Testimony of

The Honorable Orrin Hatch

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Mr. Chairman, as we are all aware, Judge Pickering has been nominated to fill one of the vacant positions on the Fifth Circuit Court of Appeals. This vacancy is one of 31 vacancies in the federal courts of appeals today. There were exactly the same number of appellate court vacancies - 31 - when President Bush announced his first 11 circuit court nominees on May 9 of last year. If the D.C. Circuit and the Sixth Circuit are any indication, it appears that the Committee is doing what it can to avoid filling seats on the courts that need judges the most. There is simply no explanation for this situation other than stall tactics.

And, it appears to me, that one of the most egregious stall tactics that has emerged is the current effort to defeat the judicial nomination pending before us today. It is no secret that many consider the smear campaign waged against Judge Pickering to be merely a warm-up battle for the ideological war that the left of mainstream special interest groups will wage to block any Supreme Court nominee that President Bush may have the opportunity to nominate. But this is no consolation for what Judge Pickering has been forced to endure in the five months since this Committee held its first hearing on his nomination. And it is definitely not a comforting sign for what lies ahead for other circuit court nominees, much less Supreme Court nominees.

Let me talk briefly on process. Last week, one of my Democratic colleagues said that this Committee was "fair" to Judge Pickering by holding a second hearing on his nomination after it made him produce ALL of his unpublished opinions. If this is the Committee's standard of fairness, then we are in real trouble. President Bush nominated Judge Pickering for the Fifth Circuit on May 25 of last year. For nearly five months, not a single person that I'm aware of raised a question about obtaining copies of any of Judge Pickering's unpublished opinions. Then, a mere two days before what was to become his first confirmation hearing, Judge Pickering received an oral request from the Committee's Democratic staff to provide a list of all cases in which he had rendered an unpublished opinion. Then, at his first hearing, Judge Pickering was asked to provide the Committee with his unpublished opinions in specific categories of cases. Nevertheless, my Democratic colleagues announced their intention at the hearing to schedule a

rarely precedented second hearing before ever having seen these additional unpublished opinions. Coincidentally, People for the American Way had made such a demand to have a second hearing.

Within a week of the hearing, my Democratic colleagues requested more unpublished opinions from Judge Pickering in specific categories. Apparently dissatisfied with what they found - or did not find - in the opinions that Judge Pickering produced, my colleagues then asked Judge Pickering for all of his unpublished opinions, as well as the captions and names of defendants in

all criminal cases to come before him. Judge Pickering has complied as well as he can to produce to the Committee his estimated 1,000 to 1,100 unpublished opinions.

I cannot recall another nominee who has been subjected to a document production of this scope. The established practice even before I was Chairman is to focus on significant opinions and reversals. This Committee never allowed outside groups to dictate Committee procedure in this way. Now, I don't take lightly our role to thoroughly examine the qualifications of judicial nominees. But I am very concerned that this is the beginning of a pattern which some may view with cynicism for future nominees, given that another one of our circuit nominees has been asked to produce to the Committee all of his unpublished opinions. Like Judge Pickering, this nominee was not requested to provide his unpublished opinions until after his confirmation hearing. I have grave concerns about the public perception of calculated fishing expeditions that these requests have created, and I am concerned that their motivation is to orchestrate a second hearing on the nominee - as appears to have been done in Judge Pickering's case.

Another one of my Democratic colleagues last week criticized Judge Pickering for his reversals during his tenure on the district court. I believe that the specific criticism was that Judge Pickering had injected his personal opinion into cases, had not followed precedent, and had been reversed as a result. I am compelled to point out to my colleague that Judge Pickering has been reversed only 26 times during his nearly twelve years on the district court bench. According to statistics maintained by the Administrative Office of the Courts, the total of the average weighted filings in his court for the period 1990 to 2001 was 5,081 cases. That is a total reversal rate of 0.5%. In other words, more than 99% of Judge Pickering's rulings were either accepted by the parties as fair interpretations of the law or were affirmed on appeal.

Even if you consider only his cases that were appealed, Judge Pickering's record still beats the averages. Three hundred twenty-eight of his cases have been appealed to the Fifth Circuit, but he has been reversed only 26 times. This means that each time one of his cases has gone up on appeal, he has been reversed only 7.9% of the time. The current national average for district court reversals in all circuits is 9.1%. So, no matter how you look at it, Judge Pickering's reversal rate is better than that of most other district court judges nationwide. This is something for which he should be commended, not castigated.

What is really going on here is an attempt to change the ground rules for judicial confirmations. Some have complained that President Bush has not sent mainstream, "consensus" nominees to the Senate for confirmation. The problem with this argument is that those who propound it seem to define "mainstream" nominees as nominees who agree with them on divisive social issues, such as abortion. They are poised to label as an extremist any nominee, such as Judge Pickering, who has a record of disagreeing with them, even when the disagreement is a matter of personal opinion and no indication of ability or willingness to follow the law. This is part of the strategy of changing the ground rules for the confirmation process by injecting an ideological litmus test. Any nominee who fails this test by daring to disagree with my colleagues will undoubtedly face an uphill battle to confirmation. I am disappointed by the politicization of the confirmation process, and will continue to resist it - just as I did when I was Chairman of this Committee.

Others have criticized the White House for what they characterize as a lack of consultation on the selection of judicial nominees. Regardless of the merits of this argument in other states, there

is no question that the White House consulted with Judge Pickering's home state senators on his nomination - both of them have ardently supported him. Surely my colleagues are not suggesting that Senators should have veto power over the President's nominees from states other than their own. Such a demand would be unprecedented and an arrogant exercise of super-constitutional authority.

Let me close by reading from a letter that a gentleman named Sheldon Sloan recently sent to Senator Boxer and copied to me and the distinguished Senior Senator from California. I remember Mr. Sloan because of his efforts on the confirmations of Judges Margaret Morrow and Richard Paez to the federal bench during the Clinton Administration - efforts that were ultimately successful with my support. I remember Mr. Sloan contacting me about these Clinton nominees. He now writes, "You will also remember the great difficulty we had in straightening out the record on Judge Morrow so that those who had received disinformation could be told the truth and moved to cast their votes for confirmation. You will also remember my similar support for Judges Paez, Matz and Feess. I now call upon you to return the courtesy by taking the time to read the enclosed article which recently appeared in The New York Times concerning Judge Pickering. After reading it, I ask you to take the further step to meet him and then lend your support for his confirmation as a Judge of the Fifth Circuit."
Mr. Sloan's letter continues, "Why do I ask this of you? I ask you to remember back to the days when Judge Morrow could not get a hearing at the Judiciary Committee and I interceded and got Senators Specter, then Hatch, to meet with her and learn the truth about the falsehoods being circulated about her. After learning the truth, they then both supported her and, as you will recall, Senator Hatch managed the floor time at her confirmation vote, a true act of statesmanship. He did so because it was the right thing to do."

Mr. Sloan further notes, "In obtaining the ability to bring Judge Morrow's confirmation to the floor of the Senate for a vote . . . we were aided behind the scenes by a then Freshman Congressman who had formerly served on the staff of Senator Lott - Charles W. Pickering, Jr., the nominee's son. Congressman Pickering was instrumental in working with Senator Lott's staff to facilitate the floor hearing and vote."

Mr. Sloan continues, "Judge Pickering has the respect of all who know him. He is a righteous man, devoted to his family and the law. You well know that you cannot get people to say the good things they do about a man in his position unless they are true. Yet, the demagogues who exist in both our parties insist on creating these roadblocks for good people on both sides of the aisle. . . . It is time to remove the judiciary from the political arena and concentrate on confirming men and women of merit, without ruining their lives and careers."

Mr. Sloan's recommendation is especially timely since it echoes an editorial published in yesterday's Washington Post by Lloyd Cutler, former White House counsel to Presidents Clinton and Carter, and Mickey Edwards, a former Congressman from Oklahoma. They say, "Although the Senate should satisfy itself that nominees are professionally qualified, impartial, committed to equal justice under law and possessed of a judicial temperament, it should refrain from seeking pre-commitments from candidates about unresolved issues that might come before them as judges and should exercise caution when drawing conclusions about candidates based upon their previous clients, speeches or writings."

The thrust of this message, as I see it, is that we in the Senate should commit ourselves to seeking the confirmation of fair, qualified judges who will follow the law instead of seeking to impose an ideological litmus test that determines who gets confirmed based on whether they pass or fail. Judge Pickering has demonstrated that he is a fair, qualified judge who will continue to follow the law on the Fifth Circuit, thereby garnering the ABA's highest rating of Well Qualified. I support his nomination, and I urge my colleagues to do the same.

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Now, Mr. Chairman, I would like to address the judicial record of Judge Pickering:

I am doing this because there has been a lot of misinformation circulating about Judge Pickering's record on the federal district court bench, and I want to set things straight. And, I ask - no, beg - my colleagues, to extend me the privilege as Ranking Member, and as the former Chairman of this Committee, who listened and, but for whose support and vote, nominees - with whom I have philosophical and ideological differences, such as Judge Berzon, Judge Paez, Judge Morrow, Judge Fletcher, and I could go and on -would never have been confirmed. This is important, because your votes, and the reasons for your votes mean more than the fate of Judge Pickering today.

And, I am going through this, not to try to make another case or argue. I am doing this, because some members last week, and I consider you all friends who I respect immensely, made the argument that the reason for their opposition is that Judge Pickering has been reversed in areas where the law is settled.

Now, given the statement from people who I respect - and I truly mean that - I wanted to take another close look to the legal cases and see the exact reason for the reversals and want to address them.

Also, Senator Edwards quoted the circuit court and noted that "There are at least, I believe, 15 occasions where he was reversed in unpublished opinions for failing to apply, and I am quoting the circuit court now, "well-settled principles of law."

This argument that Judge Pickering has been reversed 15 times for failing to apply "well-settled principles of law," refers, I believe to the language from the Fifth Circuit rule 47.5, governing the publication of opinions, which basically provides that opinions that merely decide particular cases on the basis of well-settled principles of law should not be published.

The argument is that, by reversing Judge Pickering 15 times in unpublished opinions, the Fifth Circuit, therefore found that he violated well-settled principles of law on these 15 separate occasions.

I want to address this argument. First, according to the Administrative Office of the Courts, circuit courts typically publish only 20% of all of their opinions. In other words, more than 80% of circuit court opinions are unpublished. Does this mean that we have an incompetent federal

district court bench nationwide that is unwilling or unable to follow well-settled principles of law? Of course not.

It means that even though a district court may be dealing with well-settled principles of law, the court may still make an unremarkable error in the application of the law to the facts of any given case.

Moreover, there is an old cliche that nobody's perfect. And I am not saying that we should tolerate mediocre judges. But, look, even federal district judges are not perfect. They get reversed on occasion. But a serious look at the true record shows that Judge Pickering's record of 26 total reversals during his nearly twelve years as a district judge illustrates his competence and willingness to follow the law. This is a total reversal rate of 0.5% of the estimated total of 4,000 to 4,500 cases he has decided during his tenure on the federal bench. In other words, more than 99% of Judge Pickering's rulings have never been reversed. And I will get to those cases where he was reversed shortly.

Moreover, Judge Pickering's reversal rate is actually lower than the national average and lower than the average of district court judges in the Fifth Circuit. So, if you adhere to the argument that a district judge's reversal rate is indicative of his ability to follow the law, then Judge Pickering has demonstrated an ability to follow the law that exceeds that of other district judges both nationwide and in the Fifth Circuit.

Now to the cases and the argument I have heard is that Judge Pickering's reversals were all in one of four areas: Civil rights, voting rights, employment rights, or prisoners' rights. This is absolutely not the case.

In fact, only 15 of his 26 reversals arguably fall into these areas. Judge Pickering's other reversals pertain to such areas as antitrust, insurance litigation, contracts, criminal law, and commercial law.

Even categorizing 15 of Judge Pickering's reversals as falling into these four categories is a stretch, but I will go through them. For example, his only two civil rights reversals that are not also prisoners' rights cases are actually environmental tort actions.

In Judge Pickering's sole voting rights reversal, Watkins v. Fordice, the only issues on appeal involved the district court's award of attorney's fees to the plaintiffs. Notably, Judge Pickering was one of three district judges who decided the case as a panel.

The Fifth Circuit affirmed the district court panel on every issue on appeal except one: The court's determination of the appropriate hourly rates. The Fifth Circuit did not find error in the district court's determination, but instead found that the district court had not adequately articulated its rationale in setting the hourly rate. The Fifth Circuit therefore "reluctantly remand[ed]" the case to the district court to either award each attorney's customary billing rate or articulate the reasons for its decision to do otherwise. Is this a reversal due to failure to follow "well-settled" law, and therefore indicative of hostility to voting rights? NO!

Aside from Watkins, Judge Pickering has decided a total of three Voting Rights Act cases: Fairley, Bryant, and Morgan. None of these cases were appealed, a step that one can reasonably expect a party to take if it is dissatisfied with the court's ruling.

More importantly, the plaintiffs in Fairley - including Ken Fairley, former head of the Forrest County NAACP - have written a letter in support of Judge Pickering's nomination. He supports his confirmation!

Now, onto employment rights cases. Judge Pickering has been reversed in only two cases that can arguably be classified as employment rights cases. In one of these cases, Marshall Durbin Companies v. United Food and Commercial Workers Union, Local 1991, the Fifth Circuit relied on non-binding precedent from the Third and Seventh Circuits to reverse Judge Pickering's reinstatement of a union member without back pay. Certainly, this case is not an example of Judge Pickering clearly disregarding the judgment of his own circuit, or "well-settled principles of law."

In the other case, Fairley v. The Prudential Insurance Company, the Fifth Circuit reversed Judge Pickering for ruling for the plaintiff, Mr. Fairley. Specifically, Judge Pickering reversed Prudential's determination that Mr. Fairley's loss of sight was not "irrevocable" and awarded benefits to Fairley under an insurance policy that was part of his employer's ERISA plan. It is ironic that Judge Pickering has been criticized for his reversal on procedural issues that have allegedly denied plaintiffs their day in court when apparently those critics have overlooked his reversal in the Fairley case, where he ruled in favor of the plaintiff worker. Is he praised for this decision? No. It would not advance the political agenda of the ironically-named People for the American way and similar extremist groups. Let's just ignore that case!

Moreover, Judge Pickering's reversals in these two employment rights cases must be viewed in context. Judge Pickering has disposed of at least 50 employment discrimination cases by ruling on motions. At least 13 of these cases were appealed. Ten of these appealed cases were affirmed by the Fifth Circuit, and 3 appeals were dismissed. None were reversed.

Finally, in the area of prisoner's rights, the Fifth Circuit did not even bother to provide a legal rationale for reversing Judge Pickering in two cases. In U.S. v. Dyess, Judge Pickering concluded - via, it is important to note - adoption of a magistrate judge's Proposed Findings of Fact and Recommendations - that the plaintiff's claim for ineffective assistance was barred due to a one-year grace period on a new statute of limitations on such claims under the Anti-Terrorism and Effective Death Penalty Act. The Fifth Circuit reversed simply by concluding that "it was not time-barred." Similarly, in Bell v. Black, Judge Pickering's denial of a habeas petition (also via adoption of a magistrate judge's Report and Recommendation) was vacated by the Fifth Circuit because the plaintiff had not "given the Mississippi courts the opportunity to rule on the constitutionality of the Mississippi habeas limitations bar as applied to this case." But, in fact, the plaintiff had already taken the issue to the Mississippi Supreme Court.

I make this recitation of Judge Pickering's reversals because some of my colleagues have insisted that they are voting against Judge Pickering's nomination on the basis of his record as a district court judge. But when you take a close look at that record - particularly his reversals - you find that Judge Pickering has an outstanding record as a district court judge. This record was

confirmed by the ABA, whose ratings some of my colleagues have referred to as the "gold standard." The ABA, of course, rated Judge Pickering Well Qualified for the Fifth Circuit. I completely agree with the ABA's assessment. If the ABA's input was so important to my colleagues, why ignore them in this case?

Mr. Chairman, I also want to comment on one other case. Opponents, as I have said, make much of the few reversals that Judge Pickering has had and suggest that Judge Pickering has a poor record in civil rights cases. As I said, he has had only three Voting Rights cases on the merits -- only three -- and he has been appealed in none of them. My staff has counted almost 200 decisions, and there may be more, in which Judge Pickering has applied the various civil rights laws of the United States with neither an appeal nor a reversal.

Opponents have sought desperately, to find aggrieved litigants with an axe to grind. They have found almost none. In fact, as I noted earlier, the African American parties who were involved in one of the three Voting Rights cases have even written to support the confirmation of Judge Pickering - the same judge who ruled against them. Many of my colleagues here are lawyers. We know full well, as did these African American parties who support Judge Pickering that just ruling one way or another in a case does not mean you are against the underlying law. With this, does it mean that every judge who has overturned a drug sentence is a anti-drug laws, or pro-legalization of drugs? Of course not. We all know better than that.

Judge Pickering's record is clear and distinguished. I want to mention one, just to highlight: the case of little Jeffrey Hill. His parents believed that their son was entitled to receive a free appropriate education under the Individuals with Disabilities Act. The parents sued and stood alone against the State of Mississippi. Judge Pickering, as he has done in cases involving gays, African-Americans and others, appropriately found that the law in that case required Mississippi to educate handicapped children. Judge Pickering gave little Jeffrey Hill his day in court. He ruled on the law, and that is just one example.

But I venture to say that some of the outside groups who oppose Judge Pickering are not interested in accentuating the positive record, to say the least.

I support Judge Pickering's confirmation to the Fifth Circuit, and urge my colleagues to look at the record and hopefully do the same.

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