. As we discussed in our letter to the Committee of April 3, 2008, longstanding Senate policy warrants invocation of the Thurmond Rule and an end to the consideration of nominees such as Mr. Matthews and Judge Conrad at this point in a presidential election year.

The records of both Mr. Matthews and Judge Conrad are extremely troubling, and would raise serious concerns regardless of the court to which they had been nominated. But those concerns are heightened given their nominations to the Fourth Circuit, a court that has long been unbalanced ideologically but that is now in a position to be brought more into the legal mainstream. Unfortunately, it appears that neither Mr. Matthews nor Judge Conrad would help achieve that desirable goal.

Steve A. Matthews

Mr. Matthews has spent most of his legal career as an attorney in private practice in South Carolina. Notably, however, he served for several years in “a variety of high-ranking positions”<sup>1</sup> in the Reagan Justice Department, which has produced other Bush judicial

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<sup>1</sup> Bush White House biography of Steve A. Matthews, available at <[http://www.whitehouse.gov/infocus/judicialnominees/matthews\\_steve.html](http://www.whitehouse.gov/infocus/judicialnominees/matthews_steve.html)>(visited April 24, 2008).

nominees with particularly troubling legal and ideological views, including unsuccessful Ninth Circuit nominee Carolyn Kuhl. According to Matthews' law firm biography, one of his jobs at the Reagan DOJ was to advise "Attorney General Edwin Meese III and President Reagan on the selection of nominees for federal judgeships."<sup>2</sup> Matthews also served as Special Counsel to then-Assistant Attorney General for Civil Rights William Bradford Reynolds, who was perhaps most notable for his efforts to undermine civil rights enforcement.<sup>3</sup> (More recently, Matthews and Reynolds have served together on the Board of Directors of the right-wing Landmark Legal Foundation, further discussed below.)

Seeking to learn more about Matthews' record in the Reagan Administration, our affiliate, People For the American Way Foundation, submitted FOIA requests jointly with the Alliance for Justice to the different divisions within the Justice Department where Mr. Matthews worked. In response, they were informed that an undisclosed number of records from that period had been destroyed pursuant to the Department's record retention policy, but were given access to nine boxes of documents at the National Archives. Many of those extant documents were administrative in nature and shed no light on Matthews' legal views, but others do raise concerns about his views and his role in a Reagan Justice Department engaged in undermining civil rights enforcement.

For example, in a memo to William Bradford Reynolds analyzing proposed language from the Federal Highway Administrator for a "revised procurement preference for 'disadvantaged business enterprises' in highway construction contracts," Mr. Matthews wrote that contracting set-asides, "when tied to particular racial groups, are discriminatory and wrong."<sup>4</sup>

Also in his capacity as Special Counsel to Mr. Reynolds, Mr. Matthews wrote a "confidential memorandum" to the Department's Honor Program Evaluation Committee concerning the structure of the Honor Program Hiring Committee on which Matthews then served (and blind-copied Mr. Reynolds). In that memo, Matthews opposed efforts to ensure racial and gender diversity on the Hiring Committee, urging the *deletion* from a draft report regarding Committee structure of the following language:

Efforts should also be made to obtain some representatives of both sexes and the different racial and ethnic groups. Such a cross-section will aid in recruiting efforts

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<sup>2</sup> Haynsworth Sinkler Boyd, P.A. biography of Steve A. Matthews, available at <[http://www.hsblawfirm.com/listdetail.asp?dl\\_key=1E0D431ABBFC488E9EB752D38EAB6E7F&sc\\_id=>](http://www.hsblawfirm.com/listdetail.asp?dl_key=1E0D431ABBFC488E9EB752D38EAB6E7F&sc_id=>)>(visited April 24, 2008).

<sup>3</sup> Indeed, Reynolds' anti-civil rights policies led this Committee to reject President Reagan's effort to promote him to Associate Attorney General. *See, e.g.*, Jacob V. Lamar, "The Crusading Attorney General," *Time*, Sept. 9, 1985, available at <<http://www.time.com/time/magazine/article/0,9171,959790-1,00.html>> (visited April 25, 2008).

<sup>4</sup> Memorandum from Steve A. Matthews, Special Counsel, to Wm. Bradford Reynolds, Assistant Attorney General, re Highway Contracting Set-Asides, at 2.

as committee members interview across the country and may add some perspective to the decisionmaking process which might otherwise be lacking.<sup>5</sup>

According to Matthews, while “a diversity of perspective is critical to the successful work of a hiring committee . . . to suggest that the relevant diversity is a function of race and gender involves a stereotype that denies the individuality of particular members of a given race or gender.”<sup>6</sup>

Other more recent aspects of Mr. Matthews’ record, including his active membership in ultraconservative organizations and his willingness to support far right legal ideology, create concerns about his legal philosophy. For example, by his own account, Matthews has been a member of the Federalist Society for more than twenty years, and served as president of its South Carolina Lawyers Chapter from approximately 1998-2001.<sup>7</sup> In addition, from 1995 until 2007, Mr. Matthews was the Chair of the Board of Directors of the Collegiate Network, Inc.,<sup>8</sup> an organization established in 1979 to provide financial and technical assistance to right-wing newspapers on college campuses.<sup>9</sup>

And, at the time of his nomination to the Fourth Circuit, Matthews had also been a longstanding Board member and Board Secretary of the right-wing Landmark Legal Foundation.<sup>10</sup> On its web site, Landmark Legal describes as one of its highest priorities to “challeng[e] what may be the most insidious legacy of modern liberalism -- judicial activism and the radical judges who use it to advance an extreme social agenda. America’s courts have become the final bulwark for the advocates of big government . . .”<sup>11</sup> In addition to the judiciary, Landmark Legal has also targeted the National Education Association, which it calls “the nation’s chief obstacle to substantive education reform.”<sup>12</sup>

In February 2007, when Matthews was still on its Board, Landmark Legal nominated Rush Limbaugh for the Nobel Peace Prize, calling him “the foremost advocate for freedom and democracy in the world today.”<sup>13</sup> Limbaugh at the time served “as an unpaid member of Landmark’s Board of Advisors.”<sup>14</sup>

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<sup>5</sup> Confidential Memorandum from Steve A. Matthews to the Honor Program Evaluation Committee (Jan. 30, 1986), at 4.

<sup>6</sup> *Id.*

<sup>7</sup> Steve A. Matthews, response to Judiciary Committee Questionnaire (hereafter “Matthews Questionnaire”), Answer 7, at 4, and Answer 10, at 5.

<sup>8</sup> Matthews Questionnaire, Answer 7, at 4.

<sup>9</sup> *See, e.g.*, People For the American Way Fact Sheet, Collegiate Network, available at <<http://www.pfaw.org/pfaw/general/default.aspx?oid=16241>>.

<sup>10</sup> Matthews Questionnaire, Answer 7, at 3.

<sup>11</sup> Letter from Landmark Legal President Mark Levin to “Friends,” available at <<http://www.landmarklegal.org/DesktopFrame.aspx?frame=MESSAGE&artnumber=-1&modid=630>>(visited April 24, 2008).

<sup>12</sup> *Id.*

<sup>13</sup> *See* Landmark Legal Foundation press release and letter of nomination (Feb. 1, 2007),

While we believe the letter nominating Limbaugh for the Nobel Peace Prize is testament to Matthews' extreme views, his long support of Mark Levin, President of Landmark Legal (who signed the nominating letter), is equally disturbing. Notably, Levin is also the author of *Men in Black: How the Supreme Court is Destroying America*. Published in 2005, Levin's book is an attack on the Supreme Court and the federal judiciary. The book's Introduction, by Rush Limbaugh, states that Levin wrote it "to set out in layman's terms the current state of our runaway judiciary and the threat it poses to our nation."<sup>15</sup>

As described by Charles Lane in his review for the *Washington Post*, Levin's book "argues that the [Supreme Court's] decisions in favor of abortion rights, gay rights, economic regulation and affirmative action have created 'de facto judicial tyranny' and an economy 'lurching toward socialism.'"<sup>16</sup> According to Levin, "[t]he judiciary, operating outside its scope, is the greatest threat to representative government we face today."<sup>17</sup>

Columnist Dahlia Lithwick wrote of *Men in Black* that "no serious scholar of the court or the Constitution, on the ideological left or right, is going to waste their time engaging Levin's arguments once they've read this book."<sup>18</sup> According to Lithwick,

[Levin] wants to cut all judges off at the knees: He'd like to give force to the impeachment rules, put legislative limits on the kinds of constitutional questions courts may review, and institute judicial term limits. He'd also amend the Constitution to give congress a veto over the court's decisions. Each of which imperils the notion of an independent judiciary and of three separate, co-equal branches of government. But the Levins of the world are not interested in a co-equal judiciary. They seem to want to see it burn.<sup>19</sup>

Apparently, the book sold "almost entirely due to endorsements by Rush Limbaugh, Sean Hannity, and Fox News."<sup>20</sup>

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available at: < <http://www.landmarklegal.org/uploads/Limbaugh%20Nobel.htm> > (visited April 23, 2008).

<sup>14</sup> *Id.*

<sup>15</sup> *Men in Black*, at xi.

<sup>16</sup> Charles Lane, "Conservative's Book on Supreme Court is a Bestseller," *Washington Post*, March 20, 2005, page A06, available at <<http://www.washingtonpost.com/wp-dyn/articles/A50246-2005Mar19.html>> (visited April 28, 2008).

<sup>17</sup> *Men in Black*, at 13.

<sup>18</sup> Dahlia Lithwick, *The Limbaugh Code: The New York Times Best Seller No One Is Talking About*, SLATE, April 1, 2005, available at: <<http://www.slate.com/id/2116087>>(visited April 23, 2008) (hereafter "Lithwick, *The Limbaugh Code*").

<sup>19</sup> Lithwick, *The Limbaugh Code*.

<sup>20</sup> Lithwick, *The Limbaugh Code*.

There can be no question that the views expressed in *Men in Black* of the federal judiciary and its role as a co-equal branch of our government are extremely troubling. We recognize that Mr. Matthews did not write this book and we are cautious about attributing to him the views expressed by another author. However, in *Men in Black*, Mr. Levin expressly states that

*The directors of Landmark Legal Foundation have supported me in everything I do. More importantly, their guidance and wise judgment have made Landmark a preeminent legal foundation. I would be remiss in not acknowledging each of them for their efforts in defending individual liberty, the rule of law, and limited government: Lawrence Davenport, William Bradford Reynolds, Gary McDowell, Steve Matthews, John Richardson, and Ed Meese.*<sup>21</sup>

We think it a reasonable assumption that if Mr. Matthews disagreed about Landmark Legal's and Mark Levin's views of the Supreme Court or anything else, he would have distanced himself from Levin and the organization, rather than have "supported [Levin] in everything" he does and remained on Landmark Legal's Board for nearly a decade.

Robert J. Conrad, Jr.

Turning to Robert Conrad, it is important to note that Conrad has been nominated to fill a seat on the Fourth Circuit that Senate Majority Leader Harry Reid recently and accurately described as an "illegitimate vacancy" -- a seat open only because Senate Republicans prevented President Clinton from filling it. This Fourth Circuit seat became vacant in 1994. However, during the next *six years*, Senate Republicans completely blocked President Clinton's efforts to fill the seat, refusing to consider either of the two nominees that he successively put forward. Either of the nominees would have been the first African American judge to serve on this court, a court with jurisdiction over states that are home to the largest African American population in the country.

With the seat having been held open by Senate Republicans for more than an entire presidential term, President Bush first attempted to fill it with District Court Judge Terrence Boyle of North Carolina. However, and as this Committee will recall, Judge Boyle's confirmation was strongly opposed due to his disturbing record on the rights of minorities, women, and the disabled, as well as his very high number of reversals, which raised issues about his competence. In 2007, after it was reported that Judge Boyle had violated rules of judicial ethics,<sup>22</sup> President Bush did not re-nominate him, and now has attempted to install Robert Conrad in this seat.

Conrad has been a District Court Judge in North Carolina since 2005. His nomination to that court was controversial, and in fact was opposed by then-Senator John

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<sup>21</sup> *Men in Black*, at 239 (emphasis added).

<sup>22</sup> *See, e.g.*, Will Evans, "Controversial Bush Judge Broke Ethics Law," Salon.com, May 1, 2006, available at <<http://www.salon.com/news/feature/2006/05/01/boyle/>> (visited April 28, 2008).

Edwards. Conrad has a history of inflammatory writings and extreme views about important issues relating to individual rights. For example, in 1988, he wrote an op-ed in which he called Planned Parenthood a “radical, pro-abortion fringe group,” and stated that “Planned Parenthood knowingly kills unborn babies, not fetuses, as a method of post conception contraception.”<sup>23</sup>

In 1991, Conrad criticized “safe sex” as a means of avoiding HIV/AIDS, stating that “Sexual promiscuity is wrong not because it leads to disease (so if it could be made ‘safe’ no moral significance would attach), but because it contradicts nature and nature’s God.”<sup>24</sup> Conrad added that “‘Safe sex’ is a myopically misconceived liberal ‘solution’ that fails to address the promiscuity underlying the AIDS diseases and others.”<sup>25</sup>

Even Sister Helen Prejean, author of the acclaimed book *Dead Man Walking*, did not escape Conrad’s poison pen. Conrad called Sister Prejean a “Church-hating nun” and dismissed her book as “liberal drivel,” adding that “[t]his surprisingly shallow book wallows in worn-out liberal shibboleth and dated anecdotes.”<sup>26</sup>

Conrad’s nomination to the District Court proceeded after Senator Edwards left the Congress. Although Conrad was confirmed, serious concerns were expressed then about his record, including by Senator Leahy, who said that he did “not wonder at Senator Edwards’ objections” to Conrad, “after reading some of Mr. Conrad’s more inflammatory writings.”<sup>27</sup> For example, the views that Conrad had expressed about Planned Parenthood caused Senator Leahy to “wonder whether any person going before a Judge Conrad in a case involving reproductive rights, or indeed any issue related to personal privacy, will feel their arguments have been fairly heard.”<sup>28</sup> In voting to confirm Conrad, Senator Leahy expressed the hope that Conrad could “put aside personal prejudices and preconceptions.”<sup>29</sup>

The fact that Conrad was confirmed to the District Court despite the serious concerns raised by his record does not mean that those concerns are now moot, nor does it mean that any Senator who voted to confirm Conrad is under any obligation to vote to promote him to a higher court. As important as a District Court judge is, he or she does not necessarily have the final say in a case, since the losing litigant has the right to appeal to the Circuit Court and secure the reversal of an erroneous District Court ruling. In sharp contrast, the Court

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<sup>23</sup> Robert J. Conrad, Jr., “Planned Parenthood, A Radical, Pro-Abortion Fringe Group,” *The Charlotte Observer*, June 14, 1988, 19A.

<sup>24</sup> Robert J. Conrad, Jr., “Virtues of Sports and Sex: Play by the Same Rules on Both Fields: Sacrifice, Commitment and Self-Control,” *The Charlotte Observer*, Nov. 14, 1991, 13A.

<sup>25</sup> *Id.*

<sup>26</sup> Robert Conrad, “Habitually Wrong,” *Catholic Dossier*, Jan. 1999.

<sup>27</sup> Statement of Senator Patrick Leahy on the Nominations of Robert Conrad and James Dever to be U.S. District Court Judges (April 14, 2005).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

of Appeals is literally the court of last resort for most Americans, given that the Supreme Court hears so few cases. In addition, appellate rulings also set binding precedent within the Circuit and often serve as persuasive precedent in other Circuits. The stakes are thus far higher when an appellate nomination is considered.

Moreover, in Judge Conrad's case, his short tenure on the District Court has not served to put to rest the concerns raised by his pre-judicial record. To the contrary, he has “consistently ruled against plaintiffs alleging employment discrimination,” he appears hostile to the rights of criminal defendants, and, sitting by designation on the Fourth Circuit, he joined an anti-environmental ruling overturning a District Court decision that the Army Corps of Engineers had violated the Clean Water Act in approving a permit for the discharge of material from mountain-top mining.<sup>30</sup>

Like Mr. Matthews, Judge Conrad would not likely help restore balance to the Fourth Circuit.

### Conclusion

President Bush long ago lost the confidence of the American people that he is taking this country in the right direction. He will be out office soon, but anyone confirmed to a federal court now will serve for decades, extending the Bush Administration’s destructive ideological legacy for generations. The American people deserve far better, particularly on their courts -- the guardians of justice and the Constitution.

We strongly urge the Committee not to proceed with the nominations of Steve Matthews and Robert Conrad.

Sincerely,



Kathryn Kolbert  
President

cc: All Members, Senate Judiciary Committee

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<sup>30</sup> See Alliance For Justice, “Preliminary Report on the Nomination of Robert J. Conrad, Jr. to the Fourth Circuit Court of Appeals,” available at <<http://www.afj.org/assets/resources/nominees/afj-conrad-report.pdf>>(visited April 24, 2008).