

Testimony of

The Honorable Patrick Leahy

February 7, 2002

I begin by thanking Senator Feinstein for chairing today's hearing.

Judge Pickering was nominated to a vacancy on the Fifth Circuit on May 25. Unfortunately, due to the change in the process that had been used by Republican and Democratic Presidents for more than 50 years, his ABA peer review was not received until late July, just before the August recess. At that point the Committee was concentrating on expediting the confirmation hearing of the new director of the Federal Bureau of Investigation, who was confirmed in record time before the August recess, and nominees to other key posts.

As a result of a Republican objection to a request to retain all judicial nominations pending before the Senate through the August recess, the initial nomination of Judge Pickering was required by Senate rules to be returned to the President without action. The Committee proceeded during the August recess to hold two unprecedented hearings involving other judicial nominations, including a nominee to the Court of Appeals for the Federal Circuit.

Judge Pickering was renominated in September. Although Judge Pickering's nomination was not among the first batch of nominations announced by the White House and received by the Senate, in an effort to accommodate the Republican Leader, I included this nomination at one of our three October hearings for judicial nominations. At that time, on October 18, the three Senate office buildings were closed because of the threat of anthrax contamination. Rather than cancel the hearing in the wake of the September 11 attacks and the anthrax-related closures and dislocations, we sought to go forward.

Senator Schumer chaired the session in a room in the Capitol but only a few Senators were available to participate. Security and space constraints prevented all but a handful of people from attending. Thus, today's hearing is the first real opportunity interested citizens will have to witness Judge Pickering's testimony and, for most Senators, the first chance to question the nominee.

There is, of course, ample recent precedent for scheduling a follow-up session for a judicial nominee. Among those nominees who participated in two hearings over the last several years were Marsha Berzon, Richard Paez, Margaret Morrow, Arthur Gajarsa, Eric Clay, William Fletcher, Ann Aiken and Susan Mollway, among others.

In preparation for the October 18 hearing, we determined that Judge Pickering had published a comparatively small number of his district court opinions over the years. Within a week of the first hearing, the Committee made a formal request to Judge Pickering for his unpublished opinions. Since October, Judge Pickering has been working to produce copies of those opinions to us. In fact, just last week, I was notified that 120 more of his unpublished opinions were discovered in the courthouse where he sits and just yesterday, barely hours before this hearing,

another couple hundred opinions were provided. I doubt that anyone has had an opportunity to review those recently provided materials and we will have to determine how many, of what Judge Pickering estimated to be his 1100 unpublished opinions, remain unproduced.

I have continued to work with Senator Lott and, as I told him in response to his inquiries in December, I proceeded to schedule this hearing for the first full week of this session. This hearing is being held less than four months after the October 18 session-- not years after, as was the case with Richard Paez, William Fletcher and Susan Mollway.

Normally, we would be convening in the Judiciary Committee's hearing room. But after we received requests the day before the hearing from Senator Lott's office for 15 seats to be reserved at the hearing and from the Department of Justice for more than 30 seats, we made last-minute arrangements to secure this larger room to accommodate them. Otherwise, every seat in our hearing room would have been reserved for the nominee and the Administration without any access at all to the public.

I appreciate that Judge Pickering and his clerks have been providing materials, especially most recently as this hearing date approached. Other recent nominees have been asked by this Committee to fulfill far more burdensome requests than producing copies of their opinions. For example, four years after he was nominated to the Ninth Circuit, Judge Richard Paez was asked to produce a list of every downward departure from the Federal Sentencing Guidelines during his time on the federal district court. That request required three people to travel to California and join the judge's staff to hand-search his archives. Judge Paez was also asked to produce docket sheets and attorney fee information on habeas corpus matters brought on behalf of defendants sentenced to death that were then pending before him. Margaret Morrow, who was nominated to a district court judgeship, was asked to disclose her votes on California referenda over a number of years and required to collect old bar magazine columns. Marsha Berzon, who was nominated to the Ninth Circuit, was asked to produce her attendance record from the ACLU of Northern California. She was also asked to produce records of the board meetings and minutes of those meeting so that Senators could determine how she had voted on particular issues. Timothy Dyk, nominated to the Federal Circuit, was asked for detailed billing records from a pro bono case that was handled by an associate he supervised at his law firm.

While this context is important, I want to ensure that no one misunderstands what we are doing here today. We are not engaging in a game of tit-for-tat for past Republican practices. We have not delayed proceeding on this nomination, as so many nominations were delayed in recent years. Rather, this Committee must seriously consider the nomination. The responsibility to advise and consent on the President's nominees is one that I take seriously and that this Committee takes seriously.

This Committee has asked Judge Pickering to produce a record of his judicial rulings. Given the nature of this nomination and given the disproportionately high number of unpublished opinions, this request seems appropriate as part of our efforts to provide a full and fair record on which to evaluate this nomination, as some Republican Senators have conceded.

This nomination is not without controversy. Many have written letters in support and in opposition to this nomination. Those letters will be included in the record. This hearing is an

important part of the record upon which committee members will rely when asked to decide whether or not to recommend favorably the nomination of Judge Charles Pickering to the United States Court of Appeals for the Fifth Circuit to the full Senate for its consideration.

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