Testimony of

The Honorable Patrick Leahy

March 7, 2002

Today our agenda includes several judicial nominations, including the nomination of Charles W. Pickering to sit on the United States Court of Appeals for the 5th Circuit. Judge Pickering's nomination is the 40th nomination the Committee has considered since the change in majority last summer.

During the last eight months the Senate has confirmed all 39 judges -- seven to the Courts of Appeals and 32 to the District Courts - with virtually unanimous, bipartisan support. They have included the first new judge confirmed to the 5th Circuit in seven years, the first new judge confirmed to the 4th Circuit in three years, the first new judge to the 10th Circuit in six years, the first new District Court judges for Colorado in eight years and additional District Court judges for Arizona, Alabama, Kentucky, Iowa, Oklahoma, Mississippi, South Carolina, Louisiana, Montana, Nebraska, Nevada, New Mexico, Georgia and the District of Columbia.

We have put practices into place to make the confirmation process for federal judges more orderly and fair. The Committee has made the process more open and transparent than ever before. For the first time, the Judiciary Committee is making public the "blue slips" sent to home state Senators. Until last summer, these matters were treated as confidential and restricted from public view. Since the changeover, extended unexplained anonymous holds on nominees have become a thing of a past. And the practice of leaving nominees to languish for months and even years on the Senate calendar has similarly been jettisoned. We have ended the era of the secret holds that plagued so many of President Clinton's judicial nominations.

We have moved nominees with less time from hearings to Committee votes, and then out to the floor, where nominees have received timely roll call votes and confirmations. Over the preceding six and one-half years, at least eight judicial nominees who completed a confirmation hearing were never considered by the Committee and simply abandoned, without action, and more than 50 judicial nominations were never voted upon by this Committee.

In addition to working to remedy problems of the past, I have also tried to propose constructive ways to move ahead. As I said on the Senate floor in January, we will restore steadiness in the hearing process. The Committee is holding regular hearings at a pace that is exceeding the pace of the previous six and one-half years. Last week the Committee held its 14th hearing for judicial nominees since the change in majority eight months ago. The Republican majority never held that many hearings over an entire year.

I plan to schedule another judicial nominations hearing to be held in the next two weeks. At that hearing it is likely that we will again have fewer District Court nominations with American Bar Association peer reviews and returned blue slips than we would have been willing to consider

and after that hearing there may be no District Court nominees ready for hearings. That is one indication of how quickly we have been proceeding over the last few months.

I have taken a number of actions to seek a cooperative and constructive working relationship with all Senators on both sides of the aisle and with the White House in order to make the confirmation process more orderly, less antagonistic, and more productive. Not all of my efforts have been successful and very few of my suggestions to the Administration have yielded results, but I have continued to make the effort in the best interests of the country, the Senate and this Committee.

I am extremely proud of the work this Committee has done since the change in the majority. I am proud of the way we have considered nominees fairly and expeditiously and the way we have been able to report and the Senate has proceeded to confirm so many of the judicial nominations who have come to us as qualified, non-ideological, consensus choices.

In addition, we have included a number of controversial nominees in our hearings. Controversial nominations take more time and effort, but we are making that effort and taking that time to be fair and thorough in our consideration of those nominations, as well. The constitutional responsibility to advise and consent to the President's lifetime judicial appointments is not an occasion to rubber stamp. When the President sends us a nominee whose professional record or judicial temperament raises questions, it is this Committee's duty to act. This is one of those occasions.

The Committee's Consideration of Judge Pickering's Nomination

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 peer review conducted by the ABA's Standing Committee on the Federal Judiciary 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 other nominations.

As a result of a Republican objection to a Democratic leadership 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. Judge Pickering was renominated in September.

Although Judge Pickering's nominations 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. The day before his hearing, held on October 18, the three Senate office buildings were evacuated because of the threat of anthrax contamination. Rather than cancel the hearing in the wake of the September 11 attacks and the dislocations due to the anthrax letters, 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. 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. In order to give the Committee time to consider the large number of unpublished opinions that Judge Pickering estimated he had written in his 12 years on the bench, and because of the constraints on public access to the first hearing, the Committee afforded the nominee an opportunity for a second hearing.

I continued to work with Senator Lott and, as I told him in response to his inquiries in December, I proceeded to schedule that follow-up hearing for the first full week of this session. There was, of course, ample recent precedent for scheduling a follow-up session for a judicial nominee. Among those nominees were participated in two hearing over the last few years were Marsha Berzon, Richard Paez, Margaret Morrow, Arthur Gajarsa, Eric Clay, William Fletcher, Ann Aiken and Susan Mollway, among others. Unlike those hearings, some of which were held years after the initial hearings, Judge Pickering's second hearing was held less than four months after the October 18 session and, as promised, during the first full week of this session.

I should note that the Committee has been working with Senators Lott and Cochran since the change in the majority to ensure swift confirmation of other consensus candidates to the federal bench, and as United States Attorneys and United States Marshals. On October 11, the Senate confirmed United States District Court Judge Michael Mills for the Northern District of Mississippi; on October 23, James Greenlee was confirmed as the U.S. Attorney for the Northern District of Mississippi; and on November 6, Dunn Lampton received Senate approval to be the U.S. Attorney for the Southern District of Mississippi; Nehemiah Flowers was confirmed as the U.S. Marshal for the Southern District of Mississippi on February 8 although he was not nominated until the week before adjournment last session; and Larry Wagster was confirmed as the U.S. Marshal for the Northern District of Mississippi on February 8 although he was not nominated until the day before adjournment last session. We have moved forward to fill all these crucial law enforcement vacancies in Mississippi.

Production of Unpublished Opinions

After determining that the number of Judge Pickering's published opinions was unusually low, and 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 produced copies of those opinions to us. They came to the Committee in sets of 100 or more at a time, including a delivery of more than 200 the day before Judge Pickering's second hearing, and another 200 or more nearly a week after. It took three written requests from the Committee and more than three months but eventually we were assured that all available computer databases and paper archives for all existing unpublished opinions had been searched.

We appreciate Judge Pickering and his clerks providing the requested materials. Other recent nominees have been asked by this Committee to fulfill far more burdensome requests than producing copies of their own judicial opinions. For example, four years after he was nominated to the 9th Circuit, Judge Richard Paez was asked to produce a list of every one of his 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. 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 from years before. Marsha Berzon, who was nominated to the 9th 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.

This Committee has only asked Judge Pickering to produce a record of his judicial rulings. These are public documents but not readily available to the public or the Committee. Given the controversial nature of this nomination and the disproportionately high number of his 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.

I set forth this background, for the record, to ensure that no one misunderstands how the Committee has gone about evaluating Judge Pickering's record. We have not engaged in a game of tit-for-tat for past Republican practices, nor have we delayed proceeding on this nomination, as so many nominations were delayed in recent years, as some have suggested. Rather, this Committee has seriously considered the nomination, given the nominee two opportunities to be heard, and has promptly scheduled a Committee vote. I also announced a business meeting of the Committee for last week to consider this matter. It was postponed at the request of the Republican leader, out of deference and courtesy to him.

The responsibility to advise and consent on the President's nominees is one that I take seriously and that this Committee takes seriously. I firmly believe that Judge Pickering's nomination to the Court of Appeals have been given a fair hearing and a fair process before this Committee. I thank all Members of the Committee for being fair. Those who have had concerns have raised them and given the nominee the opportunity to respond, both at his hearing and in written follow-up questions. In particular, I thank Senator Schumer for chairing the October 18 hearing and for his fairness then and, again, at the February follow-up hearing. I commend Senator Feinstein for her fairness in chairing the follow-up hearing last month. I said at the time that I could not remember anyone being more fair than she was that day and I reiterate that today.

My regret is that she and so many Democrats on this Committee have been subjected to unfair criticism and attacks on their character and judgment over the last several weeks. I was distressed to hear that Senator Feinstein was receiving calls and criticism, as have I, that are based on our religious affiliations. That is wrong. I was disappointed to see Senator Edwards subjected to criticism for asking questions, and being insulted and called names. That is regrettable. While Democrats and most Republicans have kept to the merits of this nomination, it is most unfortunate that others have chosen to vilify, castigate, unfairly characterize and condemn without basis Senators working conscientiously to fulfil their constitutional responsibilities.

Judge Pickering's Performance As A Judge: Reversals

My first area of concern, which I raised at his hearing, is that Judge Pickering's record on the United States District Court bench over the last 12 years, as reflected by a number of distressing reversals, does not commend him for elevation. Instead, it indicates a pattern of not knowing or choosing not to follow the law, of relying to his detriment on magistrates and of misstating and missing the law.

At his hearing, I asked Judge Pickering about many of these reversals. Looking at his record, I saw that he had been reversed by the 5th Circuit at least 25 times. And in 15 of those cases, the 5th Circuit reversed him without publishing their decisions, which according to their rules and practice indicates that the appellate court regards its decision as based on well-settled principles of law. Those 5th Circuit reversals on well-settled issues indicated that Judge Pickering had committed mistakes as a judge in either not knowing the law or not applying the law in the case before him. That is fundamental to judging.

I asked Judge Pickering about a First Amendment case, Rayfield Johnson v. Forrest County Sheriff's Department. This was a case in which a prison inmate filed a civil rights lawsuit claiming that a jail's rules preventing inmates from receiving magazines by mail violated his First Amendment rights. In an unpublished one-paragraph judgment, Judge Pickering adopted the recommendation of a magistrate and granted the jail officials' motion to grant them summary judgment. In other words, he said that the petitioner's claim of a First Amendment right to religious materials which he wanted to get through the mail would be denied without further proceedings.

In its unpublished opinion, the 5th Circuit Court of Appeals, not considered by many a liberal circuit or one that coddles prisoners, reversed Judge Pickering and said that the inmate's First Amendment rights had been violated. In explaining why he was wrong, the 5th Circuit relied on and cited a published decision of its own from several years before, Mann v. Smith. In that case, they struck down a jail rule prohibiting detainees from receiving newspapers and magazines, holding that it violated the First Amendment.

What was of concern here was that in the Mann case, the prison officials had made much the same argument about fire hazards and clogged plumbing that were made by prison officials and accepted by Judge Pickering in the Johnson case. This was a case with almost identical facts in his own Circuit, what we call in the law a case "on all fours" with the Johnson case, and he did not cite it. Indeed, he turned his back on it and ruled the other way. We do not know whether he did not know the law or did not follow it. At the hearing, Judge Pickering admitted that the magistrate who had worked on the matter and he had "goofed" and that he was unaware of the law and the recent, binding precedent in his own circuit.

Next, I asked Judge Pickering about a toxic tort case, Abram v. Reichhold Chemicals. There he dismissed with prejudice the claims of eight plaintiffs because he held that they had not complied with a case management order. That means he dismissed them and denied them all rights to bring the case. Again, the 5th Circuit reversed Judge Pickering's dismissal, holding he had abused his discretion because he had not tried to use lesser sanctions before throwing the plaintiffs out of court permanently, without hearing the case on the merits. Again, the 5th Circuit did not publish its reversal, indicating that it was settled law that a dismissal with prejudice was appropriate only

where the failure to comply was the result of purposeful delay or contumaciousness, and the record reflects that the district court employed lesser sanctions before dismissing that action. The 5th Circuit found none of those conditions existed.

Approximately three years before reversing Judge Pickering in the Abram case, it had reversed him on the same legal principle in a case called Heptinstall v. Blount. There the 5th Circuit held that he had abused his discretion in dismissing a case with prejudice for a discovery violation without any indication that he had used this extreme measure as a remedy of last resort. And in its ruling in Heptinstall, the Court cited to another of its previous rulings which stated the same principle of law. Thus, this was not a principle with which Judge Pickering was unfamiliar, he had been reversed on that basis one and committed the same error again. This was binding 5th Circuit authority of which he was aware but chose not to follow.

At his hearing, I asked Judge Pickering to explain his ruling in Abram, especially in light of the prior reversal by the 5th Circuit on the same principle of law in another of his earlier cases. And while he offered his recollection of the facts of the case, he offered no satisfactory explanation of why he ruled in a way contrary to settled and binding precedent.

There are many other reversals, which continue to concern me for the same reasons that I remain concerned about the Johnson case and about the Abram case.

One of them is a case called Arthur Loper v. United States. This is another case in which Judge Pickering was reversed in an unpublished 5th Circuit opinion, which again means that he violated "well-settled principles of law." This case dealt with an enhanced sentence that the 5th Circuit found he had imposed improperly on a criminal defendant. When the defendant made a motion for the sentence to be corrected or set aside, Judge Pickering denied the inmate's motion without giving him a hearing but without even waiting for the government to respond. On appeal, the 5th Circuit reversed Judge Pickering's denial of the motion, noting that the government conceded that the defendant was correct, and that an error had been made that prohibited the Judge from imposing the sentence that he did. The 5th Circuit also cited the statute under which the inmate filed his motion, which requires that under ordinary circumstances, the trial judge "shall ... grant a prompt hearing" and "make findings of fact and conclusions of law" on the petitioner's claims. The 5th Circuit criticized Judge Pickering for denying the motion in a "one-page order that did not contain his reasoning." And then the Court went on to remind him that "[a] statement of the court's findings of fact and conclusions of law is normally 'indispensable to appellate review.'" Reading this case, I can only wonder why Judge Pickering did not abide by the statute and follow the law. Was he unaware of the requirements of the law or had he decided to follow his own view of what the law should be on the matter?

There is another case in which Judge Pickering denied a petitioner's motion for a hearing and missed controlling Fifth Circuit precedent. The case was U.S. v. Marlon Johnson, in which a prisoner claimed that his rights had been violated because of ineffective assistance of counsel and asked that his guilty plea be set aside. The inmate claimed that he had asked his counsel to file a direct appeal of his conviction.

Once again, in another unpublished opinion, the Fifth Circuit reversed Judge Pickering's denial of the inmate's motion, explaining that the inmate's "allegation that he asked his counsel to file a

direct appeal triggered an obligation to hold an evidentiary hearing." This time the Court of Appeals relied on two of its own published decisions for its conclusion, neither of which Judge Pickering mentioned in his ruling. Again, there was settled law in the Circuit of which Judge Pickering was unaware of that he chose not to follow.

Judge Pickering's Performance As A Judge: Misstating the Law

In addition to the many times that Judge Pickering has been reversed by the Court of Appeals for not knowing or following the law, there are numerous instances of Judge Pickering misstating the law in cases that were not appealed to a higher court and other cases in which he stated a conclusion without any legal support.

An example is a statement by Judge Pickering in a case called Barnes v. Mississippi Department of Corrections. In an earlier go-round in this case, the 5th Circuit had reversed Judge Pickering on one point, and in this later opinion, he tried to explain that they did so, in part, on the basis of a 1993 Supreme Court case called Withrow v. Williams. In particular, Judge Pickering wrote that the Supreme Court, "acknowledg[ed] in Withrow that the Miranda warning is not a constitutional mandate." This was clearly a misreading of Withrow. I trust that Judge Pickering would now acknowledge that the Supreme Court recently made clear in Dickerson v. United States that the Miranda warning is indeed derived from a constitutional mandate.

An example of an entirely unsupported conclusion comes in a case called Holtzclaw v. United States, where Judge Pickering presided over a habeas corpus petition by a federal petitioner whom he had convicted. Although this was the first habeas petition the prisoner had filed, Pickering termed the petition frivolous. He regarded the petition as restating claims that had already been made at trial. He dismissed it, and stated that he would order prison officials to punish the petitioner if he filed another frivolous petition. Judge Pickering also conducted a "survey" of cases within his district to determine how many frivolous habeas petitions had been filed. However, in the section of his opinion dealing with the sanctions, he did not cite a single statute, rule of procedure, local rule or case as support for his decision. He stated:

In the future, this Court will give serious consideration to requiring prison authorities to restrict rights and privileges of prison inmates who file frivolous petitions before this Court. Specifically, this Court gives notice to Roger Franklin Holtzclaw that should he file another frivolous petition for habeas corpus in the future, that the Court will seriously consider and very likely order the appropriate prison officials to restrict and limit the privileges and rights of Petitioner for a period of from three to six months and/or that the Court will also consider other appropriate sanctions. Petitioner Roger Franklin Holtzclaw is instructed not to file further frivolous petitions.

Judge Pickering relied on no authority when he threatened to impose sanctions. This sort of action by a federal judge is disturbing. Through consideration and passage of habeas corpus reforms in 1996, Congress has made very deliberate decisions about what sanctions ought to be imposed for frivolous and repetitious petitions. In Holtzclaw, Judge Pickering went beyond Congress' intent, and in what could be described as judicial activism, threatens sanctions not contemplated by the statute.

Another example of Judge Pickering's misunderstanding the basics of federal practice and due process occurred in a case called Rudd v. Jones, where he presided over a prisoner's civil rights claim before the enactment of the Prisoner Litigation Reform Act. He properly noted that the Supreme Court required that a pro se plaintiff is "entitled to have his complaint liberally construed" and admitted that, under this rule, the complaint "could be construed to state a cause of action." Nevertheless, he claimed that the complaint was stated in only conclusory terms and decided that, "based upon previous experience with complaints that are couched in such a highly conclusory fashion, this Court is aware that plaintiffs in such cases are very rarely successful and very seldom come forward with any facts that would even justify a trial." Therefore, on his own motion, the Judge ordered the plaintiff to refile the complaint with more specific allegations or have the case dismissed before defendant had to respond. He also did another "survey" to prove that federal courts were wasting their resources on frivolous prisoner civil rights claims.

In forcing the plaintiff to refile, Judge Pickering entirely disregarded Federal Rule of Civil Procedure 8, which requires only notice pleading. This is a basic tenet of the American system of jurisprudence, laid out by the Supreme Court in 1957 in Conley v. Gibson.

In yet another case, Judge Pickering disregards the applicable law. In United States v. Maccachran, he denied a habeas corpus petitioner's motion for recusal without referring the matter to another judge. The petitioner filed affidavits stating that the Judge had a personal bias against him. The relevant statute, 28 U.S.C. § 144, states:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

According to the statute, the Judge had to allow another judge decide whether he should be recused or not. However, Judge Pickering did not follow the law, and he decided the case himself, stating that the affidavit was false. In support of his decision, he cited the dissent in a Fifth Circuit case.

Appropriate Role of a Judge: Inserting Personal Opinion, Creating Impression of Bias

Additional questions arise when I examine yet another disturbing trend in Judge Pickering's opinions, published and unpublished: his habit of inserting his personal views into written decisions in such a way as to create a terrible impression of bias to categories of plaintiffs and hostility to entire types of claims before the federal courts.

Employment Discrimination Cases

One entire category of claims in which Judge Pickering demonstrates hostility and bias is employment discrimination actions. This is also a category of cases where an examination of the judge's unpublished opinions was crucial, because over the last 12 years on the federal bench, he chose to publish only one of his employment discrimination decisions. The remaining 12 were

all among the unpublished decisions he produced to the Committee upon request after his first hearing last October.

What is significant in these cases are the times in the unpublished opinions that Judge Pickering went beyond merely ruling against the plaintiff to make unnecessary, off-the-cuff statements about all the reasons he believes plaintiffs claiming employment discrimination should not be in court, and about the general lack of substance of claims brought under the federal anti-discrimination statutes.

For example, in a 1996 case, Johnson v. Southern Mississippi Home Health, Judge Pickering did not limit his opinion to a legal conclusion based on the facts presented. Instead he made sure to note that:

"The fact that a black employee is terminated does not automatically indicate discrimination. The Civil Rights Act was not passed to guarantee job security to employees who do not do their job adequately."

In a case called Seeley v.Hattiesburg, No. 2:96-CV-327PG, (S.D. Miss. Feb. 17, 1998), where he should have limited himself to the facts and the law, Judge Pickering went on to comment about other matters relating to race discrimination lawsuits apparently on his mind at the time, writing that:

"[T]he Courts are not super personnel managers charged with second guessing every employment decision made regarding minorities. . . The federal courts must never become safe havens for employees who are in a class protected from discrimination, but who in fact are employees who are derelict in their duties."

In a credit discrimination case, Judge Pickering ruled on the case before him, and then included a lengthy lecture giving his very personal views on anti-discrimination laws. He wrote:

"This case demonstrates one of the side effects resulting from anti-discrimination laws and racial polarization. When an adverse action is taken affecting one covered by such laws, there is a tendency on the part of the person affected to spontaneously react that discrimination caused the action. Sometimes this is true and sometimes it is not true. All of us have difficulty accepting the fact that we sometimes create our own problems. When expectations are created that are incapable of fulfillment. . . Plaintiffs fail to recognize that whatever your race - black, white, or other - natural consequences flow from one's actions. The fact that one happens to be protected from discrimination does not give one insulation from one's own actions."

All of this unnecessary editorializing is ironic given Judge Pickering's testimony at his first hearing in October of last year, when he explained to the Committee why he has chosen to publish so few of his opinions over the years. He explained that, "Americans were drowning in information," and that there is, "absolutely too much," law written down. He testified that his view is, "[i]f you are not establishing precedent, why make lawyers have to read," and that, "there is too much being written out there." "If you don't have anything to add. . . that is going to be helpful to somebody," he said, "you are just cluttering up the information." Tr. at 41, 54.

After reading statements like those I have just read, it seems to me that a plaintiff with a discrimination claim, reading or knowing about Judge Pickering's hostile position toward anti-discrimination laws and claimants, would be justified in fearing that the Judge had already made up his mind.

Such blatant editorial comments, reflecting such a narrow view of the important goals of our nation's civil rights law, and coming from the pen of the one person who is supposed to guarantee a fair hearing and a just result, are troubling. Judges are not appointed to injection their own personal beliefs into a case or subject matter setting.

Judge Pickering voiced another disturbing aspect of his views on employment discrimination cases almost as an afterthought at his second hearing. In an attempt to explain his statements on the weakness of many of these cases in response to Senator Kennedy, Judge Pickering demonstrated a troubling misunderstanding of the role of Equal Employment Opportunity Commission in reviewing employment cases. He stated that he believed that, "the EEOC engages in mediation and it is my impression that most of the good cases are handled through mediation and they are resolved. The cases that come to court are generally the ones that the EEOC has investigated and found that there is no basis, so then they are filed in court." But this is completely wrong. The EEOC has a backlog of almost 35,000 cases. Both parties must agree to mediation. The Commission lack resources. Yet Judge Pickering had already prejudged employment discrimination cases filed in court as without merit. That kind of erroneous and unfair a generalization about the strength of discrimination cases by a federal judge responsible for presiding over them, was extremely disconcerting. That a federal judge, on the bench for a dozen years, could so misunderstand the legal and practical mechanisms behind employment discrimination cases was disturbing.

Habeas Corpus Cases

While fair treatment in employment on the basis of race, sex, national origin, age and disability is fundamental to the American dream, and crucial to a free and thriving economy, due process in criminal proceedings can be a matter of life and death. Here, too, Judge Pickering has misunderstood the law and inserted his personal views.

In a 1995 case, Barnes v. Mississippi Department of Corrections, Judge Pickering presided over a habeas corpus case in which a prisoner claimed that his confession was involuntary because he had been held in custody for more than three days before being given an initial hearing by a magistrate. The Judge denied the petition and the 5th Circuit reversed his decision. After remand, he again denied the petition, stating that granting such a habeas petition "is far more cruel than denying to a known murderer a procedural right regardless of how important that right is." He cited the Bible and Coke's treatise to make the point that habeas corpus should be limited to petitioners who can prove actual innocence. That was a misstatement of the law in contradiction to Supreme Court precedent. He further stated that, "[i]t is the fundamental responsibility of government to protect the weak from the strong, but it is also a fundamental responsibility of government to protect the meek from the mean - the law-abiding from the law violating." He cited no legal precedent for this apparently personal view that society's natural law rights to be free from crime override the specific protections contained in the Bill of Rights.

In Drennan v. Hargett, a 1994 case over which Judge Pickering presided, a habeas corpus petitioner claimed that he had been denied access to the courts and received ineffective assistance of counsel. He had pleaded guilty to a charge of capital murder at age 15 and received a life sentence. He claimed that his attorney had threatened him with the gas chamber if he did not plead guilty and that his lawyer did not make important motions, such as a motion to suppress his confession under Miranda. He also claimed that he did not know how to obtain relief from the courts for several years because of his youth and because his representatives misled him. Judge Pickering denied the claim, and devoted a third of his opinion, three pages of a nine-page opinion, to arguing that habeas corpus should not be allowed unless a petitioner can prove actual innocence. In this unusual opinion, he cited the Ninth and Tenth Amendments, the Preamble to the Constitution and the Declaration of Independence in support of his views, adding that he believes the Bill of Rights is in tension with the preamble on this point. Again, he cited no legal precedent for these odd and extremely personal views, almost entirely unrelated to the controlling law.

Finally, in Washington v. Hargett, a 1995 habeas corpus case, Judge Pickering rejected the plaintiff's request for DNA testing required to prove his actual innocence, but stated that an attempt to prove actual innocence was, "the only reason why this Court or any other federal court should be considering a petition for habeas corpus," so long after the trial. While that may be Judge Pickering's personal opinion, it is undeniably contrary to Supreme Court and statutory law. They state that a prisoner petitioning for a writ of habeas corpus is contesting the legality of his detention. The Supreme Court explained as much two years before Judge Pickering decided this case.

Interestingly, whatever the answer to that question, in the same case where Judge Pickering declared the importance of actual innocence, he denied a petitioner the only thing that could have possibly proved his - a DNA test. It was in that case of Washington v. Hargett that Judge Pickering summarily rejected the plaintiff's motion for a DNA test in order to prove his claim of innocence. The case involved a rape that occurred in August 1982, before DNA was generally available and accepted in the courts. Yet the judge suggested in his opinion that DNA testing was inappropriate simply because the request came in 1995 - 13 years after the trial. As he put it:

"Plaintiff had a fair criminal trial. He was, and is, entitled to nothing more. He was not entitled to a perfect trial. No such trial can be held. Plaintiff states that he wants DNA testing now thirteen years later. He wants a new trial. A new trial, now, thirteen years later, would be much less reliable than the one that occurred thirteen years ago."

As Judge Pickering may well know, over the last decade, post-conviction DNA testing has exonerated nearly 100 people, including 11 who were awaiting execution.

I have introduced legislation that would, among other things, afford greater access to DNA testing by convicted offenders. Senator Hatch and Senator Feinstein have also introduced bills to promote the use of DNA testing in the post-conviction context. Attorney General Ashcroft has stated that "DNA can operate as a kind of truth machine, ensuring justice by identifying the guilty and clearing the innocent." Judge Pickering appears in this case to have created an exception to his own oft-expressed view that habeas corpus should be considered would be to establish actual innocence.

Judge Pickering's Intervention on Behalf of a Hate Criminal

As I review my objections to Judge Pickering's elevation to the Fifth Circuit, I have asked in a number of different cases and areas of the law, whether Judge Pickering was unaware of the law in different areas, or whether he was trying to impose his own views in spite of the law. Another area of great concern to me - Judge Pickering's intervention on behalf of a convicted criminal - raises this same fundamental question.

In this 1994 case, United States v. Swan, Judge Pickering presided over a case brought against three people accused of burning a cross on the lawn of an interracial couple. Two of the defendants, one a juvenile and the other with significant mental disabilities, accepted plea bargains offered by the prosecution. The third, Mr. Swan, was also offered a plea up to last minute, but chose to go to trial, and was convicted of all three counts brought by the Government. One of these counts, the use of fire in the commission of a felony, carried with it at the time a mandatory minimum sentence, set by Congress, of five years in jail. Together with the sentences set by the federal sentencing guidelines for the other two offenses, the required sentence would have been something close to seven years. This was not, as some have reported and others will likely continue to argue, a "recommendation" by the Government that Mr. Swan serve five years on the arson charge, it was sentence mandated by law, unavoidable and unchangeable.

I said before that the case raised the question of whether Judge Pickering was ignorant of the applicable law or trying to impose his own views, and that is because of what Judge Pickering did in the face of the conviction and looming mandatory sentence for Mr. Swan. What Judge Pickering did was to lobby the Government to agree to dismiss the arson charge against Mr. Swan.

Why would the Government drop a charge after having secured a conviction in such a terrible hate crime? Why would the prosecution agree to imposition of such a reduced sentence for someone whom a jury of his peers had already found guilty? According to documents that the Department of Justice produced to the Committee only minutes before Judge Pickering's second hearing was to begin, and documents that they agreed to make public in a heavily redacted form a week after that, Judge Pickering made them an offer that they could not refuse. He threatened them. He threatened them with bad law - with a decision that would have called into question the applicability of the arson charge to cross burnings. And he threatened to make, and presumably grant his own motion for a new trial for Mr. Swan - a motion for which there would have been no basis in law.

He badgered them, ordering them in terms that are extraordinary, to consult personally with the Attorney General, to report on all prior Justice Department prosecutions for cross burnings, and to agree to dismiss an already secured conviction, in the face of the fact that the law did not permit the result he sought. And when the prosecutors, career assistants in the United States Attorneys Office and career prosecutors in Washington, refused to give in to his bullying, Judge Pickering took things a step further, and he called an old friend, then in a high-ranking position at the Department of Justice. As he admitted in a letter to me and in testimony at his second hearing, Judge Pickering, unhappy with the answer he was receiving from those prosecuting the case, called the Assistant Attorney General for the Civil Division, a friend of longstanding from

Mississippi, to, as he explained it, express his frustration with the prosecutors. Judge Pickering insisted in his testimony to the Committee that he did not ask his old friend to do anything or take any action but he did not deny the contact.

This sort of contact with the Department of Justice during the pendency of a case is extremely troubling. These sorts of ex parte contacts are expressly prohibited by every code of conduct and canon of ethics ever written, and for good reason. The credibility of our entire system of justice rests on the presumption that the conduct of every trial, criminal or civil, is fair and above board, and that no one side has any real or perceived advantage. Judge Pickering's phone call and actions undermine that assumption in very disturbing ways.

Judge Pickering and his defenders in this matter will tell you that he intervened in this case not because he took pity on Daniel Swan, a convicted hate criminal, but because he was concerned about the disparity among the sentences handed down to the three offenders. Explaining that this was the worst case of disparate treatment he had ever seen, in his testimony on February 7, he blamed the Government for agreeing to lower sentences for the two parties who pleaded guilty and then "recommending," as he inaccurately puts it, a higher sentence for the party who took his chances with a trial. He tried to give the impression that upon the sentencing for Mr. Swan he was surprised to learn about certain aspects of the crime and the defendants' behavior in them. But it is clear, upon examining the record, that none of the defendants was sentenced until after Mr. Swan's trial, until after all the testimony about their actions and relative culpability had been revealed in sworn public testimony. Judge Pickering is the one who sentenced all these defendants after having presided over the matter.

Moreover, I know of no other criminal cases in which Judge Pickering intervened based on a concern about disparate sentencing or another case in which he took action to avoid imposing a sentence based on a statutory mandated minimum.

The letters of legal ethics experts on these matters have been made part of the record on this nomination.

Other Ethics Concerns

The ethics concerns raised by the judge's behavior in the cross burning case is not the only ethical problem Judge Pickering's nomination presents. There is also the very serious matter of his having solicited letters of support and having asked to review them before forwarding them to the Justice Department and to the Senate. As the letter from Professor Stephen Gillers, a noted expert on legal ethics and professor of law at New York University, to Senator Feingold notes, this is a matter of grave concern. The letter, which has been made a part of the record, recounts the various Canons of the Code of Conduct for U.S. Judges implicated by this behavior, and is just another reason why I cannot approve of Judge Pickering's elevation.

I should note that Judge Pickering's behavior in this matter is similar that of a nominee from more than 20 years ago, Charles Winberry. Nominated to the U.S. District Court in North Carolina by Democratic President Jimmy Carter, Mr. Winberry's nomination was defeated in the Judiciary Committee in 1980. Among the grounds on which I opposed this nomination sent to the Senate by a President of my party, were my objections to Mr. Winberry's having solicited letters

from lawyers who would be appearing before him, if confirmed, and asking for blind copies of those letters.

The increasing frequency of nominees campaigning for confirmation to the federal bench is a troubling development and one that threatens the very independence of our judiciary. I was concerned about it in 1980 and I remain concerned about it in 2002.

CONCLUSION: DOES JUDGE PICKERING'S PERFORMANCE AS A JUDGE MERIT THIS PROMOTION? IT DOES NOT.

During the course of these proceedings, many have criticized Democratic Senators for calling Judge Pickering a racist. That did not happen and that criticism is a smokescreen to obscure the real problems with this nomination. I attended the Committee hearings on this nomination and witnessed Democratic Senators asking questions and the nominee being given opportunity after opportunity to make his best case for elevation to the 5th Circuit. The talking points distributed by the other side are partisan, political and not well-meaning. They have been accepted by some who have failed to review the record. That is unfortunate.

I think the nominee's past views and actions during a difficult time in Mississippi's history were not irrelevant, but I based my decision on his years on the bench and the record amassed at our hearings. This is a record that is replete with examples of bad judging, littered with cases that demonstrate a misunderstanding of the law in many crucial and sensitive areas, a record that shows a judge inserting his personal views into his judicial opinions, and putting his personal preferences above the law. Based on Judge Pickering's record, I will vote against confirmation.

If the majority of this Committee does not vote to report this nomination, Judge Pickering will nonetheless remain a federal judge of the Southern District of Mississippi with life tenure. He will be responsible for presiding over cases and determining matters central to the lives and well-being of many people in Mississippi and from elsewhere. He has served as a prosecutor, a state legislator, a local leader and now as a federal judge.

The oath taken by federal judges is a solemn pledge to administer justice fairly to those who come before the court seeking justice. It extends to those who are rich or poor, white or black, Republican or Democrat, without regard to gender or sexual orientation, national origin or disability.

Judge Pickering remains a very important and powerful person in Mississippi. I understand that he may be the only federal judge who sits in Hattiesburg. The Judge's ability faithfully to discharge the duties of the office are important every day, on every case, with respect to every claim and regarding every litigant. I bear him no malice and wish him and his family well.

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