

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
October 2, 2003

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On the Nomination of Charles Pickering
Executive Business Meeting of the Senate Judiciary Committee
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Today, the Republican majority has decided to proceed on the nomination of Charles Pickering to the United States Court of Appeals for the Fifth Circuit on the Committee markup agenda. After full and fair hearings, and full and fair debate, this Committee rejected that nomination to that same position last year. We did so for good reason and we set forth those reasons during the course of our debate. Despite the "religious McCarthyism" that ensued and the mischaracterizations of our actions for partisan political purposes by the Administration and others, the record shows that Judge Pickering was treated fairly by this Committee at that time.

Never in the history of this Republic has a President renominated to the same post a judicial nominee voted down by this Committee--never until this Administration chose to renominate Judge Pickering and Justice Owen this year. Until this President, the Committee's rejection of a judicial nominee on the merits was respected as a function of the Senate's process of advice and consent. When the Senate Judiciary Committee held hearings and took a vote and determined not to report a nominee, the Senate abided by that decision and every President until this one has, as well.

The President's renomination of Judge Pickering in January was itself controversial. It followed the controversy that led to the resignation of the Republican Majority Leader and the White House's designation of his successor. In the wake of those incidents the President had the opportunity to act as a uniter and not a divider. He could have consulted more broadly and selected for nomination to the Mississippi vacancy on the 5th Circuit someone who would bring people together, he could have nominated a consensus candidate who was not divisive and controversial.

Had he wanted to take healing action, he could have reached out and selected from among the outstanding African-American lawyers and Mississippi state court judges someone around whom all would unite and who would serve as an outstanding member of the second highest federal court in the country. Those would have been the actions of a uniter, and of someone concerned about ensuring that all Americans saw our federal justice system as one that would treat them all fairly and impartially and provide the highest quality of decision making. Instead, this President is continuing a pattern of conduct that seeks to incite and intimidate. This is part of a pattern of lamentable action and of squandered opportunities.

I was surprised to see this nomination added to the middle of the agenda we had for our meeting last week. I had relied upon the Chairman's previous statements about his intentions to proceed on the Pickering renomination, as extraordinary as it is, in the normal course and through regular order. Last week I noted that our many new Republican Members on the Committee had not had the opportunity to participate in a hearing for the nominee. Apparently, they see no value in confirmation hearings. I noted last week that I was particularly sorry that the Republican majority had chosen that week to resurrect the nomination because of the insensitivity it showed to the Congressional Black Caucus, some of whose members are with us today. The Congressional Black Caucus Foundation had its annual meetings last week. The Honorable Bennie Thompson, a Representative from Mississippi, is a respected member of the Congressional Black Caucus and has opposed this nomination. I know that Chairman Hatch tried to be sensitive to other Members of Congress and I know that he would not go out of his way to offend another Member of Congress, so I am left to wonder why this matter is being forced through the Committee in this way.

Given the many concerns about Judge Pickering voiced by African-Americans in Mississippi and all over the country, including every one of the 160 chapters of the Mississippi NAACP, the Magnolia Bar Association and the Mississippi State Black Legislative Caucus, this is an extremely controversial nomination.

In January of this year, at our first meeting, the Chairman expressed his clear intention of holding another hearing for Judge Pickering, not of moving him out of Committee without further consideration. Specifically, he told us all that, "we . . . will have hearings in due course for Priscilla Owen and for Judge Pickering." This certainly seemed to remain his plan through at least this past April, when he announced that, "I held a hearing for Priscilla Owen . . . and I am hopeful that we will do the same for Judge Pickering."

Indeed, we have seen press accounts of elaborate preparations being made for another hearing. By his own account, even Judge Pickering expected another hearing. In a speech he made in June, the Judge told his audience that since his renomination in January, his "hearing has been scheduled, canceled, and rescheduled." The Democratic minority was never given official notice of any such hearing, or consulted about their scheduling. Although we had discussed the need for additional hearings if Republicans intended to proceed earlier this year, I was not consulted before Republicans chose to proceed without a hearing directly to Committee consideration. I cannot help but wonder why not.

With the Owen nomination, Republicans contended that the record was misleading and needed to be corrected. I disagreed and thought that the hearing chaired by Senator Feinstein was fair and thorough. I think my view was borne out by the subsequent hearing held on that nomination earlier this year and by the tremendous opposition and controversy that nomination continues to generate.

On the other hand, if the record before the Committee on the Pickering nomination was fair, adequate and sufficient, why proceed at all with this nomination. It was based on that record that this Committee has already rejected the nomination. Unlike more than 50 of President Clinton's nominees, Judge Pickering had the chance to come before the Committee, answer our questions

and explain himself. Unlike more than 60 of President Clinton's judicial nominees, the Pickering nomination was debated in open session and we voted. This nomination was rejected. If the record was sufficiently complete so that no additional hearing or information is needed, why reconsider this nomination? What is it about Judge Pickering's judicial record that the White House does not want to open to public scrutiny?

In our previous debate we pointed out many examples of Judge Pickering injecting his personal views into his legal opinions. We have shown the scores of times he has been reversed for repeating the same errors. We have heard from him confirmation of his solicitation of support from those who appear before him and seen the expert opinions that these actions violate legal ethics. We have looked carefully at his handling of a highly charged case of a convicted arsonist and hate criminal. Nothing has changed on any of those counts.

What does seem certain is that suddenly listing Judge Pickering's nomination and insisting on Committee action is a political ploy. Whether or not the nomination survives a fight on the Senate floor, the political calculation must be that this move somehow benefits the Republican Party or certain Republican candidates. If Republicans really wanted this nomination seriously considered, it would have been a subject of significant discussion before it was listed for action. All the necessary paperwork would have been discussed and been in place before Tuesday, when his questionnaire update suddenly appeared

Whatever the reason for this turnaround in strategy, the facts and my conclusions about Judge Pickering's fitness for the appellate court have not changed and we have been given no basis on which to reconsider this matter.

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