

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Committee Hearing on the
Nomination of Judge Charles Pickering

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Mr. Chairman, I will again vote NO on the nomination of Charles Pickering to be a judge on the U.S. Court of Appeals for the Fifth Circuit.

I must say that I am sorry we are having this vote. I think it shows disrespect for the Senate and the committee process for a nominee to be resubmitted for the same position for which he or she was unable to secure committee approval at an earlier time.

We had a fair process in the last Congress on this nominee - two hearings, a lengthy period of deliberation and debate, and a fair vote. The nomination was defeated. The Committee's consideration of this nomination was thorough and fair. Obviously, some did not like the result, but I do not think they can in good faith find fault the process.

Mr. Chairman, I would like to submit for the record the statement I gave in March 2002 when Judge Pickering was considered by the Committee. It outlines in some detail the concerns that I have about this nominee and the reasons that I will vote against him. I do want to discuss today one issue on which additional information has come to light.

As noted in my statement last year, in October 2001, after his first hearing before this Committee, Judge Pickering asked a number of lawyers who practice before him to write letters of recommendation for him. He had the lawyers send the letters to him directly and he reviewed them before faxing them to the Justice Department to be forwarded to the Committee. We identified 18 such letters, all written in late October 2001, that came to the Committee in this way.

I was troubled by Judge Pickering's effort to obtain supportive letters from lawyers who practice in his court. I asked Prof. Stephen Gillers, a renowned legal ethics expert at NYU Law School for his opinion. Prof. Gillers stated that it was improper for Judge Pickering to solicit letters from lawyers who regularly appear before him. Particularly troubling was the fact that Judge Pickering was receiving and forwarding the letters themselves. He would therefore know who wrote letters (and who didn't) and what the letters said. Prof. Gillers also noted the following:

The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited. Then the desire to please the Judge would be immediately obvious and the coercive nature of the request even more apparent. In addition, soliciting favorable letters from lawyers or litigants

in current matters could lead to recusal on the ground that the Judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

Mr. Chairman, I have learned that seven of the lawyers who wrote letters on behalf of Judge Pickering at his request actually had cases pending before him at the time. A number of those lawyers had more than once case pending. One lawyer received Judge Pickering's request for a letter when a previously scheduled settlement conference was a little over a month away. Another lawyer who Judge Pickering solicited represented the plaintiffs in a class action against a major drug company. The defendant filed a motion to dismiss for lack of personal jurisdiction in May 2001, and the motion was still pending before Judge Pickering when he requested the letter.

Now I have to ask my colleagues: Suppose you were a lawyer in a case and your opponents filed a motion trying to get your case dismissed. The judge has not yet ruled on the motion and you get a call from him asking you to write a letter of recommendation because he has been nominated to serve on a higher court. What would you do? Wouldn't you be troubled? Wouldn't you feel at least a bit of pressure to comply? And would you write a fully candid letter, especially if the judge asked you to send the letter to him directly so he could see it before forwarding it to the Judiciary Committee?

Mr. Chairman, I would like to submit for the record a chart indicating the lawyers with cases pending before Judge Pickering who wrote letters for him upon his request. I have copies for my colleagues if any of them would like to review this information before casting their vote today. I consider this a very serious ethical breach, and Prof. Gillers agrees. I will again submit for the record the letter that Prof. Gillers sent to this Committee last year. This violation of judicial ethics casts serious doubt on Judge Pickering's fitness to serve on the Court of Appeals.

Mr. Chairman, the fact that Judge Pickering will be approved by the Committee today doesn't show that the decision we reached last year was wrong. No minds have changed in the eighteen months that have elapsed since the Committee voted on Judge Pickering. Indeed, in this case, in contrast to the approach taken with another nominee who failed to get Committee approval in the last Congress, Justice Priscilla Owen, another hearing wasn't even held on the nomination. So the only thing that has changed is the composition and the leadership of this Committee. The vote today does not rectify a wrong done to this nominee because the nominee suffered no wrong in the last Congress. He was treated fairly and his nomination was rejected.

Judicial nominations should not be like legislation that can be reintroduced and reconsidered by a succeeding Congress. The Senate, acting through this Committee, and exercising its constitutional responsibility, refused to give its consent to this nomination last year. I believe it was wrong for the President to re-nominate Judge Pickering. I believe it is wrong for the majority on this Committee to take this step today. I will vote No.

Thank you Mr. Chairman.