

S. HRG. 107-843

CONFIRMATION HEARING ON THE NOMINATION  
OF CHARLES W. PICKERING, SR. TO BE CIR-  
CUIT JUDGE FOR THE FIFTH CIRCUIT

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HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

—  
FEBRUARY 7, 2002  
—

**Serial No. J-107-57**

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**NOMINATION OF CHARLES W. PICKERING, SR.  
TO BE CIRCUIT JUDGE FOR THE FIFTH CIR-  
CUIT**

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**THURSDAY, FEBRUARY 7, 2002**

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C*

The Committee met, pursuant to notice, at 2:07 p.m., in room SH-216, Hart Senate Office Building, Hon. Dianne Feinstein presiding.

Present: Senators Feinstein, Leahy, Kennedy, Biden, Kohl, Feingold, Schumer, Durbin, Cantwell, Edwards, Hatch, Thurmond, Grassley, Specter, Kyl, DeWine, Sessions, Brownback, and McConnell.

Senator FEINSTEIN. This hearing will please come to order.

I would like to begin by announcing what the procedure will be today. I have been asked by the chairman to Chair this hearing and we will proceed according to his request. I will make a brief opening statement. The ranking member will make a brief opening statement.

We will then proceed to call Judge Pickering to the witness table. We will ask him to rise and be sworn, and then questioning of the witness will proceed in two rounds of 10 minutes each, alternating sides according to seniority. Speakers will speak in the order of the initial time of arrival; in other words, what we call the early bird rule. If a senior Senator arrives late, a more junior Senator who arrived earlier will speak first. If, at the end of two rounds, there are still Senators with questions to ask, we will extend it to a third round of questioning.

**OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S.  
SENATOR FROM THE STATE OF CALIFORNIA**

Let me just proceed now with a brief statement.

I think it is very hard to overstate the importance of an appointment to the United States Court of Appeals. The Supreme Court of the United States is our Nation's court of last resort, but it heard less than 80 cases in the 2000–2001 session. In contrast, the Federal Courts of Appeals considered over 27,000 cases during the same period.

For so many of the legal injuries for which people seek redress, the Court of Appeals is the last stop, the ultimate decisionmaker. Many of the issues that we wrestle with as a Nation—a woman's right to choose, civil rights, the relationship between church and

state—are essentially decided by these courts. Thus, it is imperative that this Committee thoroughly screen candidates for those lifetime appointments, to ensure that they enter the court without bias, with a commitment to upholding the Constitution, and with a recognition of their proper role as judges.

Now, Judge Pickering has had one hearing. There were many who thought that, well, the one hearing is done and that should be it. However, I want to point out that that hearing was on October 18, and the Committee had access at the time to only a very slim minority of Judge Pickering's opinions.

Judge Pickering, by his own count, has published 95 out of 1,100 opinions he has written. The Committee did not have access to his opinions in October. Simply put, without them, there was an insufficient record to evaluate his nomination.

Now, I know that Judge Pickering has spent a lot of time working to retrieve these opinions, and the whole Committee, I want him to know, appreciates his patience and effort. He has given the Committee around 900 of his 1,000 unpublished opinions, though over 200 arrived just yesterday afternoon and another 100 cases remain unaccounted for.

I would also just like to note that Judge Pickering's first hearing came under extraordinary circumstances. He first appeared before the Committee, as I said, on October 18 at a hearing room inside the Capitol. The Committee could not use the ordinary hearing room in the Dirksen Building, as the threat of anthrax contamination forced the closure of the Senate office buildings.

Access to the hearing and access to the Capitol on that day was very limited. Many community groups called. They were not satisfied with the level of public access to the hearing, given the importance of this appointment and the concerns raised about the nominee. So, today, we will have an opportunity in a minimum of two 10-minute rounds for Senators to ask their questions.

Now, if the ranking member—does anyone know if the ranking member is coming? I would defer to him for a statement.

Senator MCCONNELL. Senator Feinstein, I believe I am going to make a statement for—

Senator FEINSTEIN. Senator McConnell, on behalf of the ranking member.

**STATEMENT OF HON. MITCH MCCONNELL, A U.S. SENATOR  
FROM THE STATE OF KENTUCKY**

Senator MCCONNELL. Thank you very much.

Today, we examine the life and reputation of Charles Pickering. I hope that we can do this in a fair and impartial manner. From my review of Charles Pickering's record, I have been struck by one resounding virtue: moral courage.

As the tide of racial equality swept America in the 1950's and 1960's, it was unfortunately met with fierce resistance in certain areas. Laurel, Mississippi, was one. Unlike New England, integration was not popular in Jones County. Unlike New York, the press was not friendly to integration in Jones County.

Unlike large southern cities such as Atlanta and Birmingham, there was no substantial segment of the community that had an enlightened view on race relations. Indeed, the town of Laurel, in

Jones County, Mississippi, with a small population, was the home territory of the Imperial Wizard of the Ku Klux Klan, Sam Bowers.

In the 1960's, Klan-incited violence escalated in Jones County, Mississippi. The Klan would drive by homes in the middle of the night and shoot into them. The Klan would fire-bomb the homes of African Americans and those who helped them. The Klan would murder its enemies who stood for civil rights.

Because these shootings, bombings, and murders violated the criminal law, the victims looked for justice. They found it in Jones County Attorney Charles Pickering. On the one hand, Charles Pickering had his duty to enforce the law. On the other hand, he had public opinion, the press, and most State law enforcement personnel against vigorously prosecuting Klan violence.

A 27-year-old Charles Pickering stared in the face his political future, many in his community, and the press, and chose to do his duty of enforcing the law against the men who committed such violence. In the 1960's, in Mississippi, Madam Chairman, this took extraordinary courage.

Soon, County Attorney Charles Pickering found that he had to choose again between those in law enforcement who would only go through the motions of investigating the Klan and those who sought to vigorously prosecute and imprison Klansmen. He chose to work with the FBI to vigorously investigate, prosecute, and imprison Klansmen. In the mid-1960's, in Mississippi, this took courage.

Then came the threats. The Klan threatened to have County Attorney Pickering whipped. With the Klan already fire-bombing and murdering other whites whom it viewed as helping black citizens, the Pickering family could have easily been next.

At night, County Attorney Charles Pickering would come back to his small home and look into the eyes of his wife, Margaret. He would look into the eyes of his four small children, who believed daddy could do anything and who did not understand hate and murder. One can only imagine how his wife, Margaret, would lie awake in fear, hoping that she would hear her husband's footsteps coming home.

Charles Pickering had no money to protect his family. He had no press to stand up for him and his family. He had no covering of popular opinion to hide behind, and in this time of hate, bombings, and murder, Charles Pickering reached down deep in his soul and embraced the only thing he did have, his religious faith.

He then testified against Sam Bowers, the Imperial Wizard of the Ku Klux Klan, in the fire-bombing trial of civil rights activist Vernon Dahmer in 1967. And Charles Pickering signed the affidavit supporting the murder indictment of Klansman Dubie Lee for a murder committed at the Masonite Corporation's pulpwood plant in Jones County. This took courage.

While it is easy in Washington in 2002 to make a speech or sign a bill in favor of civil rights after decades of changed racial attitudes in schools and society and in the press, who among us would have had the courage of Charles Pickering, in Laurel, Mississippi, in 1967? Who among us would have the courage of his wife, Margaret, to stand with him?

There are those who would say we are pleased that Pickering was one of the few prosecutors who actually prosecuted crimes committed by the KKK in the 1960's, but he should also have gone further by calling for immediate integration of schools and the workplace. That argument is tantamount to saying we are pleased that Harry Truman integrated the Federal armed forces in 1948, but he should have gone further and called for the integration of the State national guards as well, or to say we are pleased that Lyndon Johnson signed the Civil Rights Act in 1964, after opposing civil rights, but he should have gone further and demanded that all businesses adopt an affirmative action hiring plan.

To judge the words and actions of these civil rights champions in the 1940's, 1950's and 1960's by a 2002 standard would leave them wanting. We must remember that in Mississippi and other Southern States in the 1960's, most elected prosecutors sat on their hands when the Klan committed acts of violence.

Young Charles Pickering had to deal with white citizens and politicians who resisted integration and resisted civil rights. He had to deal with these people in a language that would not incite further violence and with requests for action that he had a chance of getting people to take. He did so with moral courage, and because he acted with courage at such a young age, Charles Pickering was able to continue with more progressive actions decade after decade.

In 1976, he hired the first African American field representative for the Mississippi Republican Party. In 1981, he defended a young black man who had been falsely accused of armed robbery of a teenage white girl. In 1999, he joined the University of Mississippi's Racial Reconciliation Commission, and in 2000 he helped establish a program to deal with at-risk kids, most of whom were African Americans, in Laurel, Mississippi, where 35 years earlier he had backed his principles with his and his family's lives. This, Madam Chairman, is a record of extraordinary courage. It is a record to be commended.

In the years since the 1960's, attitudes in Mississippi and elsewhere have dramatically improved. Schools are integrated. The Klan is no longer a powerful force capable of intimidating whole communities, and the support from Mississippians, black and white, men and women, who have known Charles Pickering for decades has been overwhelming. This support no doubt results from the moral courage of Charles Pickering.

In 1990, this Committee unanimously and favorably reported the nomination of Judge Pickering, and the Senate unanimously confirmed him to the district court bench. In his 11 years on the bench, he has handled approximately 4,500 cases. In approximately 99.5 percent of those cases, his rulings have stood and have not been reversed. The American Bar Association rated Judge Pickering "well qualified" for the Fifth Circuit Court of Appeals.

I look forward to today's hearing to review Judge Pickering's record and his fitness for the Circuit Court of Appeals. I am certain that Senator Feinstein will conduct this hearing in the fair and even-handed manner, with which she approaches all of her duties here in the Senate.

I will listen to the testimony and review the record, and I will measure the allegations and who makes them against the whole record and the courage of Judge Charles Pickering. I hope this hearing will be free from the half-truths and mischaracterization of his record or allegations of guilt by association that have been prof-fered against this nominee by some special interest groups.

Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you, Senator.

It is my understanding that in the interest of time, the chairman is going to place his statement in the record.

Is that correct?

Chairman LEAHY. That is right.

[The prepared statement of Senator Leahy follows:]

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

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 meetings 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.

Senator FEINSTEIN. Then we will proceed.

Judge Pickering, if you would care to come forward and be seated? Would you please stand to be sworn in?

Do you swear that the testimony given before this Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Judge PICKERING. I do.

Senator FEINSTEIN. Thank you. Please be seated.

If you would like to introduce any of your family—I know I had the pleasure of meeting your son, so I know at least he is here—if you would like to introduce your family or make some comments to the Committee, we would be very happy to receive them at this time.

**STATEMENT OF CHARLES W. PICKERING, SR., NOMINEE TO BE  
CIRCUIT JUDGE FOR THE FIFTH CIRCUIT**

Judge PICKERING. Madam Chairman, I would like to introduce the members of my family who are here today: my wife, Margaret

Ann, who was seated next to me; my son, Congressman Chip Pickering, and his wife, Leisha. My daughters, Paige Dunkerton, Allison Montgomery, and Christi Chapman, cannot be with us today, but I am sure they are watching somewhere if C-SPAN is covering this.

I won't take the time to introduce my 19 grandchildren, as I did before. But I am happy to have my sister, Ellen, and her husband, Jimmy Walker, and my brother, Gene, and his wife, Karon Pickering, who are with us.

I have a number of friends and supporters here that I am happy to have. I will not take the time to introduce them.

Senator FEINSTEIN. Thank you very much. Do you have a statement you would like to make at this time?

Judge PICKERING. I do, Madam Chairman, but I am not sure, with the constraints of—

Senator FEINSTEIN. It is up to you.

Judge PICKERING. Yes. Well, I would like to make a statement—

Senator FEINSTEIN. Please.

Judge PICKERING [continuing]. Because there have been a lot of things that have been said that I could not respond to and this is my first opportunity to do that and I would like to set the record straight on some things.

Senator FEINSTEIN. Please.

Judge PICKERING. I would like to express, first of all, my appreciation to Senators Cochran and Lott for their introduction at my last hearing and for their support of my nomination.

I would like to briefly talk with you about my time on the bench and the 29 years that I spent practicing law. During my 11 years as a judge, I have done my best to be fair and impartial and to follow the law. I am a firm believer in the adage "we are a government of laws, not of men." I have great respect for the rule of law.

In 1990 and again this October, I testified that I firmly believe that whomever one marries, whether of one's own race or of another race, is a matter of personal choice, and no State should pass a law against such marriages. Such laws are, I believe, unconstitutional. The Supreme Court so held in *Loving*, and I will follow that case.

Further, while I have been on the bench, I have demonstrated my ability to do just that. To my recollection, I have had three cases before me involving mixed-race marriages. I had a case before me in which the plaintiff was suing for personal injuries. He was planning a mixed-race marriage. The jury returned a verdict for only the amount of the medical bills. I felt the verdict was inadequate and that the jury had been prejudiced because of the planned interracial marriage and because of race. I set the jury verdict aside.

In a criminal case, a young couple who had contracted an interracial marriage pled guilty to drug charges. I treated them fairly. Even since my last confirmation hearing here in October, I received a letter from the wife, who is in Houston, Texas, expressing her appreciation for my fairness and courtesy.

In a third case, a young man was convicted of cross burning in the yard of a mixed-race couple. During the sentencing, I described

the cross burning as a reprehensible, heinous crime, a despicable act, and that I had no feeling that the incident should be swept under the rug, that such conduct would not be tolerated, that we have got to stamp out that type of conduct, and that the young man was going to the penitentiary. I suggested that while he was in the penitentiary, he should do some reading on maintaining good race relations.

Although I have never had an abortion case of any kind to come before me, I have had cases where other issues of sexual privacy were involved. In a trial where homosexual men were the victims of a scam, at the very beginning of the trial it was evident that the defendants intended to mount a defense on gay-bashing. I stopped the proceedings, did not wait for an objection, and I gave the jury a cautionary instruction. I let it be known that there would be no gay-bashing in my courtroom, that homosexuals are entitled to the same protection as everyone else, no more, no less. There was no further gay-bashing in that trial.

In another case, a group of lesbians had established a cultural camp in rural Jones County. The local citizens strongly objected. Attorney General Janet Reno attempted to dispatch mediators to mediate the situation under the Civil Rights Act. A group of local citizens filed a lawsuit against Ms. Reno individually and in her official capacity to prohibit her dispatch of the mediators and complaining about comments she had made.

I held a conference with the attorneys representing Ms. Reno and the plaintiffs, and recommended to the plaintiffs that they should dismiss their complaint. Ms. Reno's attorneys and the plaintiffs agreed to an order that I recommended. Frank Hunger, who was Assistant Attorney General, later told me of Ms. Reno's appreciation for the courtesy and manner in which I handled her case.

In another case where a female was seeking damages for personal injuries, the testimony of one of the witnesses created the impression of a lesbian relationship. In this case, the jury returned a verdict for exactly what the defense attorney suggested. I again felt that the verdict was too low and that the jury had been biased by the impression of a lesbian relationship and race. I also set that jury verdict aside. Madam Chairman, these are the only two jury verdicts that I have set aside in 11 years on the bench.

During my time on the bench, I have handled cases where I disagreed with the controlling law, but nevertheless put aside my personal views and followed the law. One of those cases was the Suggs case, which involved ERISA. I feel, and still feel, that the Federal courts have misinterpreted ERISA, contrary to the language of the Act, contrary to congressional intent. The results have been to deprive people of health benefits.

I wrote an opinion of some 70 pages, approximately half of which was devoted to analyzing and applying controlling law, and the other half was devoted to explaining why I think Federal courts have misinterpreted the ERISA statute. Despite disagreement, I followed controlling law. However, that part of my opinion disagreeing with the controlling authority—the dicta, if you will—was widely quoted in the House of Representatives this past year in support of a patient's bill of rights.

In another case involving the Federal Arbitration Act, I disagreed with the factual determination of the arbitrator. But nevertheless, because the law dictated that I should affirm this opinion, I did.

Madam Chairman, on numerous occasions I have had to decide whether I could put aside my personal opinions and follow the law. I have, and I will. I will follow the law even when I disagree with it.

Now, I have some comments about the Klan days and about the Sovereignty Commission, if the Chair will allow me time to go over those two issues that have been raised.

Senator FEINSTEIN. Of course, you can complete your statement.

Judge PICKERING. Yes.

Senator FEINSTEIN. Because there is such interest, I would urge you to be as brief as you can so we can get to the questions.

Judge PICKERING. Well, prior to becoming judge, I did serve, as has been mentioned, and I did prosecute and condemn Klan activity. The prosecuting attorney in the Vernon Dahmer case, in Hattiesburg, called and asked if I would come down and testify against the Imperial Wizard of the White Knights of the Ku Klux Klan in 1967, and I agreed to do so.

We both agreed that a subpoena should be issued. One was issued. I went and I testified that he had a bad reputation for peace and violence.

In 2000, I had a petition filed in my court to release Sam Bowers on habeas corpus. He has since been convicted. Madam Chairman, there have been changes with all of us, with the State of Mississippi. But in the last 5 years, both the murder of Medgar Evers, one of the original civil rights workers in Mississippi, whose brother, Charles Evers, is here in support of my nomination today, was re-tried and the defendant, Byron de la Beckwith, was sentenced and died in prison.

Sam Bowers is now in prison in the State of Mississippi in State prison for the fire-bombing death of Vernon Dahmer. The case that I testified in resulted in a hung jury. They filed that petition and after I testified against Sam Bowers, I lost my next election. One of the reasons was because of my stand against the Klan. In 2000, when they filed this habeas corpus, they asked me to recuse myself, saying that Sam Bowers and the Klan had been responsible for defeating me in my two races for statewide race.

I had a friend who told me that he had infiltrated the Klan for the FBI. He told me of going to Klan meetings in pastures or wooded areas in the middle of the night with torches and Klan speakers perverting Christianity by crossing a sword and a pistol over an open Bible and talking about going out and burning the homes of African Americans and those who defended them.

The Klan was committing the same kind of diabolical acts that have recently been committed against America also in the name of religion. He expressed his conviction that these people were dangerous and that someone had to do something about it. He said that after going to Klan meetings where they had been worked into a frenzy by Klan speakers that he had driven by our home to make sure no one was burning it. This was a sobering moment.

I also had the experience during that time of going to a funeral home and slipping into the chapel because a Klan informant had called and wanted to give some information. I was not at home, so then he called the district attorney, but he didn't want the district attorney to tell anyone else that he was meeting with them. The district attorney was afraid it was a set-up, so he asked if I could take a gun and go into the funeral home and cover the parking lot while he met with him. I did that.

Then I did, as the Senators mentioned, defend this young African-American charged with robbing a white female. That also was not a popular decision.

Madam Chairman, I took some stands during this time and although it was costly, I have no regrets. The State of Mississippi—none of our States have been perfect in any of these areas, but we have made tremendous progress.

There are those that would say that we would have made that progress without the intervention of the FBI. I did not believe it then and I do not believe it now. We would not have made progress and they would not have obtained those rights had it not been for the brave young men and women who took a stand to obtain those rights, the massive infusion of FBI agents. And, yes, I will say that we would not have made the progress that we made if it had not been for some local officials who were also willing to stand and take a stand in that area.

Now, the Sovereignty Commission issue: In 1990 when I testified before this Committee, Senator DeConcini explained that the Sovereignty Commission was a State-funded group which was established in 1956 as a response to increased Federal intervention in State matters, especially those pertaining to civil rights.

He asked me why, as a State Senator between 1972 and 1978, I voted to seal the records of the commission, and I explained that I did so because that was the only alternative, that the choice was between destroying them or sealing them and that I voted to seal them.

Now, I told him that during the time that I was in the State Senate, I do not recall really the commission doing anything. It really was de facto abolished; it was not functioning. It was something that was still on the books and there was a disagreement as to how to handle it, how to get rid of it, since it was an existing agency.

I testified that I was never an officer of the Sovereignty Commission, that I never had any contact with that agency, that I disagreed with the purposes and the methods and some of the approaches that they took. That was my testimony in 1990 based upon my recollection of events that had occurred some 13 to 18 years before.

After reviewing the records, I can say the following today. First, I was not an officer of the Sovereignty Commission. My recollection in 1990 was completely accurate on that account.

Second, my record as a county attorney from 1964 to 1968, when I assisted the FBI in investigating and prosecuting the Klan's attacks on African-Americans and civil rights workers, showed that I disagreed with the commission's efforts against increased Federal law enforcement intervention in State matters pertaining to civil rights. And I have already told you that, in my opinion, we would

not have solved that problem without that intervention. So my recollection in 1990 on that account was entirely accurate.

Third, the choice in 1977 was to abolish or to seal the records, and my recollection on that account was correct. As an aside, although I had not been asked about my pre-1977 votes regarding the Sovereignty Commission, my review of the records show that I voted for two appropriation bills for the commission prior to 1977. It is my understanding that the commission still had some old employees, but its days of high-profile investigations were long over.

The reason for not voting against these appropriation bills was practical politics. I could have taken a single stand in 1972 to defund the commission. As a first-year State Senator, however, my effort would have failed. There was simply not enough votes in the senate to kill the commission in 1972. Indeed, an attack on the commission in 1972 would have done more harm than good by causing the old supporters of the commission to rally support for it again. By 1977, however, there were a majority of senators who were willing to vote to abolish the commission and that is how I voted.

Fourth, my view of the record has shown that my recollection in 1990 that I had no contact with the Sovereignty Commission was partially accurate and partially inaccurate. I never attended a hearing or a meeting of the commission, and never participated in helping the commission investigate a civil rights organization or any other organization or person. My 1990 recollection was accurate to the extent that it had to do with the main purposes of the commission, which was civil rights.

Next, my review of a document that was released after my 1990 testimony shows that I did have one brief contact 18 years earlier, in 1972, as part of a group of State legislators who asked a commission employee to be kept informed about a pulpwood haulers union. While this document has refreshed—

Chairman LEAHY. Judge, I am sorry. You asked the employee what?

Judge PICKERING. I asked the employee—as I recall it, Senator, I was going down the corridor of the capital and someone called me over and introduced me and said this is an employee of the capital. He said, I have some information about activities in your area, Masonite plant, union organizing.

And at that time, we had just gotten through this strike. The Ku Klux Klan had infiltrated the labor union to the point that when the strike was over, the AFL-CIO took over the local union and placed it under a trusteeship. They had murdered a security guard. They were shooting into homes and beating people.

And as he made this statement that he had this information, we were concerned that there be no further violence at the Masonite plant and I made, to the best of my recollection—Senator, I don't have a very specific recollection, but a vague recollection that I said, well, keep me informed if you find out anything that is going on there that would be detrimental to our area. That is the last that I recall of any contact in that area.

Now, I also—one other comment I should make in that regard is that the Governor and lieutenant Governor, by law, were ex officio members of the Sovereignty Commission. From 1961 to 1966, I was

law partners with Carroll Gartin. He was lieutenant Governor from 1964 until his death in 1966.

Additionally, William Winter was lieutenant Governor during my first 4 years in the senate. Carroll Gartin was defeated for Governor in 1959 by segregationist Governor Ross Barnett and the White Citizens Council. Governor William Winter was a member of President Clinton's Commission on Race and is one of the most respected leaders of Mississippi promoting better race relations.

I talked with Governor Winter this morning and I learned that he had issued a statement yesterday condemning the guilt by association of implying that Carroll Gartin, who is now deceased, was a racist. Governor Winter and Governor Gartin both were members of this commission ex officio. I had regular contact with both of these gentlemen during that timeframe, but I have no recollection of ever discussing the Sovereignty Commission with either one of them.

The Governor was also a member of the commission, as were other public officials, and I would have contact on official business with them, but I remember no contact with any of these relative to the Sovereignty Commission. Additionally, when I started cooperating with the FBI, I was still practicing with Carroll Gartin. Carroll Gartin was aware of what I was doing and he never criticized nor requested that I back up.

Madam Chairman, if I might say just one brief thing, when the possibility arose of my being nominated to the Fifth Circuit, I had no intention or thought of becoming involved in any cause or in anyone's politics. I was simply interested in being promoted to the next court up to finish out the final few years of my judicial career.

The charges that have been made against me have been hurtful and they have been painful. I have a record of standing up for equal protection, respecting the rule of law, and making efforts to promote racial harmony for more than four decades. I am proud of that record.

I appreciate the fact that you did give me the opportunity to respond and I will be happy to respond to your questions.

The biographical information of Judge Pickering follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)  
Charles Willis Pickering, Sr.
2. Address: List current place of residence and office address(es).  
  
Home: 117 Dixon Drive, Taylorsville, MS 39168  
Office: 701 North Main Street, Suite 228, Hattiesburg, MS 39401
3. Date and place of birth.  
  
May 29, 1937, Jones County, Mississippi
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
  
Married to the former Margaret Ann Thomas, who is a housewife and has been a housewife since 1961.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
  - a. University of Mississippi, Oxford, MS. 1957-1961. Received L.L.B. (1961, changed to J.D. in 1968) and B.A. (1959).
  - b. Jones County Junior College, Ellisville, MS. 1955-1957. Received A.A. Degree.
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
  - a. 1959-1961. While a student at the University of Mississippi, I distributed newspapers for the Clarion Ledger and Jackson Daily News in Oxford, Mississippi, and on the University of Mississippi campus.

- b. 1960, June-August. Worked as a doorkeeper's aid, U.S. House of Representatives, Washington, DC.
- c. 1960-1961. Worked as student-assistant to the director of men's housing at the University of Mississippi.
- d. 1961. I practiced law as a solo practitioner from June 1961 until September 1961 at 529 Central Avenue, Laurel, MS 39440.
- e. From September 1961 until January 1971 I was a partner in the law firm of Gartin, Hester and Pickering, 529 Central Avenue, Laurel, MS 39440.
- f. 1962 - I served as prosecuting attorney for the City of Laurel in Municipal Court. This was an appointed position.
- g. 1962 to present. Owner of a farm (Jones County, Mississippi.)
- h. 1964 to 1968 - I served as prosecuting attorney of Jones County, Mississippi. This was an elected position.
- i. From approximately 1965 until 1988, I was a member of the Board of Directors and served as president of Pickering Bros. Farms, Route 2, Taylorsville, MS 39168.
- j. During 1971 and 1972 I practiced law under the firm name of "Law Offices of Charles W. Pickering," 529 Central Avenue, Laurel, MS 39440.
- k. 1972 until 1980 - I served in the Mississippi State Senate. This was an elected position.
- l. From 1973 to January, 1980 I practiced law in the firm of Pickering & McKenzie, 529 Central Avenue, Laurel, MS 39440.
- m. In 1980 I again practiced law under the firm name of "Law Offices of Charles W. Pickering," 529 Central Avenue, Laurel, MS.
- n. 1980 until 1996 - I was a member and Chairman of the Board of Directors of Robine and Welch Machine and Tool Company, Inc., P. O. Box 252, Laurel, MS 39441.

o. From 1981 until approximately 1986 I practiced law in the firm of Pickering & Williamson, 529 Central Avenue, P. O. Box 713, Laurel, MS 39441.

p. 1983 to 1987 - I was a member and chairman of the Board of Directors of Computer Partner and Software, Inc., P. O. Box 483, Laurel, MS 39441.

q. 1983-1990. Chairman (1983-1985), Member of Board of Directors (1983-1990), Jones County Economic Development Authority.

r. From approximately 1986 until 1990, when I was appointed to the bench, I practiced law in the firm of Pickering, Williamson & Walters, 529 Central Avenue, P.O. Box 713, Laurel, MS 39441.

s. 1990-present. U.S. District Judge, Southern District of Mississippi.

t. 1999-present. On the Board of Directors of the Institute for Racial Reconciliation at the University of Mississippi.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

I was not in the military.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

a. Rated "AV," the highest rating given by Martindale Hubbell, a publication that rates attorneys, at time of appointment to bench.

b. Graduated first in law school class, 1961

c. B.A. Degree from University of Mississippi with honors, 1959, with major in history

d. Graduated first in class, Jones County Junior College, 1957

e. Selected to Law Journal staff, University of Mississippi School of Law, based on academic achievement

f. Selected to serve as chairman of the Moot Court Board at University of Mississippi School of Law based on academic achievement

g. Received recognition as outstanding graduate in field of real property, University of Mississippi School of Law, 1961

h. In final Moot Court competition, University of Mississippi School of Law, 1961

i. Honorary doctorate from William Carey College in Hattiesburg, Mississippi, in 1984

j. My wife and I were honored as Outstanding Alumni of Jones County Junior College, Ellisville, Mississippi, in 2000

k. Member of Phi Delta Phi Honorary Legal Fraternity, University of Mississippi

l. President of ODK National Men's Leadership Fraternity, University of Mississippi

m. President Tau Kappa Alpha, Honorary Speech Fraternity, University of Mississippi

n. Member of honorary fraternities in areas of scholastics, history and political science at University of Mississippi

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

I serve on the Judicial Branch Committee of the Judicial Conference of the United States, appointed by Chief Justice Rehnquist in 1997.

Federal Judges Association. I served on the Board of Directors from 1997-2001 and was a member of the Executive Committee, 1999-2001.

American Bar Association, from early 1960s to present

Mississippi Bar Association, from 1961 to present

Jones County Bar Association. I served as vice president and president-elect in 1978-1979, but resigned as president-elect because I was a candidate for Attorney General of Mississippi.

Mississippi Trial Lawyers Association

Association of Trial Lawyers of America

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Federal Judges Association, Board of Directors of the Institute for Racial Reconciliation at the University of Mississippi; Jones County Farm Bureau; Mississippi Farm Bureau; Jones County Junior College Alumni Association; University of Mississippi Alumni Association; State 4-H Advisory Council; and Sigma Chi Fraternity, alumni; and an inactive Mason and Shriner. Although not a formal organization, I helped convene a group that is presently developing a plan to address the needs of "kids at risk" in Laurel, Mississippi.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

a. All trial courts within the State of Mississippi, June 1961, until appointed to the federal bench in 1990.

b. Supreme Court of Mississippi, June 1961, until appointed to the federal bench in 1990.

c. United States District Court for the Southern District of Mississippi, July 11, 1961, until appointed to the federal bench in 1990.

d. U.S. Court of Appeals for the Fifth Circuit, July 14, 1980, until appointed to the federal bench in 1990.

e. United States District Court for the Northern District of Mississippi, January 18, 1990, until appointed to the federal bench in 1990.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.
- a. In November 1999 I wrote an article on the need to promote racial harmony. This article was published in the Sunday, December 26, 1999, edition of the Clarion Ledger, a newspaper published in Jackson, Mississippi. A copy of this article is attached.
- b. Speech on Jury Nullification to Federal Bar Association, Jackson, Mississippi, March 21, 2000. A copy of the draft for this speech is attached.
- c. "Torts - Right of Privacy," Mississippi Law Journal, March 1960, review of a recent case while on Law Journal staff at University of Mississippi. A copy is attached.
- d. "Criminal Law - Miscegenation - Incest," Mississippi Law Journal, May 1959, while on Law Journal staff at University of Mississippi. A copy is attached.
- e. In 1984 and 1985 I delivered addresses as the President of the Mississippi Baptist Convention. These addresses were printed in The Baptist Record, the state Baptist newspaper. These speeches were related to the Southern Baptist Convention and its Biblical doctrines. Copies of these two addresses are attached.
13. Health: What is the present state of your health? List the date of your last physical examination.
- Good. March 28, 2001.
14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.
- a. I served as municipal judge for the City of Laurel for a brief period from July 1969 to September 1969. This was an appointed position. The Municipal Court of the City of Laurel, Mississippi, handles criminal misdemeanors. In

September 1969 I was required to travel extensively. As a result I resigned the city judge's position.

b. I have served as United States District Judge for the Southern District of Mississippi since October 2, 1990. This Court has federal question and diversity jurisdiction within the Southern District of Mississippi.

15. Citations: If you are or have been a judge, provide:

(1) citations for the ten most significant opinions you have written;

(a) Suggs v. PanAmerican Life Insurance Co., 847 F. Supp. 1324 (S.D. Miss. 1994).

(b) Coats v. Penrod, 785 F. Supp. 614 (S.D. Miss. 1992).

(c) Sunbeam Products Inc. v. Westbend Co., 1996 Westlaw 511639, 39 U.S.P.Q. 2d 1545 (S.D. Miss. 1996).

(d) Bryant v. Lawrence County, 814 F. Supp. 1346 (S.D. Miss. 1993) and Bryant v. Lawrence County, 876 F. Supp. 122 (S.D. Miss. 1995).

(e) Hammond v. Coleman Company, 61 F. Supp.2d 533 (S.D. Miss. 1999).

(f) Lee v. General Motors, 950 F. Supp. 170, 34 UCC Rep. Serv. 2d 315 (S.D. Miss. 1996).

(g) Windham v. Wyeth Laboratories, 786 F. Supp. 607 Prod. Liab. Rep. (CCH)B 13,273 (S.D. Miss. 1992).

(h) Bingham v. Anderson, 21 F. Supp. 2d 639 (S.D. Miss. 1998).

(i) U.S. v. Wainuskis, 942 F. Supp. 1101 (S.D. Miss. 1996).

(j) Thornhill v. Breazeale, 88 F. Supp. 2d 647 (S.D. Miss. 2000).

(2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings:

## PUBLISHED OPINIONS

(a) Addo v. Globe Life and Accident Ins. Co., 230 F.3d 759 (5th Cir. 2000) Vacated and remanded.

This case was removed from state to federal court. Plaintiff filed a motion to remand. This court denied the motion to remand and granted summary judgment for the defendant. The case involved a \$5,000 policy of insurance. Plaintiff, in her state court complaint prayed for recovery of less than \$75,000. A few days after suit was filed, plaintiff responded to a \$5,000 offer of settlement from defendant and demanded \$250,000. In a case of first impression, a divided Fifth Circuit panel concluded that the demand letter was an "other paper" under 28 U.S.C. § 1446(b), for purposes of "opening § 1446(b)'s 30-day removal window." Since defendant removed more than thirty days after this letter was received the majority concluded that the removal was not timely, that this Court lacked jurisdiction, and vacated and remanded the grant of summary judgment with instructions that the case be remanded to state court.

(b) Phillips v. Donnelly, 216 F.3d 508 (5th Cir. 2000). Vacated and remanded.

This was a habeas corpus case in which the petitioner pled guilty to vehicular manslaughter in state court. The Magistrate Judge filed a report and recommendation which recommended dismissal of the case based on untimeliness in filing the petition. Based on information provided by the petitioner in his Objections to the Magistrate's Report and Recommendation, I remanded the matter to the Magistrate Judge for further consideration. The Magistrate Judge reviewed the matter further and provided another Report and Recommendation, again recommending dismissal of the matter based on the untimeliness of the petition. The petitioner claimed that he did not receive notice of the denial of his state court appeal until some four months after it was actually entered. He argued that the district court should toll the statute of limitations for the time period between the actual denial by the state court and the time when he allegedly received notice. Ultimately, I adopted the Magistrate's Report and Recommendation which concluded that the delay in notification did not toll the statute of limitations.

On appeal, the Fifth Circuit, recognizing that equitable tolling should only apply in exceptional

circumstances, found that it could be applicable in this case. This was the first time the Fifth Circuit had ruled that an alleged failure to receive a copy of a state court decision could be the basis for equitable tolling. The Fifth Circuit vacated the order of dismissal and remanded for a hearing as to when the petitioner actually received notice of the denial of his state court appeal. This matter was referred back to the Magistrate Judge for hearing.

(c) Martin v. Memorial Hospital at Gulfport, 86 F.3d 1391 (5th Cir. 1996). Affirmed in part, reversed in part and remanded.

The Memorial Hospital at Gulfport entered into an exclusive contract with a physician to operate the hospital's facility for end stage renal disease. Martin, another physician, claiming this contract eliminated competition and prevented him from practicing medicine, brought an antitrust action against Memorial Hospital and its Board. This Court granted in part defendant's motion for summary judgment based on local governmental immunity as to money damages and denied summary judgment as to the plaintiff's claim for injunctive relief, attorney's fees, and court costs. This Court dismissed all other claims against the individual board members.

The Fifth Circuit granted interlocutory appeal on the single issue of whether the hospital, owned and operated by a municipality, and the hospital's board of trustees are immune from an antitrust claim under the state action doctrine of Parker v. Brown, 317 U.S. 341 (1943). The Fifth Circuit found that under Mississippi law the hospital and its board members were authorized to enter into anti-competitive agreements and were entitled to state action immunity. The case was remanded for entry of summary judgment on all antitrust claims.

After the matter was remanded to this Court, the hospital filed new motions for summary judgment which were granted in their entirety. This case was then appealed by the physician. It was affirmed by the Fifth Circuit. 130 F.3d 1143 (5th Cir. 1997).

(d) Land v. United States Fidelity and Guaranty Co., 78 F.3d 187 (5th Cir. 1996). Reversed and remanded.

This was a diversity case involving "stacking" of uninsured motorist coverage. This Court concluded that stacking was allowed under Mississippi law and granted summary judgment. The Fifth Circuit stated "we trespass on the ever-shifting

sands of Mississippi's uninsured motorist law" and noted that it had a more recent case from the Mississippi Supreme Court "unavailable to the district court." The Fifth Circuit then reversed and remanded. Before the issue could be tried before this court, the Mississippi Supreme Court handed down yet another decision basically consistent with this Court's initial ruling. U.S. Fidelity and Guar. Co. v. Ferguson, 698 So.2d 77 (Miss. 1997). The parties settled for approximately 90 to 95 percent of the amount in controversy based on the subsequent decision of the Mississippi Supreme Court.

(e) Applewhite v. Reichhold Chemicals, Inc., 57 F.3d 571 (5th Cir. 1995). Affirmed in part, vacated in part.

This case involved a 1977 explosion and fire at defendant's plant in Columbia, Mississippi (incorrectly referred to as Columbus). On March 3, 1992, when this case was being handled by a different judge an order was entered "requiring all subsequent suits against Reichhold Chemicals regarding the Columbus site to be filed separately." This Court denied the plaintiffs' motion for a class certification under Rule 23(b)(3) and also dismissed the plaintiffs' complaint without prejudice based on the March 3, 1992, order. The Fifth Circuit affirmed the denial of class certification but concluded that the Court should have examined each case individually rather than relying on the March 3, 1992, order and remanded to the district court to consider whether plaintiffs were properly joined and whether they should be allowed to continue in one action.

(f) Satcher v. Honda Motor Co., 52 F.3d 1311 (5th Cir. 1995). Affirmed in part, vacated in part.

Plaintiff motorcycle rider had a leg amputated in an accident with a motor vehicle. He brought a products liability suit under the crash worthiness doctrine. This Court denied defendant's motion for summary judgment and the case proceeded to trial. The jury awarded compensatory and punitive damages. The issue of punitive damages was submitted to the jury based on testimony that defendant had known of the alleged dangerous design for twenty years and had joined with other manufacturers in deliberately blocking the adoption of safety standards within the industry which would have precluded this design and prevented the injury.

The defendant appealed and the Fifth Circuit initially reversed and rendered, but on rehearing, based on an intervening state court decision, vacated its original

opinion and remanded the case to this Court for further consideration. Upon reconsideration, this Court reaffirmed the jury verdict whereupon the defendant again appealed. The Fifth Circuit affirmed this Court's evidentiary and trial rulings and the jury verdict on compensatory damages but found that Honda's conduct did not rise to the level required for the imposition of punitive damages and vacated the punitive damages award.

(g) L & A Contracting Company v. Southern Concrete Services, Inc., et al, 17 F.3d 106 (5th Cir. 1994). Affirmed in part, vacated in part.

In this case, L & A Construction Company was a general contractor on a project to build a bridge in Apalachicola, Florida. L & A subcontracted with Southern Concrete Services to provide concrete for the project. Throughout the course of the project, the evidence established that Southern Concrete failed to provide a sufficient quantity of concrete of sufficient quality in a timely manner for the completion of the project. L & A put the subcontractor, Southern Concrete, on notice that it considered this to be a breach of contract and copied the subcontractor's bonding agent, Fidelity and Deposit Company of Maryland.

After completion of the project, L & A sued Southern and F & D for breach of contract in Mississippi state court. The case was removed to federal court. This Court conducted a six-day bench trial. At the conclusion of the trial, applying Florida law, this Court found that both Southern and F & D had breached the subcontract and awarded L & A damages against both Southern and F & D.

On appeal the Fifth Circuit, making a legal distinction between "breach" and "default", affirmed this Court's award of damages to L & A against the subcontractor Southern but vacated the judgment against the surety F & D.

(h) Although Exxon Corp. v Crosby Mississippi Resources, Ltd, 40 F.3d 1474 (5th Cir. 1995), is listed in the indexes as affirmed in part and reversed in part, the opinion of this Court was affirmed.

This appeal involved two different cases from the Southern District of Mississippi consolidated on appeal. One case, found at 775 F. Supp. 969, was rendered by a different judge. The second case, found at 815 F. Supp. 977, was decided by me. My decision was affirmed while the decision of the other judge was affirmed in part and reversed in part. 40 F.3d 1491.

(i) The following case was appealed from this Court to the Fifth Circuit. The Fifth Circuit affirmed and the decision of the Fifth Circuit was appealed to the Supreme Court. The Supreme Court reversed the Fifth Circuit. Garlotte v. Fordice, 29 F.3d 216 (5th Cir. 1994), certiorari was granted, Garlotte v. Fordice, 513 U.S. 1123, 115 S. Ct. 929, 130 L.Ed.2d 876 (1995). Judgment of Fifth Circuit was reversed by Garlotte v. Fordice, 515 U.S. 39, 115 S. Ct. 1948 (1995). On remand in Garlotte v. Fordice, 72 F.3d 34 (5th Cir. 1995), the Fifth Circuit again affirmed this Court's dismissal of Garlotte's habeas corpus petition, this time on the merits.

The factual background was as follows: Garlotte was sentenced to three years for possession of marijuana. He received two concurrent life sentences for murder to run consecutive to his three year marijuana sentence. The petition for habeas involved only the marijuana conviction. This Court denied the petition for habeas on the merits and declined to grant a Certificate of Probable Cause. The Fifth Circuit granted a Certificate of Probable Cause and ordered the respondent to brief the issue of whether or not the district court prematurely dismissed Garlotte's petition without a hearing. The Fifth Circuit then affirmed this Court finding that since Garlotte had already served his three year sentence for the marijuana charge he was no longer in custody on that charge. The Supreme Court, in a 7-2 decision, reversed the Fifth Circuit concluding that Garlotte was "in custody" for the purpose of his habeas petition even though he had already served his marijuana sentence. The Supreme Court found that he would have started serving his life sentence sooner if his marijuana conviction had been set aside. On remand, the Fifth Circuit reviewed all 15 points of error alleged by Garlotte, on the merits, and affirmed this Court's original dismissal of his habeas corpus petition.

(j) U. S. v. Nguyen, 28 F.3d 477 (5th Cir. 1994). Reversed and remanded.

Defendant was convicted of one count of using fire to commit a felony and one count of attempting to destroy a building by fire in violation of two different subsections of 18 U.S.C. §844. Defendant appealed. The Government cross-appealed. The Fifth Circuit affirmed on the question of whether the evidence was sufficient; affirmed this Court's refusal to dismiss count three as being multiplicitous, though defendant was ultimately acquitted on this count; and

affirmed this Court's denial of defendant's motion for a mistrial when defense counsel on cross examination elicited information relative to another arson. The Fifth Circuit agreed with this Court that this information was elicited in response to a direct question by defense counsel and further that the cautionary instruction given by this Court was adequate to cure any prejudice. The Fifth Circuit also affirmed this Court's giving of a modified Allen charge. This Court sentenced defendant to five years as to the mandatory count, but did not sentence defendant as to the second count, which this Court concluded involved the same conduct as the first count. The Fifth Circuit reversed and remanded for this Court to impose a consecutive sentence as to the second count.

(k) Watkins v. Fordice, 7 F.3d 453 (5th Cir. 1993).  
Reversed and remanded.

This was a voting rights case in which this Judge was one of a three judge panel composed of Circuit Judge Rhesa H. Barksdale, District Judge Tom S. Lee, and this writer. This case was originally filed in 1991 after Mississippi had redistricted both houses of its legislature based on 1990 census data. The Attorney General had objected to the 1991 redistricting plan. The appellants had asked the three judge district court to enjoin the upcoming elections. This request was denied. Watkins v. Mabus, 771 F.Supp. 789 (D.C. Miss. 1991). The denial was affirmed by the United States Supreme Court. (Affirmed in part, vacated in part. Watkins v. Mabus, 502 U.S. 954, 72 S.Ct. 412, 116 L.Ed. 2d 433 (1991).) In its 1992 regular session, the Mississippi Legislature passed a revised redistricting plan which was precleared by the United States Attorney General. The 1992 redistricting plan mooted all of appellants' claims. The Court had ordered the parties to file necessary motions for the final disposition of the case. In response, the appellants requested dissolution of the three judge court, remand of the case to a single judge district court, and award of attorney fees. The Court awarded \$198,688.23 in attorney fees and expenses instead of the \$866,938.39 requested. The appellants filed a timely appeal and the state cross appealed. The Fifth Circuit affirmed on all issues except on the hourly rate employed by the district court. Plaintiffs filed affidavits from attorneys in the community showing the prevailing market rate in the locality to be \$150 to \$200 per hour for attorneys with more than ten years experience and \$100 to \$150 per hour for those with four to ten years experience. The State introduced

attorneys' affidavits showing the market range to be \$75 to \$125 per hour. The three judge panel set what it found to be a reasonable hourly rate, of \$95-110 per hour, within the market range, but according to the Fifth Circuit this deviated from the customary billing rates of the appellants' attorneys. The Fifth Circuit vacated the award of attorney fees and remanded to the Court to either award each attorney's customary billing rate or state concise reasons for its decision to do otherwise. On remand the Court reviewed the fee request and reaffirmed its prior order. 852 F.Supp. 542 (S.D. Miss. 1994). The Fifth Circuit affirmed. 49 F.3d 728 (5th Cir. 1995).

(l) United States v. Murray, 988 F.2d 518 (5th Cir. 1993). Affirmed in part, reversed in part, and remanded.

Defendant was convicted by a jury of possession of a firearm by a previously convicted felon, aiding and abetting the transfer of an unregistered firearm, possession of an unregistered firearm and aiding and abetting in the sale of a firearm to a convicted felon. After conviction, the defendant appealed all four counts of his conviction. Considering conviction as to each count in turn, the Fifth Circuit made a determination that there was sufficient evidence to support the convictions for possession of a firearm by a previously convicted felon, aiding and abetting in the transfer of an unregistered firearm and possession of an unregistered firearm. The Fifth Circuit found, however, that the evidence was insufficient to convict the defendant of aiding and abetting in the sale of a firearm to a convicted felon. The Fifth Circuit affirmed the judgment of this Court as to three convictions and reversed this Court as to the fourth conviction, and remanded for resentencing.

(m) U.S. v. Christine Wainuskis, 138 F.3d 183 (5th Cir. (Miss.) 1998).

This case is listed on the Fifth Circuit's index as vacated. It was in fact an affirmance of this Court's denial of the defendant's 28 U.S.C. § 2255 motion to set aside her judgment of conviction.

#### UNPUBLISHED OPINIONS

(a) U.S.A. v. Kirksey Nix and John Ransom, 1:91-CR-40, 99-60069 (5th Cir. Feb. 12, 2001). Reversed and remanded.

The defendants were convicted of several counts of conspiracy involving the murder for hire of a state court judge in 1991. The defendants filed a motion for new trial in 1995 allegedly based on newly discovered evidence. At the request of the defendants, because of an intervening trial regarding new charges in relation to the murder for hire, the Court did not rule on this motion for new trial until 1997. The Court dismissed the defendants' motion. The defendants untimely filed a notice of appeal. The Fifth Circuit remanded the matter to this Court for a determination of whether or not the defendants' filings were late due to good cause or excusable neglect. In a detailed opinion this Court ruled that the defendants did not show excusable neglect nor good cause for the late filing based on Rule 17(c) of this Court's local rules which notifies all pro se litigants of their "continuing obligation to apprise the court of any address change." This Court found that the defendants had not timely notified the district court clerk's office as to their change in addresses and that such had caused the delay in filing timely notices of appeal. The Circuit Court stated that the defendants had advised the Fifth Circuit that they had orally notified the district court clerk's office of their new addresses. This argument was not made before this Court, but rather defendants argued that they had made other filings with this Court and from those filings the Clerk should have been able to ascertain their new addresses. In light of defendants' argument that they had orally notified the Clerk of their change of addresses, the Circuit Court vacated the District Court's findings by holding that the word "apprise" in the district court's local rules could include an oral as well as written notification. The Circuit Court vacated and remanded to this Court for a factual determination as to whether defendants gave reasonable notice-though not necessarily written-of their new addresses. The Appellate Court, as did this Court, noted that "Nix and Ransom are habitual litigants who have systematically burdened the federal court system with literally thousands of pages of frivolous material." The matter has been referred to the magistrate judge assigned to the case for factual findings.

(b) Fairley v. The Prudential Ins. Co., 91-CV-74, 94-60050 (5th Cir. Nov. 8, 1994). Reversed and rendered.

This case involved the interpretation of insurance coverage under an accidental dismemberment policy. Fairley injured his right eye and sought treatment from several physicians. In an untreated state his vision was 20/400. Fairley filed a

claim on his accidental dismemberment policy for loss of sight in that eye. Doctors recommended a corneal transplant which Fairley underwent after much reluctance. After the operation Fairley's vision remained at 20/400, but could be corrected to 10/20 with a contact lens. Fairley was fitted with a contact lens, but found the lens very uncomfortable and only wore it sporadically. He had difficulty wearing the lens while working. The insurance company determined that Fairley's loss of sight was not irrevocable and denied coverage. This Court reversed the plan administrator's determination and awarded benefits to Fairley on the basis that Fairley could not wear the contact in real world conditions. The Fifth Circuit determined that since this was an ERISA plan, factual findings should be disturbed only if the plan administrator (Prudential) abused its discretion. Finding no abuse of discretion, the Fifth Circuit reversed and rendered.

(c) Heptinstall v. Blount, CA H90 0254, 92-07481 (5th Cir. Aug. 11, 1993). Affirmed in part, reversed in part, and remanded.

Heptinstall, a state prisoner, pled guilty to aggravated assault. He then filed a pro se complaint alleging that since the search warrant did not describe the guns seized there was an illegal search and seizure; that as a pretrial detainee he was confined in unsanitary conditions, without adequate ventilation, in an overcrowded cell, and that this constituted a violation of the due process clause of the 14th Amendment; that he was denied access to the courts because he was not provided with writing materials and stamps; and that he was deprived of property in that an officer misappropriated \$200 in cash, that the sheriff inappropriately turned the keys to his shop over to his ex-wife, and that law enforcement officers failed to return seized property. Heptinstall failed to respond to discovery and was ordered by the Court to submit to a deposition. Heptinstall refused to be sworn at his deposition, answered a few questions and terminated the deposition by saying "Case closed, gentlemen. Bye." Defendants moved to dismiss under Rule 37 as a sanction for failure to obey a court order and under Rule 12 for failure to state a cause of action. Heptinstall failed to respond to the motion to dismiss. This Court granted the motion to dismiss on both grounds. Heptinstall moved for additional time to appeal, which this Court granted. Defendants argued that this Court should not have allowed Heptinstall additional time within which to appeal. The Fifth Circuit concluded this Court did

not abuse its discretion in granting the extension of time to plaintiff, affirmed the dismissal of the claims against defendants in their official capacities and affirmed the Court's dismissal of the deprivation of property claim. The Fifth Circuit agreed that plaintiff's failure to comply with a court order subjected plaintiff to sanctions but concluded that dismissal was too severe. The Fifth Circuit reversed and remanded the case as to the claims of illegal search and seizure, unconstitutional conditions of confinement, and denial of access to the courts against certain defendants in their individual capacities; and modified the Rule 12 dismissal of other claims to reflect dismissal without prejudice.

(d) U.S. v. West, CR S92 00015 03, 93-07042 (5th Cir. July 8, 1993). Affirmed in part, reversed in part, and remanded.

West was convicted by a jury of conspiracy to possess cocaine with intent to distribute, interstate travel in aid of unlawful activity, and possession with intent to distribute a controlled substance. West previously had been convicted under a separate indictment of conspiracy to possess marijuana, interstate travel in aid of unlawful activity, and possession with intent to distribute marijuana. At this second trial, West moved for acquittal as to the conspiracy to possess cocaine charge on the basis that there was only one conspiracy to distribute both cocaine and marijuana and that the second indictment and trial constituted double jeopardy. This Court denied West's motion for acquittal, but gave West the benefit of the doubt and made the sentence on the second conviction run concurrent with his previous conspiracy conviction. The Fifth Circuit affirmed West's second conspiracy conviction in regard to the counts relating to interstate travel in aid of unlawful activity, and possession with intent to distribute a controlled substance. The Fifth Circuit found that the evidence established only one conspiracy and reversed the conviction for conspiracy to distribute cocaine.

(e) Marshall Durbin Cos. V. United Food & Commercial Workers Union, 2:98-CV-241; 00-60597 (5th Cir. May 15, 2001). Vacated in part; affirmed in part, and remanded.

This case involved a challenge to an arbitrator's decision under the Federal Arbitration Act. Marshall Durbin Company fired Theatrice Taylor because of alleged insubordination.

Theatrice Taylor filed a grievance through the United Food & Commercial Workers Union. The matter was submitted to arbitration and the arbitrator found that Theatrice Taylor was not insubordinate and that she should be reinstated without back pay. Marshall Durbin filed suit to reverse the arbitrator's decision. This Court had reservations about the arbitrator's decision that there was no insubordination, based on the facts reflected in the record, but under controlling case law affirmed the arbitrator's decision and ordered Marshall Durbin to reinstate Theatrice Taylor. In a subsequent motion, the union sought attorney's fees and back pay for Theatrice Taylor. This Court denied both requests finding that it had no authority to set aside the arbitrator's decision that no back pay should be awarded, although this Court felt that if reinstatement was appropriate that back pay should be awarded. The Fifth Circuit affirmed the denial of attorney's fees but vacated the decision not to award back pay, citing cases from other circuits, and deciding that the arbitrator's award of reinstatement without back pay was ambiguous because the arbitrator did not contemplate the delay caused by a challenge under the Federal Arbitration Act. The Fifth Circuit remanded the case with instructions to remand the case to the arbitrator to resolve the issue of back pay.

(f) Woolwine Ford Lincoln Mercury v. Consolidated Financial Resources, Inc., 2:98-CV-148; 00-60314 (5th Cir. Dec. 27, 2000). Vacated.

This was a diversity case involving a dispute over the sale and financing of automobiles. Defendant finance company released proceeds to a middleman without obtaining the titles from Woolwine, the seller. The middleman became financially insolvent. The issue was whether the seller or finance company would suffer the loss. During pendency of the litigation the parties reached a compromise settlement wherein each would suffer one-half of the loss. On January 12, 2000, the Court dismissed the case with prejudice reserving the right to enforce the settlement for a period of 35 days after the dismissal. On February 25, 2000, Woolwine filed a motion to enforce the settlement agreement. Defendant filed a response and stipulated that the motion to enforce settlement had been timely filed. Defendant fired its attorney, contacted this Court and requested a continuance. After obtaining the continuance, Defendant contacted court personnel the afternoon before the hearing to obtain details relative to the hearing, but failed to appear at the hearing. The Court entered judgment enforcing

the settlement. Defendant appealed. The Fifth Circuit held that the motion to enforce settlement was not filed within thirty-five days after the case was dismissed and therefore the Court had no jurisdiction. The judgment was vacated.

(g) Rayfield Johnson v. Forrest County Sheriff's Dept., 2:96-CV-291; 98-60556 (5th Cir. Feb. 15, 2000). Vacated and remanded.

Plaintiff, a state prisoner, filed a complaint challenging the defendant's jail policy prohibiting inmates from receiving magazines by mail. The sheriff cited reasons for the ban as being the danger of fire, the possibility that inmates could use magazine pages to stop toilets, and the potential for messy cells. This Court adopted the recommendation of the Magistrate Judge and dismissed the complaint. Based on the First Amendment, the Fifth Circuit vacated the order of dismissal, directed that the plaintiff be allowed to amend his complaint to allege a claim of retaliation, and remanded the case to this Court for further proceedings.

(h) United States of America v. Roger O. Dyess, 2:97-CV-163; 98-60174 (5th Cir. Mar. 22, 1999). Vacated in part, affirmed in part, and remanded.

Dyess was convicted of mail fraud by arson at a trial before this Court. His conviction was affirmed by the Fifth Circuit in an unpublished opinion. Subsequently Dyess filed a motion for a new trial and a motion to set aside sentence under Section 2255. In accordance with the Report and Recommendation from the Magistrate Judge, this Court denied the motion for a new trial and dismissed the petition for habeas as time barred. The Magistrate Judge's Report and Recommendation as to the habeas petition was based upon a Second Circuit decision that concluded that the one year statute of limitations found in 28 U.S.C. § 2244(d)(1) expired on April 23, 1997. After this Court dismissed the complaint, the Fifth Circuit rendered a decision determining that the one year statute of limitations under 28 U.S.C. § 2244(d)(1) expired on April 24, 1997, rather than April 23. The Fifth Circuit affirmed this Court's denial of the motion for a new trial, vacated this Court's dismissal of Dyess' Section 2255 motion, based on the intervening Fifth Circuit decision, and remanded the matter to this Court for consideration of Dyess' Section 2255 motion. After remand, the Government moved for downward departure based upon

substantial assistance and Dyess voluntarily dismissed his Section 2255 motion.

(i) Herman Barnes v. Edward Hargett, CA-H-88-0223, 92-7436 (5th Cir. April 15, 1994). Vacated in part, affirmed in part, and remanded.

Barnes, a state prisoner, serving two consecutive life sentences for two capital murders committed during the course of an armed robbery, filed for habeas relief alleging an illegal arrest, involuntary confession, and an unreasonable detention prior to his initial appearance. This Court adopted the Magistrate Judge's Report that characterized plaintiff's issues as Fourth Amendment challenges precluded from federal review by Stone v. Powell. The Fifth Circuit affirmed this Court's decision that the Fourth Amendment issues had been fully litigated in state court and were barred from relitigation on collateral federal review. Construing the complaint most favorably to plaintiff, the Fifth Circuit, however, held that the issue of the voluntariness of plaintiff's confession should have been considered under the Fifth, Sixth, and Fourteenth Amendments. The Fifth Circuit remanded the case for a determination as to whether plaintiff exhausted his state court remedies on the voluntariness issue, and if so, for an analysis of these constitutional claims. This Court then remanded this case to another Magistrate Judge who recommended that the petition for habeas be dismissed. This Court adopted the subsequent recommendation of the Magistrate Judge and dismissed the petition. The Fifth Circuit then affirmed the dismissal of plaintiff's petition for habeas.

(j) Charles Sylvester Bell v. Lee Roy Black, 2:91-CV-118, 93-7484 (5th Cir. April 4, 1994). Vacated and remanded.

This was a habeas case involving a prisoner in state custody. The Fifth Circuit vacated this Court's judgment with instructions to dismiss plaintiff's federal habeas petition for failure to exhaust, without prejudice.

(k) U.S. v. Arthur Loper, 1:94-CV-560, 95-60274 (5th Cir. May 27, 1996). Vacated and remanded.

Loper was convicted of conspiracy to distribute cocaine. This Court imposed an enhanced statutory minimum sentence of 120 months under U.S.S.G. § 5G1.1(b) which requires a court

to impose the statutory minimum sentence where it is greater than the maximum of the applicable guideline range. Loper's conviction was affirmed on direct appeal in an unpublished opinion. Loper then filed a Section 2255 motion to vacate, set aside, or correct his sentence. This Court denied plaintiff's motion. The Fifth Circuit noted that this Court should have set out its findings of fact and conclusions of law, vacated the dismissal, and remanded for resentencing because the Government failed to give notice that it would seek an enhanced sentence as required under Section 851(a)(1).

(1) U.S. v. Marlon Johnson, 1:97-CV-571, 99-60706 (5th Cir. Dec. 7, 2000). Vacated and remanded.

Johnson pled guilty to conspiracy to possess with intent to distribute cocaine and conspiracy to intimidate a witness. He waived his right to appeal his sentence. Johnson filed a § 2255 motion alleging ineffective assistance of counsel, in that his attorney failed to argue for a three point reduction for acceptance of responsibility; failed to challenge the use, for enhancement, of a prior state conviction that was allegedly constitutionally infirm; and failed to file a notice of appeal as requested. This Court adopted the Magistrate Judge's Report and Recommendation, overruled Johnson's Objections, and denied Johnson's Section 2255 motion. The Fifth Circuit's remand is somewhat contradictory. In footnote four on page three of the opinion, the Appellate Court said "Johnson's allegations are not precise as to whether he challenges that he was not counseled, or instead, that his plea was involuntary. This is an issue the district court should explore on remand. Ultimately to succeed, Johnson will have to prove that his guilty plea was flawed, not just that he requested an appeal." However, in the final sentence of the remand order, the Court stated "The sole question on remand is whether Johnson requested that his attorney file a direct appeal challenging the guilty plea and, if so, whether the attorney failed to file the appeal." The Appellate Court on page four of its opinion in footnote seven stated "The district court should be impatient with any attempt to discuss (1) the breach of the plea agreement, (2) any challenge to the sentence, (3) the use of the uncounseled misdemeanor, or (4) an ineffective assistance of counsel claim relating to the waiver of Johnson's right to appeal his sentence." This Court re-referred this matter to the Magistrate Judge for hearing in accordance with the Fifth Circuit remand.

(m) U.S. v. Four Parcels of Land, CA-H89-0201, 93-07256 (5th Cir. Feb. 10, 1994). Affirmed in part, vacated in part, and remanded.

This Court, on motion for summary judgment, granted civil forfeiture of four parcels of land owned by Donnell and Bessie Baylous. In its motion, the Government alleged that one of the four parcels of land was used in connection with the distribution of crack cocaine and that the other three parcels were acquired with proceeds from drug sales. In a responsive affidavit, Bessie Baylous stated that three of the parcels of land were purchased with money from legitimate sources. For more than twelve months, the Baylouses failed to respond to the Government's motion. This Court relied on affidavits from confidential informants to establish that the three parcels were indeed obtained with drug money. The Fifth Circuit affirmed the forfeiture of the one parcel used in connection with the distribution of crack cocaine but vacated the forfeiture of the remaining three parcels. The Fifth Circuit held that the affidavit of Bessie Baylous created a genuine issue of material fact as to the source of funds used to purchase the three parcels and that summary judgment, therefore, was inappropriate. The Fifth Circuit concluded that on remand the trial court could consider whether the Baylous had filed timely responses. Ultimately default judgment was entered for the Government and the appeal of that judgment to the Fifth Circuit was dismissed.

(n) Garlotte v. Miss. Dept. of Corrections, 2:93-CV-246, 94-60544 (5th Cir. Feb. 24, 1995). Affirmed in part, vacated in part, and remanded.

Three prisoners challenged a regulation that prohibited the possession of word processors and typewriters with memory and sought a temporary restraining order and a preliminary injunction. Prison officials contended that the regulation was necessary because these devices were used to store "scam letters, gambling pool information, prison officials' phone numbers and addresses and gang related information." This Court accepted the recommendation of the Magistrate Judge and dismissed the complaint. The Fifth Circuit affirmed the dismissal of the denial of the access to the courts claim, the denial of the claim that the prisoners' freedom of speech and association had been abridged, the denial of the Ninth Amendment claim of right to possess word processors and typewriters with memory, the denial of plaintiffs' procedural due process claim, and the denial of plaintiffs'

request for an injunction or temporary restraining order. The Fifth Circuit vacated the dismissal of the prisoners' equal protection claim, their substantive due process claim, and their claim under the Takings Clause, because plaintiffs had alleged discriminatory and arbitrary enforcement of the regulation. On remand, the parties agreed to a non jury trial before a magistrate judge. The magistrate judge ruled that the plaintiffs failed to prove their constitutional claims and a judgment was entered for defendant. No appeal was taken.

(c) Abrams v. Reichhold Chems., 2:92-CV 122, 95-60784 (5th Cir. July 2, 1996). Affirmed in part, vacated in part, and remanded.

This was a complex toxic torts case. This Court supervised the settlement of more than 4000 claims. At the time of this appeal, only the claims of the fifteen appellants remained in litigation. This Court entered several orders requiring plaintiffs to provide medical information demonstrating causation. Seven of the appellants sought to comply with the Court's last order to produce medical evidence. Eight made no attempt to comply with any of the Court's orders requiring production of medical evidence to support causation. This Court concluded that the proffered expert testimony would not be admissible at trial, granted summary judgment against the seven plaintiffs who had produced medical evidence, dismissed their claims for fear of future illness, and dismissed the claims of the remaining eight plaintiffs for failure to comply with the various court orders requiring them to produce some evidence of causal connection. The Fifth Circuit affirmed the Court's rulings as to the seven plaintiffs who had produced evidence but reversed this Court's dismissal as to the eight plaintiffs who had produced no evidence, but noted that the Court could consider these claims for summary judgment. On remand, this Court granted defendant's motions for summary judgment as to these remaining plaintiffs and they appealed but dismissed their appeal.

The above unpublished opinions are all of the unpublished opinions that I could find reversing or seriously criticizing my decisions or rulings after reviewing my files and requesting the Clerk of the Fifth Circuit to do the same.

(3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

(a) McGee v. U.S., 863 F. Supp. 321 (S.D. Miss. 1994). This was one of the original cases challenging the Brady Handgun Bill. This Court concluded that the part of the Brady Bill requiring local sheriffs to perform certain duties was unconstitutional under the Tenth Amendment. This opinion was affirmed by the Fifth Circuit. 79 F.3d 452 (1996) (Koog v. U.S.) The Supreme Court denied certiorari. 521 U.S. 1118, 17 S. Ct. 2507, 138 L.Ed.2d 1011 (1997).

(b) Yates v. Turzin, et al, 786 F. Supp. 594 (Miss. 1991). Held that defendants were not amendable to suit in Mississippi since tort was not committed in Mississippi, manufacturer was not doing business in Mississippi, and under the Due Process Clause there were insufficient minimum contacts with the State to support long arm jurisdiction.

(c) Neal v. Puckett, (2:97cv90PG - S.D. Miss.) Although the opinion of this Court denying habeas corpus in this death penalty case was not published, the Fifth Circuit affirmed this Court's denial of habeas. Interpreting Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000), a panel of the Fifth Circuit held that although the Mississippi Supreme Court's conclusion of lack of prejudice was incorrect, it was not an unreasonable application of clearly established federal law. Judge Jones, who concurred, was of the impression that the Mississippi Supreme Court did not incorrectly interpret the prejudice prong of Strickland. The opinion of this Court dealt with a number of issues argued by the plaintiff. The Fifth Circuit granted a Certificate of Appealability on only one issue, ineffective assistance of counsel. Before this Court, the main argument had related to granting of an instruction later determined by the U. S. Supreme Court to be unconstitutional. This Court analyzed the instruction under Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and held that there was no prejudice from the granting of this instruction. As noted, when this case went to the Fifth Circuit, that issue was not even argued. Ineffective assistance of counsel, which was not argued nearly so hard before this Court as it was in the Fifth Circuit, was the only issue before that Court. On that issue this Court had ruled in accordance with Judge Jones' concurrence.

(d) Fairley v. Forrest County, 814 F. Supp. 1327 (S.D. Miss. 1993). This was a case involving the one man-one vote principle of the Equal Protection Clause and reapportionment based on population shifts. The case analyzed the history of the one man-one vote principle and discussed the problems that occur when courts intrude into areas normally reserved for legislative bodies, including the breaking of precinct, beat and county lines, separating communities of interest and ignoring things considered by the voters to be important which can appropriately be considered by legislative bodies but not courts. The case also dealt with issues of special elections and the deference to be accorded local representative bodies in their redistricting efforts.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed.
- a. During the year 1962 I served as prosecuting attorney for the City of Laurel in Municipal Court. This was an appointed position.
  - b. From 1964 to 1968 I served as prosecuting attorney of Jones County, Mississippi. This was an elected position.
  - c. From 1972 until 1980 I served in the Mississippi State Senate which is an elected position.
- State (chronologically) any unsuccessful candidacies for elective public office.
- a. In 1967 I narrowly lost an election to the House of Representatives for the State of Mississippi.
  - b. In 1978 I was a candidate for the United States Senate in the Republican Primary and lost that primary election to now U. S. Senator Thad Cochran.
  - c. In 1979 I won the Republican nomination for Attorney General of Mississippi and narrowly lost the general election to later Gov. Bill Allain.
17. Legal Career:
- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I did not clerk.

2. whether you practiced alone, and if so, the addresses and dates;

I practiced alone from June of 1961 until September 1961 at 529 Central Avenue, Laurel, MS 39440.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

(a) From September 1961 until January 1971 I was a partner in the law firm of Gartin, Hester and Pickering, 529 Central Avenue, Laurel, MS 39440.

(b) During 1971 and 1972 I practiced law under the firm name of "Law Offices of Charles W. Pickering," 529 Central Avenue, Laurel, MS 39440.

(c) From 1973 to January, 1980 I practiced law in the firm of Pickering & McKenzie, 529 Central Avenue, Laurel, MS 39440.

(d) In 1980 I again practiced law under the firm name of "Law Offices of Charles W. Pickering," 529 Central Avenue, Laurel, MS.

(e) From 1981 until approximately 1986 I practiced law in the firm of Pickering & Williamson, 529 Central Avenue, P.O. Box 713, Laurel, MS 39441.

(f) From approximately 1986 until 1990, when I was appointed to the bench, I practiced law in the firm of Pickering, Williamson & Walters, 529 Central Avenue, P.O. Box 713, Laurel, MS 39441.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

From June 1961 until 1990 I engaged in the general practice of law. In 1962 I served one year as city prosecuting attorney prosecuting misdemeanor criminal cases. From January 1964 until January 1968 I was prosecuting attorney for Jones County, Mississippi, and engaged in the prosecution of misdemeanor and felony criminal cases. In 1969, for a brief period of time, I was part-time city judge in Laurel, Mississippi. I did a limited amount of criminal defense work. However, I primarily engaged in civil practice.

I represented a bank for some six or seven years (approximately 1980 to 1987) and a major insurance company for a brief period of time (in the mid-1970s). I represented an oil company (approximately 1968 to 1990) and the local cable television company (approximately 1964 to 1990). I primarily handled negligence claims.

During the early years of my practice, I did a considerable amount of title work. I did some estate practice. For many years I did a limited amount of domestic practice. In the first few years of my practice, I handled a few bankruptcy matters. In summary, I had a general practice.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

It is difficult to describe typical former clients since my law practice was so varied. My clients requested help with land transactions, preparation of wills, contracts, and domestic problems. Other clients had business or other commercial work to be done. I represented some business clients on a retainer basis. Although personal injury clients did not comprise the largest number of my clients, personal injury work did represent the biggest part of my practice. Most of these clients had either lost a family member or had received a personal injury.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

In the last five years of my practice, I appeared in court regularly. I did not appear more because we settled by far the largest percentage of our cases.

2. What percentage of these appearances was in:  
(a) federal courts;

Approximately 20 to 30 percent.

- (b) state courts of record;

70 to 80 percent.

- (c) other courts.

Occasionally.

3. What percentage of your litigation was:  
(a) civil;

98 percent.

- (b) criminal.

2 percent.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

In the last five years of my practice, I was sole or chief counsel in approximately ten cases tried to verdict.

5. What percentage of these trials was:  
(a) jury;

Most of the cases that I tried were before a jury.

- (b) non-jury.

Very few of the cases that I tried were non-jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

a. Style of case: Glaston Hilbun, et al vs. Ralph Pickering, et al, No. 19,026

Summary of case: Around 1910 a Mr. Hilbun deeded 40 acres of land to one of his children for life with a remainder interest to his grandchildren born of this child. In the 1920's this property sold for taxes. The company that bought the 40 acres of land at the tax sale filed a confirmation suit. In the 1930's or 40's Ralph Pickering purchased this 40 acres of land and established his home and other improvements on the land. In the late 1950's the life tenant died and the remaindermen filed suit to cancel the tax sale that occurred in the 1920's and to confirm their title to the property. It was plaintiffs' contention that their interest did not vest until the death of the life tenant, that the statute of limitations had not run, that the tax sale was void because statutory steps had not been followed, and that the confirmation suit was void because they were minors at the time of the confirmation suit and process had not been properly served upon them.

Although this was not the first case that I tried, it was by far the most important and significant case that I tried during my first couple of years of law practice. There were numerous complicated issues of law that required extensive research, including the doctrine of equitable estoppel, laches, statutory requirements for a valid tax sale, and statutory requirements for process on minors. This involved the homestead of a cousin who lived in the small rural community in which I was reared. This case was tremendously important to me.

Party or parties I represented: Ralph Pickering and his wife

Nature of my participation: I was the chief counsel throughout the handling of this matter. Although I associated an older lawyer to assist me in this matter, he died before trial. I associated another experienced attorney and he became sick just before the trial date. The day before trial I associated a third lawyer to assist

in this matter. I did all of the trial preparation and 75 to 80 percent of the trial of the case.

Final disposition: The case was dismissed with prejudice. Ralph Pickering and wife kept their homestead. I filed discovery and required the complainants to specify what they alleged to be the defect in the tax sale. Mississippi had a 1930 Code. The complainants had researched the law back to the 1930 Code. However, the law had been changed in the 1920's and although the proof they offered would have been sufficient under the law as it existed from 1930 forward, it was inadequate to establish a case under the law that existed in the 1920's. The discovery had doomed the case of the complainants. They simply did not meet their burden of proof. Extensive research paid off. The complainants did not know until after the case was submitted to the court and we were engaged in final arguments that they had proven that the tax sale would have been void under the wrong law, and not the law that was applicable at the time the tax sale took place.

Date of trial: August 8, 1962

Name of court: Chancery Court of Second Judicial District of Jones County, Mississippi

Name of judge: Hon. L. B. Porter, deceased

Name, address and phone number of co-counsel: Hon. Robert L. Riddley, North Carolina, address unknown

Name of counsel for other party or parties: The firm of McFarland and McFarland represented the complainants. Joe A. McFarland, who later became a state circuit judge and who actually tried the case, is now deceased. The other member of this firm was Hon. Robert H. McFarland, former U.S. District Judge for the Canal Zone, now retired from the practice of law. His address is P. O. Box 445, Bay Springs, MS 39422, (601) 764-2145.

Citation: This case was not appealed and consequently was not reported.

b. Style of case: State of Mississippi vs. Tilson (Bud) Stringer, No. 5133

Summary of case: Tilson (Bud) Stringer operated a motel and bar in the City of Laurel, Mississippi. In 1965 a woman who

apparently was working with Stringer as a prostitute attempted to commit suicide. It was discovered that two teenage girls were living at the motel and were engaging in prostitution. As county prosecuting attorney, I filed charges against Tilson (Bud) Stringer for contributing to the delinquency of minors.

This was a criminal case I prosecuted early in my law practice. Although Tilson (Bud) Stringer was alleged to have been involved in many criminal activities, he had never spent any time in jail prior to this trial. When I ran for State House of Representatives in 1967, Stringer claimed that he hauled enough voters to the polls to vote against me to cause my defeat.

Party or parties I represented: The State of Mississippi.

Nature of my participation: I was the sole prosecutor in this case.

Final disposition: The jury returned a verdict of "guilty." The case was appealed to all available courts. The defendant was given the maximum sentence which he served in jail.

Date of trial: May 12, 1965

Name of court: County Court of Jones County, Mississippi.

Name of judge: Hon. Luther Austin, deceased.

Name of co-counsel: none

Name of counsel for other party or parties: Hon. George Maxey, deceased; Hon. Gene Clark, P. O. Box 525, Laurel, MS 39441, (601) 649-7823.

Citation: 191 So.2d 851

c. Style of case: State of Mississippi vs. Lavelle Stockman, No. 937

Summary of case: In 1967 I was serving as county prosecuting attorney. At that time there was a great deal of violence being committed by members of the Ku Klux Klan. There was a violent labor strike. People were shooting into homes of people who had gone back to work in the plant that was being picketed. At the scene of one of these homes law

enforcement officials recovered shotgun shell hulls. These hulls obviously came from the gun used to fire into the home. The hulls from these shotgun shells were turned over to the state crime lab. Later the man who drove the car in this shooting incident confessed. He implicated Lavelle Stockman as the man who shot into the house. We obtained an arrest warrant for Lavelle Stockman and a search warrant for his home. A shotgun was recovered and submitted to the crime lab. It was determined that the hulls of the shotgun shells recovered at the scene had been fired from the gun found in the home of Lavelle Stockman. I was convinced of the guilt of Lavelle Stockman. It was one of the strongest cases of circumstantial evidence in which I had been involved. In addition to the circumstantial evidence, we had the direct testimony of an accomplice who was driving the car. Nevertheless, the jury quickly found Lavelle Stockman not guilty.

I have a great deal of faith in the jury system. However, this case drove home the point to me that in particular situations both prejudice and fear can cause a jury to make a mistake.

Party or parties I represented: State of Mississippi.

Nature of my participation: The District Attorney was the chief counsel for the case. I served as co-counsel in trying and presenting this case.

Final disposition: Not guilty.

Date of trial: December 1967

Name of court: Circuit Court of First Judicial District of Jones County, Mississippi.

Name of judge: Hon. Lunsford Casey, deceased.

Name of co-counsel: W. O. Dillard, 101 N. State Street, Jackson, MS 39225, (601) 355-7961.

Name of counsel for other party or parties: Hon. George Maxey, deceased; Hon. Gene Clark, P. O. Box 525, Laurel, MS 39441, (601) 649-7823.

Citation: Not reported.

d. Style of case: Florence Kaplin Miller and Henry M. Ginsburg vs. Carson Biglane and Robert Smith, No. H74-116(C)

Summary of case: In the 1950s the Commercial National Bank as trustee of the estate of Sam Kaplin entered into a lease of commercial property located at an intersection in Laurel, Mississippi, on which was located a store building. This property at that time was in a declining neighborhood. After entering into this long-term lease Robert Smith and Carson Biglane improved the property on both sides of the street. Thereafter property values increased greatly. When this case was tried, more than 20 years after the original lease was executed, reasonable rental value of this property had greatly increased and exceeded the amount provided for in the lease. The plaintiffs contended that the lease had not been properly entered into and was void. Plaintiffs also contended that the consideration was so grossly inadequate as to amount to a gratuity and no consideration. The plaintiff was a resident of New York. This action was maintained in the federal courts on the basis of diversity of citizenship. This case shows the diversity of cases handled by our firm.

Name of parties I represented: Robert Smith and Carson Biglane, owners of Westside Grocery.

Nature of my participation: I was the chief counsel in handling this entire matter.

Final disposition: The court dismissed the complaint and confirmed the lease.

Date of trial: September 1976

Name of court: U. S. District Court for the Southern District of Mississippi.

Name of judge: Hon. William Harold Cox, deceased.

Name and address of co-counsel: Hon. Franklin McKenzie, Jr., now Chancery Judge of 19th Chancery District, P. O. Box 1961, Laurel, MS 39441, (601) 428-7625.

Name of counsel for other party or parties: Hon. Kalford C. Ratcliff, deceased, and Hon. David Ratcliff, P. O. Box 706, Laurel, MS 39441, (601) 425-2303; and Hon. Anthony Thaxton, P. O. Box 106, Laurel, MS 39441, (601) 649-3351.

Citation: Not reported.

e. Peggie Mae Ratcliffe, et al vs. W. C. "Dunk" Crosby, et ux, No. 26,421

Summary of case: Peggie Mae Ratcliffe, acting on behalf of her brother, the Rev. Sam Graves, purchased a tract of land from David Graves, her nephew. A young lawyer in our law firm prepared this deed. He made a mistake in dictating the description. Thereafter W. C. Crosby hired an attorney to check the record to see what land David Graves still owned. This attorney discovered the mistake in the deed to Peggie Mae Ratcliffe. W. C. Crosby obtained a deed from David Graves to the property that should have been included in the deed from David Graves to Peggie Mae Ratcliffe. Later when this mistake was discovered, our firm filed suit against W. C. Crosby in an attempt to correct the error that had been made. Our theory of the case was that the mistake in the description of the deed was patently obvious and that this should have constituted sufficient constructive notice to the purchaser to require further inquiry on his part in order for him to be a "bona fide purchaser for value without notice." By this time, David Graves had been convicted of a felony in Georgia and was in the Georgia State Penitentiary. We had to travel to the Georgia State Penitentiary to take his deposition. The trial court held that a defective description was not notice and dismissed our complaint. We appealed to the Mississippi Supreme Court. The Mississippi Supreme Court affirmed the ruling of the trial court.

This case emphasized the need to be very careful and thorough to avoid mistakes in preparation of documents. It also emphasized the need to be open and candid with one's clients. I candidly and frankly acknowledged to our clients the mistake that had been made and kept them regularly posted on the progress that we were making in trying to correct the error. When the Supreme Court finally dismissed our complaint, it was no trouble to resolve this matter with our clients and to make them whole. This we quickly did.

Parties I represented: Peggie May Ratcliff and her brother, Sam Graves.

Nature of my participation: Chief counsel.

Final disposition: Bill of complaint dismissed, appealed to Supreme Court and ruling of lower court affirmed.

Date of trial: February 1976

Name of court: Chancery Court of the Second Judicial District of Jones County, Mississippi, and the Mississippi Supreme Court.

Name of judge: Hon. J. Shannon Clark, P. O. Box 168, Waynesboro, MS 39367, (601) 735-4447.

Name, address and phone number of co-counsel: Hon. J. Larry Walters, P. O. Box 745, Laurel, MS 39441, (601) 649-4424.

Name of counsel for other party or parties: Hon. Matthew Harper, deceased.

Citation: 354 So.2d 802 (Miss. 1978).

f. Style of case: State of Mississippi vs. David L. Gray, No. 5540

Summary of case: David Gray, a young black man in his late 20's or early 30's, was charged with robbing a teenage white girl who was working in a store. Gray was charged with using a knife to commit the robbery.

Even though times had changed considerably, a black defendant charged in a crime of that nature still had a difficult time finding local counsel who would accept private employment to defend a charge of this nature. I had represented David Gray's father since shortly after I started practicing law. David Gray's parents approached me about defending him in this criminal matter and convinced me that he was innocent. The young girl who had been robbed was a granddaughter of a friend and supporter of mine in political campaigns. It was not an easy decision to make, but our firm came to the conclusion that David Gray was entitled to a good defense and agreed to accept employment in the case.

Party I represented: I represented David Gray, the defendant.

Nature of my participation: Chief trial counsel.

Final disposition: The first jury trial resulted in a hung jury. The second trial resulted in an acquittal. After the second trial, David Gray's parents were grateful and invited

all of us who had been involved in the trial to their home for a celebration dinner.

Date of trial: First trial May 21, 1981; Second trial September 30, 1981.

Name of court: Circuit Court of the Second Judicial District of Jones County, Mississippi.

Name of judge: Hon. James D. Hester, deceased.

Name, address and phone number of co-counsel: Hon. W. Dal Williamson, P. O. Box 394, Laurel, MS 39441 (601) 426-0056

Name of counsel for other party or parties: Hon. Donald Smith, then district attorney, 1915 23rd Avenue, Gulfport, MS 39502, (228) 868-8426; Hon. Larry Walters, P. O. Box 745, Laurel, MS 39441, (601) 649-4424.

Citation: None.

g. Style of case: Judy B. Smith vs. Younger Transportation, Inc., et al, No. 81-4-45

Summary of case: David Smith was killed while working at an oil well site helping to unload a truckload of pipe. One of the timbers that was used to roll the pipe from the truck bed to the pipe rack "kicked out" and another broke causing the pipe to fall to the ground and crush David Smith. Suit was filed against the trucking company on the theory that the driver of the truck was the "captain of the ship" and responsible for the safe unloading of his truck. The defendants defended on the basis that the deceased himself placed the timbers between the truck and the pipe rack. Thorough investigation revealed that even though this was true the truck driver came back and moved the timbers after they were put in place by the deceased. The case was tried to completion and while the jury was deliberating, the defendants made their first substantial offer. The case was settled for \$475,000.

A wife and two small children were left without adequate means of support. By this settlement we were able to secure the financial future of these children so that they could be supported during their minority and get an education. At the time this case was settled, the settlement was larger than any previous settlement or jury verdict before the Circuit Court of Jones County,

Mississippi. This case also demonstrated the need for thorough preparation and investigation of a case.

Party I represented: Judy Smith, the wife of David Smith, and her two children.

Nature of my participation: Hon. Jack Riley, attorney in Hattiesburg, who originally represented Judy Smith and her children, associated our firm to try this case. I was the chief trial counsel.

Final disposition: Settlement after submission to jury.

Date of trial: August 19, 1981

Name of court: Circuit Court of the Second Judicial District of Jones County, Mississippi.

Name of judge: Hon. James Hester, deceased.

Name, address and phone number of co-counsel: Hon. Jack Riley, P. O. Box 654, Hattiesburg, MS 39401, (601) 583-2607; Hon. W. Dal Williamson, P. O. Box 394, Laurel, MS 39441, (601) 426-0056.

Name of counsel for other party or parties: Hon. Matthew Harper, deceased.

Citation: Not reported.

h. Style of case: James M. Ainsworth vs. Tom's Foods, Ltd., a corporation, and Robert E. French, an individual,  
No. H79-0159N

Summary of case: Milton Ainsworth, a truck driver, who was approximately 57 or 58 years of age was driving an 18-wheel tanker loaded with gasoline on Highway 49 south of Collins, Mississippi, when an 18-wheeler pulled out into the road in front of the truck he was driving. It was early in the morning before day break. This was a divided four-lane highway. Our theory of the case was that the Tom's truck failed to yield the right-of-way and blocked both southbound lanes of traffic. The defense theory was that the Tom's truck occupied only one of the two lanes of traffic and that there was no reason for the truck driven by Milton Ainsworth to have collided with the Tom's truck.

This was one of the first cases that I handled that largely involved psychological injury. Milton Ainsworth had been a "pillar of the community" in the small town in which he lived. He had been active in community and church activities. At the time of his wreck Milton Ainsworth was hauling 10,000 gallons of gasoline. The fear of what could have happened if his tank truck had exploded or if the gas had caught on fire caused Milton Ainsworth to suffer serious emotional and psychological trauma. The testimony was that, after this incident, Milton Ainsworth was completely changed. He was disabled. This case was also significant in that the defendant driver contended that he had straightened the tractor of his truck in the road and was occupying only one lane of traffic at the time he was struck from the rear. However, after impact his tractor struck a bridge abutment on the right-hand side of the road. I consulted a professor of physics at the University of Southern Mississippi. By cross-examining the defendant on principles of physics, his testimony largely collapsed. The defendant's testimony enabled us to settle the case. The principle of physics used in cross-examination of this witness was that if an object is traveling in a given direction, it will continue to travel in that same direction when it is struck from behind by another object, unless it strikes an object that causes it to veer or change course. The question to the defendant was "When you were struck from the rear, if you were going straight down the road as you have testified, and were not turned cross ways of the road as testified to by the plaintiff, what did you strike that caused your vehicle to veer to the right and strike the bridge abutment?"

Party I represented: Milton Ainsworth

Nature of my participation: I was associated as chief trial counsel by Hon. Aubrey Calhoun. Another attorney had been engaged for this purpose but did not pursue the case.

Final disposition: After cross examination of the defendant and upon recommendation of the trial judge, this case was settled.

Date of trial: May 12, 1981

Name of court: U. S. District Court for the Southern District of Mississippi.

Name of judge: Walter L. Nixon

Name, address and phone number of co-counsel: Hon. Aubrey Calhoun, deceased; Hon. W. Dal Williamson, P. O. Box 394, Laurel, MS 39441, (601) 426-0056; and Hon. Robert D. Gholson, P. O. Box 6523, Laurel, MS 39441, (601) 425-0400.

Name of counsel for other party or parties: Hon. Dorrance Aultman, P. O. Drawer 750, Hattiesburg, MS 39401, (601) 583-2671; Hon. Lawrence Gunn, Jr., P. O. Box 1588, Hattiesburg, MS 39401, (601) 544-6770; Hon. Jon Mark Weathers, P. O. Box 18109, Hattiesburg, MS 39404, (601) 261-4100.

Citation: Not reported as case was settled during trial.

i. Style of case: Judith L. Adams vs. Doris H. Guy and Grady W. Guy, d/b/a Union Bus Station, No. 81-9-126

Summary of case: Judy Adams, a housewife with children, carried one of her children into the bus station in Laurel, Mississippi, to use a pay toilet. The janitor for the operators of the bus station had mopped the floor and had left a slippery cleaning detergent on the floor. The janitor did not clean up the slippery substance before he left the bathroom. Judy Adams slipped and fell. Judy Adams received no broken bones but she received extensive soft tissue injury. The scar tissue around her shoulder blades caused it to droop. She had to undergo numerous painful procedures whereby the therapist would literally tear the scar tissue by pulling on her shoulder blade and arm. Judy Adams was a highly motivated person and her inability to work as she had before the injury and her constant severe pain caused her serious problems in coping with her physical condition. Judy Adams incurred large medical bills. This case involved numerous expert witnesses necessary to prove the extent of the injury to Judy Adams. For the first time we also used video in the presentation of a case to the jury. The jury returned a verdict of \$150,000. This was another case of great need and we were able to partially meet the needs of our clients.

Parties I represented: Judy Adams and her husband, Narvel Adams

Nature of my participation: I was the chief counsel through the handling of this case.

Final disposition: Jury verdict of \$150,000 plus settlement of loss of consortium claim.

Date of trial: Concluded on February 2, 1982

Name of court: Circuit Court for the Second Judicial  
District of Jones County, Mississippi

Name of judge: Hon. James D. Hester, deceased.

Name, address and phone number of co-counsel: Hon. W. Dal  
Williamson, P. O. Box 394, Laurel, MS 39441, (601) 426-0056;  
Hon. Robert Gholson, P. O. Box 6523, Laurel, MS 39441,  
(601) 425-0400.

Name of counsel for other party or parties: Hon. Kenneth  
Bullock, P. O. Box 6400, Laurel, MS 39441, (601) 649-5239.

Citation: Not reported.

j. Style of case: Colon R. Shows vs. Jamison Bedding,  
Inc., and Mallon Dobbins, No. H78-0061(R)

Summary of case: Colon Shows was a passenger in a truck owned and operated by his employer, a rural electric power association. As the truck in which he was riding came upon the ramp onto I-59 in the City of Laurel, Mississippi, his vehicle was struck by an 18-wheeler. Colon Shows suffered many broken bones, a severe laceration to the scalp which resulted in considerable medical expense and severe permanent injury. It was our theory that the pickup truck in which the plaintiff was traveling had been in the right-hand lane of traffic several hundred feet when the pickup was struck from the rear by the 18-wheeler. The driver of the 18-wheeler denied this and contended that the pickup truck in which the plaintiff was riding swerved immediately in front of his truck causing the collision.

During the trial of this matter the trial judge recommended settlement of this case for \$170,000. The carrier for the defendant would not pay this amount. The jury returned a defense verdict. The trial judge gave a new trial, stating this was the first time in his 14 years on the bench that he had disturbed a jury verdict. The second trial resulted in a jury verdict of \$600,000. The defendant appealed this case to the Fifth Circuit Court of Appeals in New Orleans. It was affirmed. By the time this case was finally resolved, it involved a number of complicated legal issues, including the court's responsibility when reviewing a jury verdict. The defendant truck driver had given three different versions of how the wreck occurred, either in

depositions or at trial or to the police officer. Although I have great respect for the jury system, I learned that sometimes juries can be wrong.

Parties I represented: Mr. and Mrs. Colon Shows

Nature of my participation: I was the chief counsel throughout the handling of this matter.

Final disposition: Jury verdict of \$600,000 in favor of plaintiff; judgment affirmed by Fifth Circuit Court of Appeals in April, 1982.

Date of trial: First trial in April 1979, second trial May 5, 1980. Affirmed by Fifth Circuit Court of Appeals in April 1982.

Name of court: U.S. District Court for the Southern District of Mississippi, Fifth Circuit Court of Appeals

Name of judge: Hon. Dan Russell, Jr., P. O. Box 1930, Gulfport, MS 39502, (228) 863-2762

Name, address and phone number of co-counsel: Hon. Franklin C. McKenzie, Jr., now Chancery Judge of 19<sup>th</sup> Chancery District, P. O. Box 1961, Laurel, MS 39441, (601) 428-7625

Name of counsel for other party or parties: Hon. Dorrance Aultman, P. O. Drawer 750, Hattiesburg, MS 39401, (601) 583-2671; Hon. Lawrence Gunn, Jr., P. O. Box 1588, Hattiesburg, MS 39403, (601) 544-6770

Citation: 671 F.2d 927 (5th Cir. 1982).

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

a. Perhaps the most significant group of cases that I have handled during the ten years that I have been on the federal bench did not result in any written opinions by me, but these cases did involve numerous rulings on complicated legal issues, resulted in four different trials over a period of six years consuming a considerable amount of time

and resulting in numerous appeals. These cases related to the execution-style murder of State Circuit Court Judge Vincent Sherry and his wife, involved criminal conspiracy, RICO, travel in interstate commerce to commit murder, use of interstate communication facilities to commit fraud, and centered around an extensive and complicated homosexual scam operating out of the Louisiana State Penitentiary at Angola with the avowed purpose of creating a slush fund to hopefully bribe then Louisiana Governor Edwin Edwards to pardon convicted murderer Kirksey Nix. The disappearance of scam funds as well as political motivation resulted in a brutal gangland type murder carried out by an itinerant carnival worker from Texas. In the last of these trials to be conducted, and after several weeks of testimony, some jurors accused a fellow juror of misconduct including sexual harassment toward a fellow juror. One of the most challenging tasks I have faced as a judge was protecting the integrity of those particular jury deliberations. The Fifth Circuit stated

. . . Judge Pickering proceeded in a very careful and conscientious manner. . . . [H]e consulted with the lawyers throughout, giving thoughtful consideration to their suggestions.

193 F.3d 852 at 861.

The juries in these four cases convicted numerous individuals on numerous counts. These convictions have all been affirmed.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None, except I will receive \$1,000 per month for life in the form of an annuity from General Electric Capital Assurance Company (the successor to Reliance Insurance Company).

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

a. As to any parties in which I own stock, I will recuse myself.

b. I will follow the dictates of 28 U.S.C. § 455 and cases interpreting it.

c. In 1967 I testified for the prosecution in the trial of then Imperial Wizard of the White Knights of the Ku Klux Klan Sam Bowers for the fire bombing death of civil rights activist Vernon Dahmer. I testified that Bowers had a bad reputation for peace and violence. Sam Bowers recently was convicted for the first time in state court for the murder of Vernon Dahmer. He filed a pro se complaint before me to declare the Mississippi Constitution unconstitutional and his conviction null and void. Another pro se plaintiff in that case, Shawn O'Hara requested this Court to recuse itself because this Court had previously sanctioned O'Hara for filing frivolous claims. I did not grant O'Hara's motion for recusal because the prejudice which he alleged insofar as he personally was concerned occurred in rulings of this Court on matters before the Court. However, O'Hara alleged that I should recuse myself because Sam Bowers had been responsible for defeating me in two elections, in retaliation for my testimony in his earlier trial. Since

O'Hara is not a lawyer, he could not file a motion for recusal for Bowers. However, I concluded that my previous testimony against Bowers and his contention that he had defeated me in previous political elections could reasonably be perceived as creating a bias. I sua sponte recused myself from the case. On the few occasions that motions for recusal have been filed, I have declined to recuse myself when the matter dealt with legal rulings I had made. This is the first case that I recall in which I have felt compelled to recuse myself because of what might be reasonably perceived as prejudice. However, I have recused myself in instances where I own stock in one of the parties.

I will continue to resolve potential conflicts of interest as I have done in the past, and as set out in response to this question.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

My Financial Disclosure Report is attached.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Attached

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.
- a. Bush-Quayle Chairman for Mississippi in general election of 1988.
- b. Co-chairman of Bush-Quayle campaign in Mississippi during primary, 1988.

- c. One of several co-chairmen of Reagan-Bush campaign in Mississippi, 1980.
- d. Republican nominee for Attorney General of Mississippi in 1979. Narrowly lost.
- e. Candidate, Republican nomination for U. S. Senate, 1978.
- f. As chairman of the Mississippi Republican Party in 1976, I coordinated much of the campaign in Mississippi for the Ford-Dole ticket.
- g. Candidate and elected to Mississippi State Senate in 1971 and 1975.
- h. In 1967, candidate, narrowly lost election for Mississippi House of Representatives.
- i. 1963, candidate and won election as county attorney of Jones County.
- j. Had lesser support positions in other campaign for Republican nominees from 1964 to 1980.

FINANCIAL STATEMENT  
NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	\$21,500.00	Notes payable to banks-secured	none
U.S. Government securities-add schedule	none	Notes payable to banks-unsecured	none
Listed securities-add schedule	155,838.00	Notes payable to relatives	none
Unlisted securities--add schedule	36,500.00	Notes payable to others	none
Accounts and notes receivable:		Accounts and bills due	4,000.00
Due from relatives and friends	none	Unpaid income tax	none
Due from others	3200.00	Other unpaid income and interest	none
Doubtful	none	Real estate mortgages payable-add schedule	204,422.00
Real estate owned-add schedule	1,951,650.00	Chattel mortgages and other liens payable	none
Real estate mortgages receivable	none	Other debts-itemize:	none
Autos and other personal property	137,200.00		
Cash value-life insurance	43,000.00		
Other assets itemize:			
IRA	229,000.00		
Thrift	130,000.00		
Annuity (present value estimated)	60,000.00	Total liabilities	208,422.00
CRP payments (present value estimated)	12,000.00	Net Worth	2,571,466.00
Total Assets	2,779,888.00	Total liabilities and net worth	2,779,888.00
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	500,000.00 secured by real estate, value exceeds loan	Are any assets pledged? (Add schedule)	none, except real estate mortgages above
On leases or contracts	none	Are you defendant in any suits or legal actions?	no
Legal Claims	none	Have you ever taken bankruptcy?	no
Provision for Federal Income Tax	none		
Other special debt	none		

SCHEDULE 1

LISTED SECURITIES:

4082 shares of Union Planters Bank - \$146,952

150 shares of Sanderson Farms - \$1350

471 shares of Telecorp PCS, Inc. New A - \$7536

Total listed securities - \$155,838

SCHEDULE 2

UNLISTED SECURITIES:

200 shares of First Bank Shares, Inc. - \$1500

1000 shares of Bank of Jones County - \$10,000

20,000 shares of LS Communications, Inc. - \$10,000

5,000 shares of JP Systems, Inc. - \$15,000

Total unlisted securities - \$36,500

## SCHEDULE 3

## REAL ESTATE:

684 acre farm in rural Jones County with home, barn, timber, and various buildings

One-sixth interest under 80 acre tract of rural swamp land in Leflore County near Morgan City, Mississippi

260 acres in rural Jones County near Sandersville, Mississippi (4 lots or 12 acres developed, balance in trees

21 acres of rural land in Jones County, Mississippi, near Sandersville (6 lots developed

Joint interest in real estate in Northern Virginia

One-half interest in 286 acre farm in Covington County, Mississippi, on Leaf River

## Minerals:

13 acres of non-producing minerals in S34, T7N, R12W, Jones County, Mississippi

35 acres non-producing minerals, S4&5, T17, R5E, Warren County, Mississippi

50 acres of minerals in S15, T6N, R12W, Jones County, Mississippi

10 acres non-producing minerals, S9, T2N, R12E, bonus, Jasper County, Mississippi

55 acres minerals, S30, T8N, R20W, Lawrence County, Mississippi

50 acres non-producing minerals, S20&29, T8N, R14W, Covington County, Mississippi

Interest in West Yellow Creek and West Chapperell Oilfields in Wayne County, Mississippi, with Tellus Energy Group

One acre non-producing minerals in Grimes County, Texas, Vol. 618, page 708

Other interests in small tracts of minerals

SCHEDULE 4

Real estate mortgages

Union Planters Bank, Deed of Trust on residence - \$204,422

AO-10 (w)  
Rev. 1/2000

**FINANCIAL DISCLOSURE REPORT**  
**Nomination Report**

*Report required by the Ethics in Government Act of 1978, as amended (5 U.S.C. App. 4, Sec. 101-112)*

<b>1. Person Reporting</b> <i>(Last name, first, middle initial)</i> ...kering, Sr., Charles W.	<b>2. Court or Organization</b> U.S. Court of Appeals, 5th Cir	<b>3. Date of Report</b> 05/30/2001
<b>4. Title</b> <i>(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)</i> U. S. Circuit Judge - nominee	<b>5. Report Type (check type)</b> X Nomination, Date 05/25/2001 Initial Annual Final	<b>6. Reporting Period</b> 01/01/2000 to 04/30/2001
<b>7. Chambers or Office Address</b> <i>(current)</i> 701 N. Main Street, Suite 220 Hattiesburg, MS 39401	<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is in my opinion, in compliance with applicable laws and regulations.</b> Reviewing Officer _____ Date _____	

*IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on the last page.*

**I. POSITIONS** *(Reporting individual only; see pp. 9-13 of Instructions.)*

POSITION	NAME OF ORGANIZATION / ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1 Owner of a farm	
2	
3	

**II. AGREEMENTS** *(Reporting individual only; see pp. 14-16 of Instructions.)*

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> NONE (No reportable agreements.)	
1	
2	
3	

**III. NON-INVESTMENT INCOME** *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

DATE	SOURCE AND TYPE	GROSS INCOME <i>(yours, not spouse's)</i>
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1	General Electric Capital Assurance Co., annuity.	16,000.00
2		
3		

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting	Date of Report
	Pickering, Sr., Charles W.	05/30/2001

**IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.**  
*(Includes those to spouse and dependent children. See pp. 25-28 of Instructions.)*

	SOURCE (No such reportable reimbursements.)	DESCRIPTION
<input type="checkbox"/>	NONE	
1	Exempt	
2		
3		
4		
5		
6		
7		

**V. GIFTS**  
*(Includes those to spouse and dependent children. See pp. 29-32 of Instructions.)*

	SOURCE (No such reportable gifts.)	DESCRIPTION	VALUE
<input type="checkbox"/>	NONE		
	Exempt		
2			
3			

**VI. LIABILITIES**  
*(Includes those of spouse and dependent children. See pp. 33-35 of Instructions.)*

	CREDITOR (No reportable liabilities.)	DESCRIPTION	VALUE CODE*
1	Bancorp South	secondary liab.on note secured by DT on prop. valued in excess of debt (paid off 2000)	J
2	Bancorp South	second liab.on note secured by DT on prop. valued in excess of debt	N
3			
4			
5			
6			

* VAL CODES: J=\$15,000 or less	K=\$15,001-\$50,000	L=\$50,001 to \$100,000	M=\$100,001-\$250,000	N=\$250,001-\$500,000
0=\$500,001-\$1,000,000	P1=\$1,000,001-\$5,000,000	P2=\$5,000,001-\$25,000,000	P3=\$25,000,001-\$50,000,000	P4=\$50,000,001 or more

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Pickering, Sr., Charles W.	Date of Report 05/30/2001
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**VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions** *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets (including trust assets)  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
			(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure	
						(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)					<b>EXEMPT</b>				
1 Union Planters Corp. common stock	D	Dividend	M	T					
2 Bank of Jones County common stock		None	J	T					
3 First Bankshares, Inc.		None	J	T					
4 Sanderson Farms, common stock	A	Dividend	J	T					
5 LS Communications, Inc		None	J	T					
6 Telecorp PCS, Inc.		None	J	T					
7 J.P. Systems, Inc.		None	J	T					
8 SmartSynch, Inc.		None	J	T					
9 IRA # 1	D	div. cap.	M	T					
10		gain dist.							
11		interest							
12 - Money Fund									
13 This ends IRA # 1.									
14 IRA # 2	A	Interest	K	T					
15 - Money Funds									
16 - LS Communications Inc.									
17 This ends IRA # 2.									

1 Inc/Gain Codes: A=\$1,000 or less (Col. B1, D4)	F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 I2=\$5,000,001 or more	E=\$15,001-\$50,000
Codes: J=\$15,000 or less (Col. C1, D3)	O=\$300,001-\$1,000,000	K=\$15,001-\$50,000 P1=\$1,000,001-\$5,000,000	L=\$50,001-\$100,000 P2=\$5,000,001-\$25,000,000	M=\$100,001-\$250,000 P3=\$25,000,001-\$50,000,000	N=\$250,001-\$500,000 P4=\$50,000,001 or more
Val Mth Codes: Q=Appraisal (Col. C2)	U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Pickering, Sr., Charles W.	Date of Report 05/30/2001
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**VII. Page 2 INVESTMENTS and TRUSTS— income, value, transactions** *(Includes those of spouse and dependent children. See pp. 36-54 of Instructions.)*

A. Description of Assets (including trust assets)  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code (A-I)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (J-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure			
						(2) Date: Month-Day	(3) Value Code (J-P)	(4) Gain Code (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions.)					EXEMPT				
18 658 ac. farm-rural Jones Co.-50 ac.pasture-balance timberland	E	cattle, CR P	PI	W					
19 103ac. farm(95ac. rural Jones Co, 8ac. rural Covington Co., adj.		None	M	W					
20 255 ac. farm-Jones Co.-rural	C	Rent	N	W					
21 21 acres, rural Jones County		None	K	W					
22 1/6th int. in 80 acres-swamp land, Leflore Co., MS		None	K	W					
23 1/2 int. in 308 acre farm, Covington Co., MS		None	M	W					
4 1 acre non-producing minerals-Grimes Co., TX		None	J	W					
25 13 acres non-producing minerals-Jones Co., MS		None	J	W					
26 35 acres non-producing minerals-Warren Co., MS		None	J	W					
27 50 acres non-producing minerals-Jones Co., MS		None	J	W					
28 10 acres non-producing minerals-Jasper Co., MS		None	J	W					
29 55 acres non-producing minerals-Lawrence Co., MS		None	J	W					
30 50 acres non-producing minerals-Covington Co., MS	D	Bonus	J	W					
31 Mineral interest-West Yellow Creek LLC-West Chapperell LLC		None	L	W					
32 both operated by Tellus Energy, Wayne Co., MS									
33 Bank of Jones County account	A	Interest	J	T					
34 Bancorp South (account)	A	Interest	J	T					

1 Inc/Gain Codes: A=\$1,000 or less B=\$1,001-\$2,500 C=\$2,501-\$5,000 D=\$5,001-\$15,000 E=\$15,001-\$50,000  
 (Col. B1, D4) F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more

2 Val Codes: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000  
 (Col. C1, D3) O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more

3 Val Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market  
 (Col. C2) U=Book Value V=Other W=Estimated

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Pickering, Sr., Charles W.	Date of Report 05/30/2001
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VII. Page 3 INVESTMENTS and TRUSTS — income, value, transactions (includes those of spouse and dependent children. See pp. 36-34 of Instructions.)

A. Description of Assets (including trust assets)  <i>Place "X" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period					
			(1) Amount Code (A-H)	(2) Type (e.g., dividend, rent or interest)	(1) Value Code (I-P)	(2) Value Method Code (Q-W)	(1) Type (e.g., buy, sell, partial sale, merger, redemption)	If not exempt from disclosure		
			(2) Date: Month-Day	(3) Value: (I-P)	(4) Gain: Code (A-H)	(5) Identity of buyer/seller (if private transaction)				
NONE (No reportable income, assets, or transactions.)					EXEMPT					
35 Union Planters Bank (account)	A	Interest	J	T						
36 IRA # 3	A	Interest	K	T						
37 - Money Fund										
38 - Mutual Funds										
39 This ends IRA # 3.										
40 Note - Shirley West	B	prin & int	J	T						
41 Note - Robine & Welch	F	prin & int		T						
42										
43										
44										
45										
46										
47										
48										
49										
50										
51										

1 Inc/Gain Codes: A=\$1,000 or less B=\$1,001-\$2,500 C=\$2,501-\$5,000 D=\$5,001-\$15,000 E=\$15,001-\$50,000  
 Col. B1, D4 F=\$50,001-\$100,000 G=\$100,001-\$1,000,000 H1=\$1,000,001-\$5,000,000 H2=\$5,000,001 or more

2 Val Codes: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000  
 Col. C1, D3 O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more

3 Val Mth Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market  
 Col. C2 U=Book Value V=Other W=Estimated

<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Pickering, Sr., Charles W.	Date of Report 05/30/2001
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**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.**

*(Indicate part of report.)*

- I. Line 18. CRP means Conservation Reserve Program of USDA.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Pickering, Sr., Charles W.	05/30/2001

## IX. CERTIFICATION

I certify that all the information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. 4, section 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature



Date 5-30-01

Note: Any individual who knowingly and wilfully falsifies or fails to file this report may be subject to civil and criminal sanctions (5 U.S.C. App. 4, Section 104).

## FILING INSTRUCTIONS

Mail original and three additional copies to:

Committee on Financial Disclosure  
 Administrative Office of the United States Courts  
 One Columbus Circle, N.E.  
 Suite 2-301  
 Washington, D.C. 20544

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.
  - a. I served as chairman of the Jones County Economic Development Authority from 1983 to 1985. I was the first and organizational chairman. During these two years I spent approximately one day per week working and putting this organization together which was a time-consuming delicate process. The purpose of this organization is to promote economic development and thereby enhance the quality of life for all of the citizens of Jones County and especially the disadvantaged and those needing a job. From 1985 until 2000, I continued to serve on the Board of Directors and to devote time to this organization, but not as much as during the years that I was its chairman.
  - b. During the five years just before I went on the bench, I averaged spending at least one hour per month giving advice and counsel to people who were disadvantaged and unable to pay a legal fee in regard to various legal questions that they might have relative to medicaid, welfare and other legal problems.
  - c. From 1983 to 1985 I served as president of Mississippi Baptists. This likewise required an extensive amount of time, at least one day every two weeks. It is the church's responsibility to help meet the needs of the disadvantaged and by helping my denomination I was making a contribution in this area.
  - d. During 1988 and 1989 I met with and coordinated a bi-racial group working to promote racial harmony in Jones County. This was a benefit to all Jones Countians, including the disadvantaged.
  - e. I am now a member of a group in Laurel meeting to develop a program for "kids at risk."

f. I serve on the Board of Directors of the Institute for Racial Reconciliation at the University of Mississippi.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

None

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is no selection commission for the Southern District of Mississippi. Senators Thad Cochran and Trent Lott recommended that I be nominated. In my conversations with both of these Senators, there was no discussion of any case or of my judicial philosophy. I was interviewed by staff of the White House Counsel. They questioned me about my general judicial philosophy but discussed no specific cases and did not suggest that I should rule in any way in regard to any particular type of case. I have completed the relevant questionnaires pertaining to my nomination.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the

judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

It is the responsibility of the judiciary to interpret the law, not make law. A court has the responsibility of resolving the controversy between the parties who are before the court. It is neither responsible, nor appropriate, for the court to determine general policies that are the prerogatives of the legislative branches of government.

Once a decision is rendered in a case it should have similar application in subsequent cases involving other individuals in the same situation. However, it is dangerous to make the language so broad that it covers other individuals who might not be in the same circumstances as those particular parties. In other words, court decisions should answer the questions presented and not hypothetical questions involving others not before the court.

The courts should not impose broad, affirmative duties upon governments and society. The courts must, however, apply the Constitution and statutes of the United States, and follow Supreme Court rulings interpreting the Constitution and federal statutes.

The federal courts should not be increasing their jurisdiction by broadening interpretations and assuming jurisdiction over cases that are best left for other tribunals. The judiciary should avoid, where possible, imposing itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Senator FEINSTEIN. Thanks very much, Judge. We certainly appreciate that.

Let me just tell you why I think this is so important. There are many who believe that your seat on the Fifth Circuit is really going to be pivotal on many critical questions that are very controversial in our society. I would like to confine my questions on this round to three of those issues. The first is a woman's right to choose, the second is appropriate regulation of weapons, and the third one is civil rights.

So let me begin with the first question. In your October 2001 hearing, you stated that you intend to follow Supreme Court precedent on the issue of choice. Now, I am trying to reconcile your testimony with your years of advocacy against a woman's right to choose.

I am particularly concerned about your vote as a Mississippi State Senator for a resolution endorsing a constitutional amendment to ban abortion, except in the case of the death of the mother or rape. As you know, this would substantially overturn *Roe v. Wade*, which is the case which essentially provides for choice within certain constraints.

The resolution you voted for stated in part, and I quote, "All human life is entitled to the protection of laws which may not be breached by act of any court or legislature, or by any judicial interpretation of the Constitution of the United States."

My question is can you explain your support for this amendment and for laws that may not be abridged by any judicial interpretation of the Constitution of the United States? Are there certain laws that trump the Constitution?

Judge PICKERING. No, there are no laws that trump the Constitution. Madam Chairman, I recognize and know the difference between a personal opinion or view and a political position or view and a judicial decision. When I take an oath as a judge to uphold the Constitution of the United States, that means to uphold the Constitution as interpreted by the Supreme Court, and I will do that.

Senator FEINSTEIN. And what is your position today on a constitutional amendment to ban abortion?

Judge PICKERING. Well, you know, my personal views, I think, are immaterial and irrelevant, and it would be inappropriate for me to share my personal views. I will tell you that I will follow the Constitution and I will apply the Supreme Court precedent.

Senator FEINSTEIN. Thank you very much. Let me go to the issue—

Judge PICKERING. And I have, Madam Chairman. I have shown that I can take a position that is a legal position, regardless of what my personal view is. I have demonstrated that in 10 years on the bench.

Senator FEINSTEIN. Thank you. Let me go to the issue of guns. In *United States v. Lopez*, the Fifth Circuit, and later the Supreme Court, struck down a law regulating guns near schools based on the argument that Congress had overstepped its bounds. This case joined several cases in recent years that have challenged the traditional role of Congress in addressing issues of national concern with national regulations. I am concerned that this trend threatens

to prevent Congress from addressing problems that the Nation is asking us to address—choice, guns, and others.

I would like to ask you to speak to this case and your view of it. Did *Lopez* represent to you one step in a continuing trend toward limiting congressional power to legislate? Did it strike the proper balance? And, specifically, please comment on the extent to which you believe that Congress can regulate in the area of dangerous firearms, particularly when those weapons travel in interstate commerce, affect commerce and tourism, and have such a devastating impact on the children of this country.

Judge PICKERING. Madam Chairman, I have already addressed that issue. I had one of the original Brady gun cases filed in my court and I found that that was a proper exercise of congressional authority. I upheld the constitutionality of it. I did not uphold the direction of the sheriff to check records, but I found that it was severable and that the rest of the law was enforceable.

Senator FEINSTEIN. So then you would support the role of Congress to regulate in this area?

Judge PICKERING. I did so. I found that to be true in that case.

Senator FEINSTEIN. Thank you very much. Now, let me just touch on my civil rights question. The Fifth Circuit has the largest percentage of minorities of any circuit in the country. If you are confirmed, you will be rendering decisions in a circuit where 43 percent of the population comes from minority groups.

In light of this, I am concerned about a number of votes you cast as a Mississippi State Senator on the issue of civil rights for African-Americans and other minorities. And you touched on some of this, but let me quickly state it.

You voted in 1972 and 1973 for appropriations for the Sovereignty Commission. As you pointed out, that was an organization established in the 1950's to oppose desegregation in Mississippi. In 1973 and 1975, you voted for reapportionment plans that continued to provide for county-wide voting in State Senate elections rather than creating single-member districts, thus diluting African-American voting strength.

In 1976 and 1979, you voted for open primary legislation that abolished party primaries and eliminated the possibility of winning a general election with less than a majority vote. One of your three African-American colleagues in the Mississippi House argued that, and I quote, "an open primary bill had racial overtones because it countered the effects of a potential block vote by the black community."

How would you explain each of these votes to the 12 million minority residents of the Fifth Circuit? And looking back on these votes, would you cast the same votes today that you did in the 1970's?

Judge PICKERING. Madam Chairman, on the open primary bill, I did not view it at all as eliminating the possibility of anyone winning an election. The truth of the matter is that African-Americans did not vote in Mississippi in any numbers at all until 1971. So at the time—and incidentally, on that election I ran—I was a Republican nominee for the State Senate. Mayor Charles Evers was running as an independent for Governor that year, and he and I were on the ballot that was distributed in the African-American commu-

nity. They knew my record of what I had done previously and I received two-thirds of the African-American vote.

Now, the open primary bill from my standpoint—and, again, I have indicated to you that I know the difference between political decisions and judicial decisions. At that time, I felt that one of the reasons the Republican Party had not made more progress was because all of the voters, practically all of them—and whenever I am talking about voters at that time, I am basically talking about white voters because this was just—the African-American vote was something that had just come on the scene.

You must realize how much progress we have made since that time. It is hard to realize that that was the first year that they really participated. Well, it was my feeling, and the reason I supported the open primary bill—there were not more than one or two instances where any African-Americans had won—I didn't know of any, but there might have been some in other parts of the State where they had won in that manner, but that was not a general practice.

I saw it as a vehicle for the Republican Party to make progress because if the voters—the voters were not going to come vote in a Republican primary because the candidates were all in the Democratic primary. The candidates weren't going to come run in the Republican primary because the voters were in the Democratic Party. So you had a situation of which comes first, the chicken or the egg, and I felt like this would give an opportunity for the party to grow and that is simply the reason I was for an open primary.

Now, as the redistricting plans, yes, if I was voting on those measures today, I would vote differently. At that time, we did not have the information that we have now to break down with the computers and did not have the ability that you do. And reapportionment has changed drastically. I was elected in a—when I went to the Senate, reapportionment plan already there, and these plans had to be approved by the Justice Department. So the plan we adopted could not go into effect without being approved by the Justice Department.

So I had no intent at that time of depriving anyone of the opportunity to elect someone to office. In fact, I don't recall very much debate about the issue. Going back that far, I am sure that if you all—perhaps maybe you wouldn't have the same, but remembering the bills you—unless it was something that you were involved in, you don't have that much specific recollection. I was very much involved in open primary. I remember that, but the others I don't remember that much about.

As far as the Sovereignty Commission, there was an effort, as I recall—and, again, I thought when I testified before that it had ceased to be functioning when I arrived at the senate. It now turns out that it functioned to some degree for a year-and-a-half after I was there.

Governor Winter was on that commission during that time and he and I talked about it briefly this morning. But I was trying to get ready for my testimony, so I didn't have time to have a long conversation with him about it. But there was an effort, as I recall, to try to change the direction of it. We felt that it had too much

baggage, it had done too much wrong, it had to be abolished, and we did.

Senator FEINSTEIN. But you voted for appropriations to support it.

Judge PICKERING. Apparently, I did. I have no independent recollection of it, but the records indicate that.

Senator FEINSTEIN. Thank you. I see my time is up and I will call on the ranking member, Senator Hatch.

**STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH**

Senator HATCH. Well, thank you, Madam Chairman, and thank you for being willing to grant me just a little bit extra time as ranking member to make my opening statement and, of course, hopefully ask a couple of questions.

I would like to introduce several distinguished Mississippians who are here today in support of Judge Pickering. These individuals have known Judge Pickering for many years and know his strong record on civil rights and his fairness as a judge. So I want to recognize just a few of these individuals.

Mr. Charles Evers—if you would stand up, please, sir—

[Mr. Evers stood.]

Senator HATCH [continuing]. Brother of slain civil rights leader, Medgar Evers. He is a civic leader in Mississippi and has held numerous positions, including Mayor of Fayette, Mississippi. We are proud to have you here.

Frank Montague, former President of the Mississippi Bar Association.

[Mr. Montague stood.]

Senator HATCH. The Honorable Johnny Williams, Chancery Judge of Forrest County, Mississippi.

[Judge Williams stood.]

Senator HATCH. We are so proud to have you here, both of you.

Mr. Mike McMahan, a trial lawyer in Hattiesburg, Mississippi, who practices in Judge Pickering's courtroom on a regular basis. We are proud to have you here, as well.

[Mr. McMahan stood.]

Senator HATCH. Mr. James King, who is the first African-American hired to work as a field representative by the Mississippi Republican Party. He was hired by Charles Pickering when he was directing the party in the 1970's.

[Mr. King stood.]

Senator HATCH. So we are honored to have all of you here, and others as well.

This is the second hearing that this Committee has convened on the nomination of Charles Pickering, Sr., to be Judge of the United States Court of Appeals for the Fifth Circuit. I am aware of some of the allegations that have been levied against Judge Pickering and I have been interested in hearing his response here today, as I feel sure that we will during the course of this hearing.

I am, however, troubled at what appears to be a national agenda by a coalition of leftist interest groups who have spent months hunting around for an excuse to use the Pickering nomination as a way to attempt to paint this administration's nominees as ex-

tre. Although I am concerned by the underlying agenda, I believe they have picked the wrong nominee for that.

There appears to be a real disconnect here. We have received nearly 100 letters of support for Judge Pickering's nomination to the Fifth Circuit. They include letters from 18 current or former presidents of the Mississippi State Bar. We have received letters from 27 members of the African-American community, including 4 present or former NAACP officials, 10 public officials and 4 pastors.

Eighteen self-professed Democrats have sent letters, including two former Governors and three former lieutenant Governors. And we have received letters from 57 practicing attorneys, including 5 civil rights attorneys, 13 criminal defense attorneys, 10 plaintiff's lawyers, and 14 civil defense lawyers. Any judge that can get along with that crowd is doing pretty good, in my opinion.

Madam Chairman, I would like to submit copies of these letters for the record.

Some of the Mississippians who have written us have made the trip here to D.C. to show their support for Judge Pickering. One such supporter, as I have mentioned, is Charles Evers, brother of slain civil rights leader Medgar Evers.

In an editorial that appeared in today's Wall Street Journal, Mr. Evers documented Judge Pickering's commitment to civil rights over the past four decades, which has included testifying against the Imperial Wizard of the Ku Klux Klan in the 1960's, hiring the first black political staffer in the history of the Mississippi Republican Party in the 1970's, representing an African-American man accused of robbing at knife-point a 16-year-old white woman in the 1980's, and leading a charge to establish the Institute of Racial Reconciliation at the University of Mississippi in the 1990's.

Mr. Evers explained his reasons for coming forward in support of Judge Pickering as follows, quote: "In recent days, I have been saddened and appalled to read many of the allegations which have been put forth about Judge...Pickering...These allegations are mostly made by groups with a Washington, D.C., address and a political agenda, not by anyone with real knowledge of Judge Pickering's long and distinguished record on civil rights. As someone who knows Judge Pickering and is familiar with his commitment on matters of race, I could not sit by and watch these groups' attempts to destroy a good man. Let me tell you about the Charles Pickering many of us in Mississippi have known for well over 30 years," unquote.

Madam Chairwoman, I would like to submit a copy of this editorial for the record as well.

Senator FEINSTEIN. Without objection.

Senator HATCH. Others who could not be here today nonetheless wrote in ardent support of Judge Pickering. For example, Jack Dunbar, former President of the Mississippi Bar, wrote, quote, "I am a Democrat and would not want you to confirm any person to the Federal courts of this nation who I felt was gender or racially biased. I have never known Judge Pickering to be a person or judge that was anything other than fair and impartial in his conduct toward women or minorities," unquote.

William Winter, former Democratic Governor of Mississippi, wrote about Judge Pickering, quote, "While he and I have not al-

ways been in agreement on certain public issues, I know he is a man of reason and sound judgment. He is certainly no right-wing ideologue. He will bring a fair, open and perceptive mind to the consideration of all issues before the court...He has been one of this state's most dedicated and effective voices for breaking down racial barriers," unquote.

And Shane Langston, President of the Mississippi Trial Lawyers Association, wrote of Judge Pickering, quote, "We know that he applies the law fairly and equally with regard to economic status, party affiliation, race, sex, or religion...Many members of the MTLA are African-Americans. We represent tens of thousands of African-Americans. We prosecute more race discrimination cases and claims of civil rights violations than any other legal association in the State of Mississippi. Members of our association and I represented the State conference of the NAACP in a historic challenge to the 'Mississippi State Flag' regarding its divisive Confederate battle symbol. Our organization would never support a judicial candidate with a record of hostility or unfairness toward litigants claiming civil rights violations," unquote.

These Mississippians, who know Judge Pickering best, urge his confirmation. Those fighting Judge Pickering's nomination, in contrast, seem to consist primarily of a host of Washington lobbyists representing leftist special interest groups whose main goal is to fight the Pickering nomination in an organized attempt to change the ground rules and impose their political litmus test for all of President Bush's judicial nominees.

After an 8-year hiatus, these groups are back on the scene, ready to implement an apparently vicious strategy of "Borking" any judicial nominee who happens to disagree with their view of how the world should be. I really like the open-mindedness of these groups to views different from theirs.

An article in Monday's Legal Times provides a glimpse of what is going on behind the scenes of this confirmation hearing. The article reported, quote, "As a young lawyer in Jones County, Mississippi, in the 1960's, Charles Pickering Sr. helped put Klansmen in jail. In the early 1990's, when preservationists and black activists clashed over a 'colored only' sign in a county courthouse, Pickering helped craft a compromise that the black community applauded. And as a Federal trial judge, Pickering has tried to keep young African-Americans out of the criminal justice system, convening a group of local civic leaders to try to solve the problem. When the Senate Judiciary Committee meets February 7 to consider Pickering's nomination to the U.S. Court of Appeals for the 5th Circuit, his liberal opponents won't be focused on these aspects of the nominee's record. Liberal activists have combed through the decisions that Pickering has written in 11 years as a U.S. district judge in Hattiesburg, Mississippi, and have concluded that Pickering's confirmation 'poses a grave danger to our rights and liberties.' But a Legal Times analysis of Pickering's important rulings, as well as interviews with community leaders in his home state, offers an alternative view to the liberals' conclusions that Pickering is racially insensitive and indifferent to constitutional rights."

The article continued, quote, “[A] look at the 64-year-old Pickering’s record shows that although he has often ruled against civil rights claims, the facts of the cases have often tilted strongly against the litigants claiming discrimination. And although in some voting rights cases he has doubted the correctness of relevant Supreme Court decisions, he has followed the law in making his rulings,” unquote.

Madam Chairwoman, I ask to submit the full text of this article for the record.

Senator FEINSTEIN. Without objection.

Senator HATCH. It is against this backdrop that we must examine the allegations we have heard and evaluate their credibility. I am concerned about the tenor and the tone of the attacks that intolerant leftist special interest groups have launched against Judge Pickering because they indicate to me a broader agenda at work here.

I see these attacks as part of an organized campaign by the usual suspects to, quote, “change the ground rules,” unquote, for the confirmation of Federal judges. This is precisely what some professors and some activists advocated to the 42 Democrat Senators who attended a retreat last year in Pennsylvania, as reported by the New York Times, if that report is accurate.

The goal of that retreat was to plot a way to hinder the confirmation of President Bush’s judicial nominees, according to the Times. The conclusion they reached, according to someone in attendance who was quoted by the Times, was, quote, “for the Senate to change the ground rules,” unquote.

Today’s hearing is the culmination of nearly a year of effort to change the ground rules by injecting a political litmus test into the confirmation process. We have even had hearings on injecting political ideology into the confirmation process. Even Lloyd Cutler, former President Clinton’s White House Counsel, thought this strategy was misguided.

Of course, those legal experts who were invited to testify at the first of these hearings by my Democratic colleagues all testified that injecting politics into the confirmation process is the course the Senate should take. I think that is pathetic.

To further put this hearing in the appropriate context, I would like to make an additional observation about how very easy it is to make a political statement in Washington, D.C., in 2002, before a friendly crowd who wants to hear it, and indeed demands to hear it, given their political muscle. It is quite another thing to testify against the Imperial Wizard of the Ku Klux Klan in Mississippi in 1967, as Charles Pickering courageously did, despite great risk to himself and his family.

Although the physical safety of Judge Pickering and his family remained intact, his political career was not so lucky. He was defeated in his next election after testifying against the KKK. Years later, the former Imperial Wizard against whom he testified claimed credit for defeating Judge Pickering’s bid for the U.S. Senate in 1966 and for State Attorney General in 1979. Any Washington interest groups who question Judge Pickering’s commitment to civil rights would do well to remember this.

Now, I have a number of questions, but I will reserve those for the second round, if there is one.

Senator FEINSTEIN. There will be one.

Senator HATCH. If there will be one, I will reserve those, and I appreciate you giving me just that little additional time.

I don't mean to malign anybody here, but I don't want you maligned either.

[Laughter.]

Senator HATCH. Well, truth is truth. I don't want you maligned either.

And I will tell you something: I get a little sick of some of this stuff that happens about every time we get a Republican President. So I just wanted to make these points and I think they are points that needed to be made.

Thank you, Madam Chairman.

[The prepared statement of Senator Hatch follows:]

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

This is the second hearing that this Committee has convened on the nomination of Charles Pickering, Sr., to be a judge on the United States Court of Appeals for the Fifth Circuit. I am aware of some of the allegations that have been levied against Judge Pickering, and I am certainly interested in hearing his response, as I feel sure that we will during the course of this hearing. I am, however, troubled by what appears to be a national agenda by a coalition of left-wing interest groups who have spent months hunting around for an excuse to use the Pickering nomination as a way to attempt to paint this Administration's nominees as extremist. Though I am concerned by the underlying agenda, I believe they have picked the wrong nominee for that.

There appears to be a real disconnect here. We have received nearly 100 letters of support for Judge Pickering's nomination to the Fifth Circuit. They include letters from 18 current or former Presidents of the Mississippi State Bar. We have received letters from 27 members of the African-American community, including 4 present or former NAACP officials; 10 public officials; and 4 pastors. Eighteen self-professed Democrats have sent letters, including 2 former Governors and 3 former Lieutenant Governors. And we have received letters from 57 practicing attorneys, including 5 civil rights attorneys, 13 criminal defense attorneys, 10 plaintiff's lawyers, and 14 civil defense lawyers.

Some of the Mississippians who have written us have made the trip here to DC to show their support for Judge Pickering. One such supporter is Charles Evers, brother of slain civil rights leader Medgar Evers. In an editorial that appeared in today's Wall Street Journal, Mr. Evers documented Judge Pickering's commitment to civil rights over the past four decades, which has included testifying against the Imperial Wizard of the Ku Klux Klan in the 1960s; hiring the first black political staffer in the history of the Mississippi Republican Party in the 1970s; representing an African-American man accused of robbing at knife point a sixteen year old white woman in the 1980s; and leading the charge to establish the Institute of Racial Reconciliation at the University of Mississippi in the 1990s.

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have not always been in agreement on certain public issues, I know that he is a man of reason and sound judgment. He is certainly no right-wing ideologue. He will bring a fair, open and perceptive mind to the consideration of all issues before the court— He has been one of this state's most dedicated and effective voices for breaking down racial barriers." And Shane Langston, President of the Mississippi Trial Lawyers Association, wrote of Judge Pickering, "We know that he applies the law fairly and equally with regard to economic status, party affiliation, race, sex or religion—. Many members of the MTLA are African-Americans. We represent tens of thousands of African-Americans. We prosecute more race discrimination cases and claims of civil rights violations than any other legal association in the State of Mississippi. Members of our association and I represented the State Conference of the NAACP in a historic challenge to the 'Mississippi State Flag' regarding its divisive Confederate battle symbol. Our organization would never support a judicial candidate with a record of hostility or unfairness toward litigants claiming civil rights violations."

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It is against this backdrop that we must examine the allegations we have heard and evaluate their credibility. I am concerned about the tenor and tone of the attacks that intolerant left-wing special interest groups have launched against Judge Pickering because they indicate to me a broader agenda at work here. I see these attacks as part of an organized campaign by the usual suspects to "change the ground rules" for the confirmation of federal judges. This is precisely what Professors Laurence Tribe and Cass Sunstein and activist Marcia Greenberger advocated to 42 Democratic Senators who attended a retreat last year in Pennsylvania as reported by the *New York Times*. The goal of that retreat was to plot a way to hinder confirmation of President Bush's judicial nominees. The conclusion they reached, according to someone in attendance who was quoted by the *Times*, was "for the Senate to change the ground rules."

Today's hearing is the culmination of nearly a year of effort to change the ground rules by injecting a political litmus test into the confirmation process. We have even had hearings on injecting political ideology into the confirmation process. Even Lloyd Cutler, former President Clinton's White House Counsel, thought this strategy was misguided. Of course, Professors Tribe and Sunstein, and Ms. Greenberger, who were invited to testify at the first of these hearings by my Democratic colleagues, all testified that injecting politics into the confirmation process is the course the Senate should take.

To further put this hearing in the appropriate context, I would like to make an additional observation about how very easy it is to make a political statement in

Washington, DC, in 2002 before a friendly crowd that wants to hear it and, indeed, demands to hear it, given their political muscle. It is quite another thing to testify against the Imperial Wizard of the Ku Klux Klan in Mississippi in 1967, as Charles Pickering courageously did despite great risk to himself and his family. Although the physical safety of Judge Pickering and his family remained intact, his political career was not so lucky: He was defeated in his next election after testifying against the KKK. Years later, the former Imperial Wizard against whom he testified claimed credit for defeating Judge Pickering's bid for the U.S. Senate in 1976 and for state attorney general in 1979. Any Washington interest groups who question Judge Pickering's commitment to civil rights would do well to remember this.

On a separate matter, I would like to note that today's hearing seems to have been orchestrated from the start. 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 with Judge Pickering about obtaining copies of any of his 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. The request covered more than 900 cases, and was impossible to fulfill on such short notice. The request was then revised to include only those unpublished opinions in four categories of cases: Title VII, the Americans with Disabilities Act, ADEA, and the Equal Pay Act. Judge Pickering complied with this request on the following day.

At his October 18 hearing, my Democratic colleagues requested that Judge Pickering provide the Committee with his unpublished opinions reversed by the Fifth Circuit—a mere 21 out of more than an estimated four thousand-plus cases that Judge Pickering has decided during his tenure on the federal bench. My friends across the aisle also agreed to limit their request for Judge Pickering's unpublished opinions to specific categories of cases in order to facilitate their production. Accordingly, they asked for those cases pertaining to Voting Rights Act, Fair Housing Act, labor relations, Section 1983, equal protection, habeas corpus, PLRA, and AEDPA cases. Incidentally, Judge Pickering responded in three separate letters the following day. Nevertheless, my Democratic colleagues announced their intention at the October hearing to schedule a second hearing before ever having seen these additional unpublished opinions.

Within a week of the hearing, my Democratic colleagues requested more unpublished opinions in the categories of VAWA, Fourth Amendment, and Eleventh Amendment cases. Judge Pickering responded within three days to this request.

Apparently dissatisfied with what they found—or did not find—in the opinions that Judge Pickering produced, and contrary to their original representation that they would limit their request to specific categories of cases, my colleagues then asked Judge Pickering for all of his available unpublished opinions, as well as the captions and names of defendants in all criminal cases to come before him. This request came nearly one month after his hearing. Judge Pickering responded by express mail on the same day that he received this request. On December 21, Chairman Leahy inquired further about additional unpublished opinions. He noted that the Committee had received only “approximately 600 opinions,” and asked for an accounting of the location of Judge Pickering's remaining unpublished opinions. He also questioned Judge Pickering's effort to obtain copies of his unpublished opinions. Judge Pickering responded, and has since been able to locate additional unpublished opinions which he promptly turned over to the Committee.

As recently as January 31, Chairman Leahy insisted that Judge Pickering produce not only his unpublished opinions of which he is aware, but also “potentially hundreds more of [his] unpublished opinions . . . in paper archives” of which Judge Pickering is not aware. I cannot recall another nominee who has been subjected to a document production of this scope. If this continues for future nominees, we will have to start filing environmental impact statements along with such requests. Again, I don't take our role to thoroughly examine the qualifications of judicial nominees lightly. But in all seriousness, I have grave concerns about the appearance of a fishing expedition that this request has created. I sincerely hope that this is not the beginning of a pattern of what some may view as harassment for future nominees.

I would also like to note that holding a second hearing solely for the purpose of examining the record of a single nominee is an extraordinary measure. During my six-year tenure as Chairman of this Committee during the Clinton Administration, we held second hearings for 9 nominees who, for various reasons, faced substantial opposition. In all but one instance, we considered the nominees facing a second hearing along with a slate of other nominees who were making their debut before the Committee. Likewise, the second hearing for all but one of these nominees took

place in a new Congress, which allowed any new Members to evaluate the nominee first-hand. I might note that all but one of the nominees who endured second hearings before this Committee were ultimately confirmed. The nomination of the sole individual who was not confirmed was withdrawn. So, the very fact that we are here today considering only the nomination of Judge Pickering in the same Congress is an extraordinary matter.

Senator FEINSTEIN. Thank you very much, Senator Hatch.

The Chair would just like to acknowledge I was present at that retreat and I don't remember anything like what you just quoted. So I want the record to reflect that.

Senator HATCH. I am just quoting what the press said.

Senator FEINSTEIN. The chairman of the Committee, Senator Leahy.

Chairman LEAHY. Thank you, Madam Chair.

Insofar as the confirmation hearing is about you, Judge Pickering, and not about everybody that Senator Hatch has been referring to, we may actually accomplish more by asking you questions than reading newspaper articles.

I do that because this is an important hearing on your own record. A Federal judge gets a lifetime appointment. You already hold a lifetime appointment as a Federal judge and you understand that, and you know the impact Federal judges have on people's lives and their rights and all the freedoms that we cherish as Americans, basic rights, fundamental rights, fundamental fairness.

Reaffirming or undercutting people's fundamental belief in our system of self-government really matters, and a Federal judge is in the forefront of that. In this circuit, it matters to the people and litigants in Mississippi and Louisiana and Texas, who are part of the Fifth Circuit, but it also matters to people in my home State of Vermont and the Second Circuit, where I am, because it can become the basis for Supreme Court decisions which would then bind all of us. That can be in civil rights or reproductive rights or privacy rights.

These matter, and often it is the courts that are left with the responsibility for determining and protecting those rights in accordance with the Constitution. It is in our Federal courts of appeals that decisions are made that affect directly tens of millions of people in the circuit, and they affect what goes before the Supreme Court.

Now, I understand your answer to the question asked by Senator Feinstein that you would follow the law, not your personal opinion. I have been here for 27 years hearing judges, and I have voted for, I would say, 99 percent of all the judges appointed by both Republican and Democratic Presidents. They always say that and I am sure they always mean it, but I have a problem with you in saying that, Judge, and let me very honest with you.

You say you will follow the law, not your personal opinion. But I look at your record as a district judge and you have been reversed by the Fifth Circuit at least 26 times. Now, either that was because you followed your personal opinion or you didn't follow the law. It has got to be one or the other.

I am told that when your court of appeals doesn't publish a decision in connection with a reversal or other decisions, it is because the court of appeals regards its decision as based on well-settled principles of law. Of your 26 reversals, you were reversed at least

15 times through an unpublished opinion. In other words, the Fifth Circuit said that it was such a well-settled issue that you had committed mistakes as a judge in either not knowing the law or not applying the law in the case before you. So let me ask you about a couple of those.

One is a recent 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, you adopted the recommendation of a magistrate and you granted the jail official's motion to grant them summary judgment. In other words, you said that the petitioner's claim of a First Amendment right to religious material which they wanted to get through the mail would be denied and you sided with the jailer.

Now, the Fifth Circuit Court of Appeals, never once seen as a group of these liberals that Senator Hatch has referred to, said that the inmate's First Amendment rights had been violated. In explaining why you were wrong, the Fifth Circuit relied on and cited a published decision of its own several years before, called *Mann v. Smith*. In that case, they struck down a jail rule prohibiting detainees from receiving newspapers and magazines, holding it violating the Fifth Amendment.

Now, in the Mann case, the prison officials had made much the same argument about fire hazards and clogged plumbing and all that you accepted in the *Johnson* case. But here was a decision right in your own circuit. Certainly, we would all agree that the district court judge in the Fifth Circuit is bound by the decisions of the Fifth Circuit.

It was on all fours. It was decided 4 years before your decision. It was decided and said denying these magazines under these same arguments was a violation of the First Amendment. But you turned your back on your own circuit's decision. Why wouldn't that have been controlling? And, of course, the Fifth Circuit reversed you.

Judge PICKERING. Senator Leahy, let me first mention you have talked about 26 reversals, and there may be 26. My count was 25, but in any event—

Chairman LEAHY. Well, let's say 25 then.

Judge PICKERING. But 25 or 26 out of 4,000; that is slightly more than one-half of 1 percent of the cases that I have handled.

Chairman LEAHY. How many go up on appeal?

Judge PICKERING. Well, of those that went up on appeal, it was about 93 percent, I think, so it was still a good—

The Chairman

[presiding.] Well, let's go to this one, this particular case. I picked that only because it is a First Amendment case. Four years before, you had a case from the Fifth Circuit that was on all fours, and yet you went different than your own circuit.

Judge PICKERING. The procedure in handling prison litigation is that those are matters that we refer to our magistrate judges. And the magistrate judges become somewhat experts in that area, much more so than I do, but ultimately the buck stops with me. Also, on pro se litigants, we have clerks that become specialists in that who operate out of Jackson, who serve all of the judges.

Now, in this case, it was referred to the magistrate judge. He analyzed the law and he analyzed it from the basis that the prison authorities could limit rights of prisoners if there was a penal reason why it needed to be done. And he analyzed that the fires and the damage to the plumbing, blocking it up, that was a legitimate penal concern and interest.

Chairman LEAHY. Weren't those the same arguments made in the Mann case?

Judge PICKERING. Yes. I was going to say the magistrate judge did not refer to the Mann case. It was not argued to me and that is one where we goofed. If I had been aware of the Mann case, I would not have decided that case that way. But until it came from the Fifth Circuit, I was not aware of the Mann case.

Chairman LEAHY. But the Mann case was in your circuit and it was 4 years—

Judge PICKERING. Yes, that is correct.

Chairman LEAHY. Let me take a toxic tort case, *Abram v. Reichhold Chemicals*. You dismissed with prejudice the claims of the eight plaintiffs because you held they had not complied with a case management order. It is pretty significant when a judge dismisses a case with prejudice. It really denies any rights to bring the case again or anything else.

But the Fifth Circuit reversed your dismissal. They held you had abused your discretion because you hadn't tried to use lesser sanctions before you threw the plaintiffs out of court permanently, with prejudice, without hearing the case on the merits.

Again, the Fifth Circuit said that in their circuit 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.

Now, approximately 3 years before reversing you in the toxic tort case—now, I understand you may not have been aware of the Mann case, the one we were discussing before, but about 3 years before reversing you in the toxic tort case, the Fifth Circuit had reversed you on the same legal principle, holding that you had abused your discretion in dismissing another case with prejudice for a discovery violation without any indication that you had used dismissal with prejudice as a remedy of last resort which should only be applied in extreme circumstances.

So, in other words, it wasn't a case that you weren't aware. You may have been unaware in the First Amendment case, but in this case where you really go into the rights of the litigants, you were aware of what the court said because they had reversed you for doing the same thing a few years before.

How would you explain that? Again, is it a case of your personal feelings or a case of not following the law?

Judge PICKERING. Senator, let me discuss the *Reichhold* case first, and it will require some explanation for you to understand the decision that I made. I felt that the *Reichhold* dismissal met the criteria that the Fifth Circuit has set forth for dismissal with prejudice.

The *Reichhold* cases were assigned to me, I think, some 18 days after I went on the Federal bench. There eventually were 10 cases,

and of the 10 cases there were about 4,000 plaintiffs and they ultimately settled for between \$16 and \$20 million. Now, these cases came along during the final stages of that, after a class had been certified for punitive damages, as I recall.

And let me say, Senator, that we are covering a lot of material and I am going back a long time in my memory, and all of my testimony today will be based upon my best recollection of these things.

Chairman LEAHY. Well, now, with all due respect, Judge, I told the Department of Justice before this hearing—I mean, this is not a surprise thing—that I would raise these cases. This is the same Department of Justice where we asked for material in your file and they gave us part of it a few minutes before this hearing, and even then told us we couldn't use it.

So I would assume they are being a lot more fair in working with you than they have been in preparing material for this Committee. I just don't want to leave the impression that this is some kind of a "gotcha."

Judge PICKERING. No.

Chairman LEAHY. I made darn sure, out of fairness to you, that we notified the Department of Justice I was going to raise these cases.

Judge PICKERING. Senator, I got that message about 3 hours before my testimony. Now, again, it was somewhere between ten and eleven o'clock this morning when it was given to me.

Now, again, I am familiar with this and I think I can give you—

Chairman LEAHY. Go ahead.

Judge PICKERING. But I am not like a lawyer arguing a brief where you have got the brief up here and you look at everything to be sure. I am still having to draw from my recollection even if I had remembered it, and I don't want to get in a situation where I did once before and remember something and not have said that this is according to my recollection.

So in this situation, these plaintiffs had been told repeatedly that they had to get some evidence in to show that the damages that were claimed was caused by Reichhold's pollution. They brought forward absolutely—and it wasn't one time; I had continued the cases and given them about three or four extensions, and my impression was that they could not come up with it.

Now, what happened—all of the cases settled except 15, and the 15 that were going up, the plaintiffs' lawyers came in with some evidence on 8 of them. I analyzed the evidence. It was insufficient to establish a cause of action. I dismissed those 7 or 8 on summary judgment with prejudice. The Fifth Circuit affirmed that. Then the Fifth Circuit said the others that I should have sanctioned first.

Senator I had given them ample opportunity at the time. The only thing I had not done—if I had sanctioned the attorney for that, the Fifth Circuit would have affirmed it. I don't like to do that. I had given them three or four times. When it came back to me, then they were given an opportunity to again submit the evidence. They still could not come up with evidence.

These 7 or 8 cases were still dismissed on summary judgment and they were not appealed.

Chairman LEAHY. But, Judge, I understand you are saying you don't like doing it that way, but isn't that the way the Fifth Circuit requires you to do it?

Judge PICKERING. Well, I thought—

Chairman LEAHY. I mean, it is not your personal feelings, obviously.

Judge PICKERING. No. You are right about that, but I thought when I had given three or four that that was contumacious. I had given them three or four times to get the information. They hadn't done it. I thought it met with the criteria. I did not think I had to specifically—I think the Fifth Circuit law—and I think it is broad enough to cover that situation because I had given them time and time again. I said, you have got to get it in. They didn't get it in.

I had given a continuance, saying you have got to get it in. And this was about the third or fourth time that had been done before I dismissed it. The Fifth Circuit said you could do the same thing on summary judgment, and I did, and they had no basis, no evidence to show that these cases had a basis in law. So they were dismissed.

Chairman LEAHY. Judge, out of fairness to the next Senator who will be asking questions, who will be a Republican—we have begun this vote and I think it would be more fair to recess for about 5 minutes so we can all go and vote, and we will come back so I won't have to interrupt during that time.

Senator HATCH. Could I just ask just one thing—

Chairman LEAHY. No. We will—

Senator HATCH. Just to clarify that last point while we are here—

Chairman LEAHY. Well—

Senator HATCH. As I understand it, what you are saying is that in the end you were basically sustained.

Judge PICKERING. That is correct.

Senator HATCH. I mean, so all this rigormarol—

Chairman LEAHY. Well, actually, you weren't sustained.

With all due regard to my dear friend, Orrin, I hope the President nominates you for something and we can ask you the questions.

[Laughter.]

Chairman LEAHY. And you can certainly answer what you did, but in the meantime maybe out of fairness to Judge Pickering, we should allow him to.

We will stand in recess for 10 minutes.

[The Committee stood in recess from 3:22 to 3:33 p.m.]

Senator FEINSTEIN

[presiding.] The hearing will come to order.

I would like to just sort of read the list of Senators in their line here according to the early bird rule. The next Senator will be Senator Thurmond, then Senator Kennedy, then Senators Kyl, Feingold, DeWine, Durbin, McConnell, Cantwell, Sessions, Schumer, and Grassley.

Because Senator Thurmond is not here, and Senator Kyl indicated to me that he had to go to Intelligence—there is a major Intelligence markup today and I would like to just indicate that is

where he is. So we will drop down, then, to the next Republican that happens to be present, who is Senator McConnell.

Senator MCCONNELL. Thank you, Senator Feinstein.

Judge Pickering, as you no doubt are aware, the group People for the American Way has leveled several criticisms against you. The one criticism I found most interesting was its charge that you have been, quote, “promoting religion from the bench.”

Because this organization’s report said that it had, quote, “disturbing evidence,” end quote, of your doing so, I expected to read that you were performing baptisms in your chambers. Instead, the disturbing evidence I found was disturbing to me only in that it is so weak as to indicate a hostility to religion, or at least to any mentioning of it in the public square.

I don’t have time to go through all of this, quote, “evidence,” end quote, so I will highlight a few criticisms that are either radical or disingenuous.

The first piece of evidence is an anonymous quote from the Almanac of the Federal Judiciary that said about you, quote, “He is the judge who concerns me the most. He is a fine person, but he is almost so pious that it interferes with his assignment as a judge,” end quote.

Now, being pious, if that is true, isn’t evidence of anything, other than the fact that you exhibit some moral rectitude. And it certainly isn’t evidence that you are promoting religion from the bench. Frankly, after various instances of Congressmen, Senators, and even Presidents exhibiting lewd and lascivious behavior, I would welcome a little more moral rectitude or being pious.

I note that this organization didn’t bother to mention other comments from the Almanac of the Federal Judiciary about your service, such as “I think he is a good judge, he is a man of high morals, he is a straight arrow, he acts judicial, he is a little stern sometimes, he is a little more formal than some of the other judges are, he has no bias, he is straight down the middle.”

If having high morals, being pious, or being a straight arrow is deemed to promote religion, then we probably have a lot of judges who are promoting religion. So this piece of so-called evidence obviously isn’t persuasive.

As part of its brief against you, this same organization also notes that in your personal capacity, you once said that the Bible should be recognized as the absolute authority by which all conduct of man is judged. Now, even they agree that you weren’t saying that in the courtroom, in your chambers, or in some other judicial or quasi-judicial capacity. You were, in fact, saying this as President of the Mississippi Baptist Convention, as part of your president’s address to that organization at your denomination’s annual meeting.

Frankly, as a Southern Baptist myself, I don’t know what else you would say at an annual meeting of the Southern Baptist Convention, particularly when you are the president. Given that you were speaking on a purely theological matter, in your personal, private capacity, I thought the only thing disturbing about this was that people would seek to hold it against you.

This organization also argues that you are, quote, “promoting religion,” end quote, because you simply suggested to a prisoner that

he might want to avail himself of Chuck Colson's prison ministry. Now, you weren't mandating this or threatening this; you were just mentioning this.

Given the proven success of Mr. Colson's prison programs, I don't think that was at all inappropriate. In fact, Democrat Joe Califano, writing in the Washington Monthly in his article "A New Prescription," noted that a study of New York inmates participating in Chuck Colson's Prison Fellowship Program showed that they were less likely to commit infractions while incarcerated and had a much lower rate of recidivism upon release from prison—only 14 percent, compared to 41 percent of those who did not participate in this program.

Chuck Colson's Prison Fellowship Program works in conjunction with 1,400 prison chaplains across the country. If merely suggesting this program to an inmate out of concern for the inmate is impermissible, then I guess we should no longer have prison chaplains. I don't know. Maybe that is what this organization prefers.

Last, People for the American Way mischaracterizes your use of a one-sentence Bible passage in an opinion. It argues that in this verse you were citing the Bible as recorded law on par with the Supreme Court. This is what People for the American Way said about your reference to that biblical passage.

What you wrote was the following: "One of the oldest recorded codes of law provides: 'the innocent and the just you shall not put to death, nor shall you acquit the guilty,'" Exodus 23:7. That doesn't sound like a radical proposition to me, nor is it placing the Bible as recorded law on par with the Supreme Court.

In fact, it might interest everyone to know that you weren't the first Federal judge to use a Bible passage as part of a legal analysis. It is hard to read, but we have a chart over here and let me just tell you what it shows. It is a biblical passage from one of Chief Justice Earl Warren's opinions, a biblical passage from one of Justice Thurgood Marshall's opinions, and a biblical passage from one of Justice William Brennan's opinions—all radical conservative members of the judiciary, I might say. Each of them used a biblical passage in this fashion. I guess they were promoting religion from the bench as well.

So, Judge Pickering, I find these accusations against you that are based upon your religious activities in your private life, or de minimis religious comments in your public life such as the one just referred to, to be troubling, not because of anything you did, but because they evidence a hostility toward religion by your accusers.

The First Amendment does not command that we eviscerate all mention of religion from public life. We start every day in the Senate chamber with a prayer, and I might add we haven't completely eviscerated religion from our own activities here in the Congress. Given your incredibly low reversal record which we were discussing earlier, less than 1 percent, I have no doubt that you will properly interpret the First Amendment.

So I have no questions, but I wanted to address those accusations myself because I found them really quite incredulous and completely inappropriate in the context of what we are considering today.

Thank you, Senator Feinstein.

Senator FEINSTEIN. Thank you, Senator McConnell.  
Senator Kennedy?

Senator KENNEDY. Thank you very much.

Judge Pickering, I firmly believe that America is never going to be America until we free ourselves from all forms of discrimination, and this has been a continuing battle for this country over a long period of time. I would like, just in the time that I have, to talk with you about employment discrimination and voting rights, and if I have time to just followup on some questions that Senator Feinstein had.

One of the important areas where there has been discrimination—and it has existed in the southern parts of the country, and we have our own problems in Massachusetts, as well, and all parts of the country. We recognize this, but one of the important areas that we have been making some progress is in the area of employment, understanding that if people are not permitted to work, if they are going to be discriminated against in terms of employment, they are not going to be a part of the American economy and not be able to be a part of the American dream.

So we passed the Title VII legislation a number of years ago and it has been one of the most important—it has been challenged and we came back and reaffirmed it in the Ward's Cove case in recent years, so we are solidly committed to that.

The point I want to raise with you is the concern about your singling out the civil rights cases as a place to express your personal views that appear to be somewhat disdainful of the statutory protections against discrimination.

In the employment discrimination cases that I have reviewed, you appear rarely to rule for the plaintiff. In fact, I believe I only found two or three discrimination cases in which you ruled for the plaintiff, and one of those involved a male's claim of gender discrimination, *Green v. University of Mississippi*.

What troubles me beyond the rulings are the statements you made about the perceived problems with Title VII of the Civil Rights Act. In one case, after deciding the case for the plaintiff, you went on to opine, "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 *Johnson v. Southern Mississippi Home Health*, 1996.

In another case where you again could have limited yourself to the facts and law, you went on to comment that, "The courts are not super personnel managers charged with second-guessing every employment decision made regarding minorities." You stated that the case was frivolous and thus helped to discourage employers from hiring protected minorities, in *Seeley v. City of Hattiesburg*.

In another employment discrimination case, you stated that the unfortunate effect of Title VII was to create the expectation that discrimination has occurred in every instance, thus, quote, "creating a tension in the workplace."

Now, while I understand that not every employment discrimination case has merit, I am concerned that in discrimination cases you go well beyond what is required to explain your holding and proceed to express profound skepticism toward these claims. I don't

see that you consistently express this type of disdain for other categories of claims that come before you.

Title VII of the Civil Rights Act has, of course, been recognized by the Congress as one of the most important statutes. More than 10 years ago, we amended it to strengthen its provisions in terms of protecting employees. So I would be interested if you could explain why you express the particular skepticism for cases involving this kind of discrimination.

Judge PICKERING. Senator, first, I would like to address the first issue that you raised which has to do with the number of reversals that I have granted, if I may, and then I will answer the other question.

Senator KENNEDY. All right.

Judge PICKERING. In that vein, I would say first of all that the mechanism that the Congress has put in place is working well. 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. If I am going to grant summary judgment, I have to write an opinion and state why I am granting summary judgment. If I am going to deny summary judgment, I don't have to do that. You can try the case or settle the case, or whatever.

Now, I had my staff go back and look, and of employment discrimination cases, my understanding is that nationwide that most employment cases that get to court are dismissed, again, for the same reason I think I explained just a few moments ago, because of the effective work of the EEOC.

But I had 170 closed cases. I had 68 settled, 51 summary judgment granted, 11 voluntarily dismissed, and 3 tried to verdict. So not nearly half of the cases that actually came to court were dismissed. Most of them either settled or they were voluntarily dismissed or they went to trial.

I have a letter from a female who had an employment case before me. Her name was Mary Baltar and she stated that when she found out that I was going to be the judge that was handling her case that she did not request a jury. She was satisfied to come before me as the judge and jury in the situation, and she assured in there that I had treated her fairly and made sure of that. So I would call your attention to that evidence that should be in the record.

Jim Wade, who is the most prominent attorney in Mississippi handling employment discrimination cases, without solicitation, wrote a letter to the editor saying Judge Pickering is not unfair in the employment discrimination cases. In fact, he wrote an excellent letter endorsing that.

Now, as for the comments, Senator, it is my feeling that whenever frivolous lawsuits are brought that that hinders the good lawsuits. And the lawsuits where I made those comments in were where the case, I thought, clearly indicated there was no basis for this action. It never should have been brought, and I think that is detrimental to African-Americans who have good claims. And I think it does create tension in the workplace whenever frivolous

lawsuits are filed. So that was the reason for the expression of these, no hostility toward enforcing the law. I agree with you that they should be enforced, and I will.

Senator KENNEDY. Well, I understand that the EEOC does important work, but you know as well as I do it is vastly overburdened, and in many instances it takes such a profound period of time that people go on into the courts. These are legitimate cases which are brought.

I will go back to see whether these were cases that were brought before the EEOC and ruled on in the EEOC and then were brought to the courts. But the fact is, with the length of time, failure to complete all of its—all of us know that the delay in that form of consideration is significant. I just noted that you were willing to make comments about this particular aspect of employment discrimination which you hadn't made with regard to other forms.

To move on to voting rights, I know that you answered some questions on the issue of voting rights, and you also talked about the changes that have taken place in Mississippi. You pointed out in response to a question that in the Mississippi Senate, in the 1970's, you supported the larger multi-member districts that served to submerge the black vote. You also voted for the open primary bills that sought to dilute the black vote by abolishing party primaries, and also the "plurality win" feature of the State's general election.

The open primary legislation was prevented from taking effect twice because the Justice Department objected because it was discriminatory against African-Americans. At that time, the Democrats were working to exclude the African-Americans, as well as the Republicans. I mean, that is the history. I remember very well that time. I remember the convention in 1964 and the group that came on in to represent the Democratic Party and their designation. I have some memory of this. It was done by Democrats, as well as Republicans.

In 1975, you voted for a resolution that would repeal Section 5 of the Voting Rights Act. So this is the series. There is a confluence of different actions that many believe were carefully designed in order to exclude the black vote here. And the most important, I think, was Section 5 of the Voting Rights Act, which, of course, is the important provision that requires pre-clearance for voting changes.

We had seen two instances where the Justice Department actually turned down requests by the State previously, but you voted against that, and that is in the mid-1970's. And I am just wondering, as we are coming into these issues on voting—and we have gone through this last election with the concern people have about whether their vote counts.

Another issue: on one person, one vote, you considered a case involving one person, one vote, in association with a county's supervisor's election where the districts were drawn pursuant to a redistricting plan that had a 25-percent deviation—*Fairley v. Forrest County*. Your opinion included a lengthy discussion in which you characterized this deviation as a de minimis variation in terms of voter influence, and this even though the Supreme Court has char-

acterized districts with lower population variations as not de minimis, but as posing constitutional problems.

You suggested in this case that even when an apportionment plan is unconstitutional, ordering new elections would cause courts to be more obtrusive into matters that under our Constitution should be discharged by others—elected officials and legislative bodies. So you continue to express skepticism of the one person, one vote principle, stating “It is wondered if we are not giving the people more government than they want, more than is required in defining one man, one vote, too precisely. Nevertheless, this court is bound to follow the precedents established by prior controlling judicial decisions.”

Now, you said you believed that a 25-percent variation was de minimis because the actual influence of each voter on the outcome of an election is almost infinitesimal. In *Reynolds v. Sims*, the Supreme Court quoted an earlier case that said, “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which as good citizens we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily bridges this right.”

Given the values that are at stake here, why would you not seek to give the maximum protection in protecting voters’ right in that case?

Judge PICKERING. Senator, that was the Fairley case that you are talking about. To the best of my knowledge, I have handled four voting rights cases. None of them have been appealed.

Now, it is true in *Fairley* that I did discuss the history and the background of the Voting Rights Act. And, Senator, I have had to review so many cases, but I would like to say my recollection of that case is that the deviation was 25 percent and I said that is unconstitutional, and the parties agreed to that.

The issue in that case was not whether the districts were properly—it was whether there would be a special election, and I think most of the circuits have agreed that we did not—that that was not required. I did not require that.

Now, the named plaintiff in that case, Mr. Fairley, has written a letter in my support saying that he felt that after the decision was rendered that they didn’t appeal it and they didn’t feel like it was unfair. His brother, who was president of the NAACP, who was instrumental in bringing it, has likewise endorsed by candidacy.

Now, my impression is that a 16-percent deviation is unconstitutional. That is what I understand the Supreme Court to be. Now, the obtrusiveness, a number of judges have written about. When we are forced as judges to go in and draw districts, we are doing that which legislatures should do. And to that point we are being obtrusive in that we—to provide constitutional protection, we are having to do what the judges shouldn’t have done, and that is obtrusive.

But the 25-percent I did not find to be de minimis. I did raise some question about the fact that, for instance, my precinct was put in with another county and I would personally prefer to vote

in my own county even if there was some deviation. But that is not the law and I will follow the law.

Senator KENNEDY. My time is up.

Senator FEINSTEIN. Thank you very much, Senator Kennedy.

Senator SESSIONS, you are next on the early bird.

Senator SESSIONS. Thank you.

So you are saying, Judge Pickering, that the plaintiff in that case who was seeking a civil rights remedy has written a letter in support of your nomination saying that they were treated fairly in that case?

Judge PICKERING. Yes, that is correct.

Senator SESSIONS. Well, I think that is more important than some of these groups that are trying to make this nomination a show here. The person who filed the lawsuit, who tried the lawsuit, who sought relief, was satisfied with the relief and supports the nominee. I think that is important.

On this Dahmer case—is that it, the Klan case?

Judge PICKERING. Dahmer.

Senator SESSIONS. Dahmer, yes.

Judge PICKERING. Mr. Vernon Dahmer.

Senator SESSIONS. Dahmer.

I wanted to get it quite correct. This was in the 1960's. You were asked to testify as a character witness against him, not a fact witness, when you have no choice about that, basically. But you were asked to give your opinion of his character and you agreed to go and testify against him and say he was a bad character. Is that correct?

Judge PICKERING. I did. I think there were two or three people in Jones County that they contacted. I think one of them was a banker and one of them was me, and I agreed to testify and they subpoenaed me to do that.

Senator SESSIONS. Did the others testify?

Judge PICKERING. Well, I think there was only one other one. There were many law enforcement officers they didn't ask.

Senator SESSIONS. Well, I was going to ask that. I thought it was interesting that you were asked and thought to be a person who might be willing to testify against a Klan leader. Did that indicate that your reputation in the community and your feelings about this Klansman were known and that you disapproved of them? Did they probably know that when they asked you to testify?

Judge PICKERING. Well, it was known because I had issued statements condemning the Klan activity. And in addition to that, I had attended the FBI briefings and meetings where they were trying to solve civil rights violations not only in Jones County, but in neighboring counties and nearby counties.

I think there were probably some 90 FBI agents that were assigned to work in that area, and frankly if they had not been assigned there, we would not have solved those problems.

Senator SESSIONS. And you had five individuals that I got to talk with earlier who are here on your behalf, three African-Americans, and I asked them this question and they all answered the same way.

I said, with regard to Judge Pickering, during the 1960's when so much tension and turmoil and violence and hatred was afoot,

was he a force for good in the community? Was he a force for progress and change, or was he a force against change and progress? And they all said, without hesitation, you were on the right side; you were a force for progress and change. And I think that is more important, those people who know you, grew up in the community with you, than some of these people that are putting out words and messages on the television and in newspapers who really don't know the facts about it.

It was curious to me that it was suggested that somehow you performing badly to have 26 reversals out of 4,000 cases. I suspect, in your opinion, the court of appeals was wrong on some of those reversals. They could have been, couldn't they?

Judge PICKERING. Well, they have the last say. Whether I agree with them or not, I have to abide by what they say.

Senator SESSIONS. Well said, Your Honor. That is true, spoken like a good district judge.

You indicated that of the cases that went up, you had a 93-percent affirmance rate, you think?

Judge PICKERING. In that range, yes.

Senator SESSIONS. And all 4,000 don't go up?

Judge PICKERING. No, no, no.

Senator SESSIONS. But if somebody feels wronged and they think the district judge clearly was in error, they will take that case up, will they not?

Judge PICKERING. They will.

Senator SESSIONS. And if they don't feel like they are wronged, they generally won't take the case up. So the first decision on whether a party has been wronged in a case they have to make themselves before they decide to appeal to the higher court.

Judge PICKERING. If they don't take action to appeal it, the end of it is in the district court.

Senator SESSIONS. Well, I would just say that just because your case wasn't appealed—I mean, that is an indication of its validity in itself, would it not be?

Judge PICKERING. I would think so, in most instances, not in every one.

Senator SESSIONS. And on the prison case, there is some very complex law in prison litigation. This Congress has improved, I think, the law in some regards, but magistrate judges around the country do handle those cases at the first level.

Judge PICKERING. That is correct.

Senator SESSIONS. And you indicated they really develop a high degree of expertise in these cases, do they not?

Judge PICKERING. They do.

Senator SESSIONS. And when a magistrate judge has reviewed a case and cites the authoritative law and it comes across your desk, you have the final say. It is your final decision whether to affirm it or not affirm it.

Judge PICKERING. That is correct.

Senator SESSIONS. But you don't—

Judge PICKERING. Senator, I might add in that respect that I looked back to see if my prison litigation reversal rate was any worse than the rest of my reversal rate. It is not. In fact, it is better. The percentage of my cases that were prison litigation was

about a third, about 33 percent, and the percentage of my reversals that were prison cases was about 25 percent.

Senator SESSIONS. The magistrate judge does the research, does the facts and sets out the law, and you review it and see if anything strikes you as improper. But you do tend to give deference to the opinion of the magistrate judge, do you not?

Judge PICKERING. I consider that they are sort of the experts in the area and they have more knowledge. But, again, the buck stops with me and I have the responsibility. Now, sometimes what will happen is the magistrate judge will make a recommendation and after the magistrate judge has made a recommendation, the pro se plaintiff will come before me and he will argue something different than he argued before the magistrate judge. And if that happens, I generally send it back to the magistrate judge and ask him to look at the issue again.

Senator SESSIONS. With regard to the suggestion that you abused your discretion in one of the reversals by the court out of those just 26 cases, of course, I think people ought to know that that is a standard basis for reversal. Trial judges are given certain discretion and they exercise it the best the Lord gives them the ability, and when a judge upstairs decides not, the holding is you abused your discretion. It is not like you committed a crime, is it?

Judge PICKERING. That is a term of art.

Senator SESSIONS. Yes.

Judge PICKERING. And unless they make that finding, they can't reverse me.

Senator SESSIONS. I don't think we ought to make too much out of the fact that a court, in a few cases out of 4,000, said you abused your discretion.

I know Senator Kennedy is concerned about employment discrimination cases. I haven't seen anything in your comments that suggests to me a lack of willingness to enforce those fairly, but you just indicated, I believe, that Attorney Jim Wade, who does more of those probably than anybody in the State, a plaintiff's lawyer—is that right?

Judge PICKERING. He is a plaintiff's lawyer.

Senator SESSIONS. He wrote a letter to the newspaper in your behalf?

Judge PICKERING. He did.

Senator SESSIONS. Defending you on those cases?

Judge PICKERING. He did. He said that the charge that I was not fair in employment cases was not a charge that stuck. He said he felt that I was—was very complimentary of my handling of employment cases.

Senator SESSIONS. With regard to the fact that you had a number of unpublished opinions, I find that a most curious complaint. In 1964, the Judicial Conference of the United States, which includes the Chief Justice and the chief judge of each circuit court of appeals and a district judge from each circuit, passed the following resolution: "Resolved that the judges of the courts of appeals and district courts authorize the publication of only those opinions which are of general precedential value, and that opinions authorized to be published be succinct."

Is that your understanding of the court's view about publishing too many opinions?

Judge PICKERING. The Judicial Conference of the United States and the Judicial Conference of the Fifth Circuit both have discouraged district courts publishing opinions. And the circuit court of appeals' Federal Rules of Appellate Procedure—or the Federal Judicial Center Judicial Writing Manual says this: "Because decisions of district judges are merely persuasive authority—i.e., they are not binding precedent even in their own districts—publication should be the exception."

The truth of the matter is that the appellate courts only publish about 20 percent of their opinions. And I published about 8 percent of mine, and it has been mentioned 15 of the reversals were not published. So publication should be the exception rather than the norm.

Senator SESSIONS. Well, I think that is exactly correct. I remember when I graduated from law school, we checked on this. The F. Supp., which carries the district court opinions, issued 15 volumes that year. In the year 2000, it was 52 volumes. So you have this plethora of opinions piling out there that provide little guidance, and I think judges would do well to restrain themselves and not publish their great works of literature. And I don't think you should be criticized for not publishing too many opinions.

Judge PICKERING. Well, I must confess that that was one that was an indication or implication that questioned did I have something to hide. I was shocked when that issue was raised because I thought I was doing what I was supposed to be doing, and I really thought that it was an indication that I didn't have to see my name in lights or in print every time that I rendered a decision. I thought I was doing the right thing.

Senator SESSIONS. You were doing the right thing, but what I have learned as you watch this process, Judge Pickering, is that the experts who are trying to make your record look bad, they know that if they say you had 26 reversals and you had all these unpublished opinions that that will, for the uninitiated, sound bad and put a certain cloud there.

I think that is not fair and it is not legitimate, and I am glad the chairman has given you an opportunity today to have your say and explain some of it.

Judge PICKERING. Senator, I must confess when I——

Senator FEINSTEIN. Thank you, Senator Sessions.

Senator Feingold?

Senator FEINGOLD. I thank the Chair.

Judge Pickering, it has been good to hear your statement in which you covered a number of issues, and also your answers to questions about issues that have largely been the ones that have already publicly been associated with the question of your confirmation.

I would like to get into a couple of other matters. As Senator Hatch mentioned, the Committee has received really quite a large number of letters in favor of your nomination from Mississippi. It is an impressive outpouring of support from people who know you, and I congratulate you on that, but I would like to ask you about some of the letters.

We count at least 18 letters from members of the bar in Mississippi who have appeared before you during your time as a U.S. district judge. All of these letters are dated either October 25 or October 26, and they were all faxed to Washington from your chambers in Mississippi.

Can you tell me how you came to obtain these letters?

Judge PICKERING. Yes. Senator, I knew of no opposition to my nomination that had been pending since May, sometime in May of last year, until 2 days before I came for my hearing on October 16th. Well, when I came and the opposition came and they wanted to produce the unpublished opinions and I started producing those, it was obvious that there was some opposition somewhere. So I contacted individuals and told them if they felt inclined to write letters, or else I had someone else on my behalf contact them at that time.

And if you will recall, Senator, that was at the time of the anthrax scare and mail wasn't going through.

Senator FEINGOLD. I do recall.

Judge PICKERING. So if we were going to get it to you, the only way we could get it to you was fax it.

Senator FEINGOLD. This certainly isn't a criticism of faxing.

So you have said that you have asked these lawyers to write letters in support of your nomination?

Judge PICKERING. Yes. I didn't tell them what to say.

Senator FEINGOLD. Did you ask present or former litigants, parties in cases that you handled, to write such letters?

Judge PICKERING. Some.

Senator FEINGOLD. Did you request that they send the letters to you, to be forwarded to the Committee?

Judge PICKERING. That was the procedure that was suggested because that was the only way that we knew to get them here and to get them through the anthrax.

Senator FEINGOLD. Did you review the letters before you forwarded them?

Judge PICKERING. Most of them.

Senator FEINGOLD. How many attorneys did you ask to submit letters?

Judge PICKERING. A lot less than you have, because there were—and some of this—I would ask one attorney; they would ask another attorney. Sometimes, other people would call on my behalf, but I would say 20 to 25 percent of them probably came—Senator, I started—I had three major surgeries last year from the time the President nominated me until I came.

And one of the things that was real touching to me was one morning I was being discharged from the hospital after my second surgery. There was an African-American lady who came in the room. My baby daughter was there. And she was a real exuberant person and she had been before me and I didn't remember at the time. Her name is Nora Jones and you have a letter from her that was filed just recently.

It was touching to me, with my family there and at a time when I was sort of down. She said, I am president of the Charles Pickering fan club. She had been before a judge in New Orleans that was African-American. She had lost. She came before my court. I

felt like she was not being treated fairly. I let that be known. She was able to get her life back together and settle it. Yes, I have some letters from folks like that who have been before me.

Senator FEINGOLD. I certainly appreciate that comment. I just want to know if you received any letters that you did not forward to the Committee that you reviewed.

Judge PICKERING. The letters, I think, have been forwarded that I received.

Senator FEINGOLD. You forwarded all the letters that you received?

Judge PICKERING. Yes.

Senator FEINGOLD. Are you aware of attorneys who you asked to—

Judge PICKERING. Let me—I forwarded them to the Justice Department.

Senator FEINGOLD. There were no letters that you reviewed that you chose not to forward?

Judge PICKERING. No. I forwarded all letters that I received.

Senator FEINGOLD. Are you aware of attorneys who you asked for recommendations but who declined to provide them?

Judge PICKERING. I am not aware of any. I am not saying there are not—well, there were a couple that said they were going to write letters that later came back and said that pressure had been put on them and that they would rather not.

Senator FEINGOLD. Well, I want to be clear. I am not questioning at all the sincerity of these letters. I would just like to ask you, do you see how this situation can perhaps create an appearance of coercion, given the fact that these individuals appear before a district judge, your being directly involved in reviewing the letters?

Judge PICKERING. Senator, a lot of these lawyers have never been before me. They know my reputation. For instance—

Senator FEINGOLD. I assume some have, though.

Judge PICKERING. Some, oh, yes, absolutely.

Senator FEINGOLD. And certainly some of the litigants.

Judge PICKERING. Absolutely.

Senator FEINGOLD. Let me ask you about a different matter. Let me first of all say that I was moved by the account by Senator McConnell and yourself of the testimony you gave in the 1960's with regard to the KKK. And I think that is an important story for the Committee to hear, but let me ask you about another matter from about that time.

As I understand it, about 2 weeks after the Democratic Convention of 1964, you resigned from the Democratic Party and became a Republican. You had every right to do that, of course, but I would like to ask you about the circumstances of that party switch and some of the things that you actually said at the time.

As I am sure you recall, the summer of 1964 was known as the Mississippi Freedom summer. After decades of discrimination, African-Americans across the State attempted to register to vote, and in particular to participate in the precinct, county and State conventions of the Democratic Party to help select delegates to the Democratic National Convention.

There was violence in Mississippi that summer. For example, that summer was when civil rights workers Goodman, Chaney and

Schwerner were murdered. African-Americans were discriminated against and excluded from participation in the regular Mississippi State Democratic Party processes. This included such tactics as canceling precinct meetings, denying African-Americans entry to meeting halls, and preventing them from voting in party meetings. The regular State party delegation to the convention was, in fact, all white.

During that summer, black Mississippians formed the Mississippi Freedom Democratic Party and elected an alternative slate of delegates to the convention. The two slates each claimed the State seats at the convention, and testimony was taken by the convention's Credentials Committee, including, of course, the riveting testimony from Fannie Lou Hamer, who described some of the discrimination that had occurred.

A compromise was suggested by President Johnson under which the regulars would keep their seats, the Mississippi Freedom Democratic Party would get two at-large seats, and the State party would pledge to support the national ticket and to eliminate discrimination in future delegate selection. Neither State party agreed and the regular State party delegates walked out of the convention.

Now, despite the clear discrimination against African-Americans in the party process, the regular party delegates and their supporters felt that they had been the victims of humiliation and mistreatment. For example, your law partner at the time, Lieutenant Governor Carroll Gartin, who was a delegate to the convention, accused President Johnson of, quote, "master-minding the insults," unquote, against the State at the convention and urged voters to vote for Barry Goldwater.

About 2 weeks later, you announced your shift from the Democratic to the Republican Party. According to the local newspaper you stated that, and I am quoting here, "The people of our State were heaped with humiliation and embarrassment at the Democratic Convention, and this has convinced me beyond any doubt that Mississippians do not now and will not in the future have any useful place in the National Democratic Party," unquote. The Republican Party, you claimed, was, quote, "our only hope of rescuing our national government from an ever-increasing tendency toward socialism," unquote.

Can you explain what you meant by the statement that, quote, "The people of our State were heaped with humiliation and embarrassment at the Democratic Convention?"

Judge PICKERING. Senator, a couple or three comments. First, as I have indicated a few moments ago, I certainly recognize the difference between political decisions and political statements and judicial decisions.

We are also looking back at a time from the perspective of 2000, looking back to a situation that was 1964. When I called Governor Winter today, whom I mentioned to you as one of the most respected figures on race relations in the State, he was talking about the fact that Carroll Gartin was a progressive leader of that time.

I don't know of any of the State leaders at that time who would not have made similar statements. Senator Eastland, Senator Stennis, just did not go to the Democratic National Conventions. The issues that were presented were issues that would not have al-

lowed them to be elected in Mississippi. So I would say that that statement had to do with the perspective of those times and that it was a political decision.

Senator FEINGOLD. Were you aware at the time of these events of the efforts to prevent African-Americans from participating in Democratic Party politics?

Judge PICKERING. Senator, I have always felt even before then that African-Americans should have been allowed to vote, but they were not voting. They had not voted and many counties did not allow them to vote. I had never taken any part in prohibiting them from voting.

Senator FEINGOLD. But were you aware of the tactics that I have mentioned earlier in my statement that were being used against African-Americans?

Judge PICKERING. The Voting Rights Act, I believe, was passed in 1966, which would have been—

Senator KENNEDY. 1965.

Judge PICKERING. 1965. The Civil Rights Act, I think, was passed in 1964.

Senator KENNEDY. 1964, 1965, 1967.

Judge PICKERING. Right, right. Things were changing drastically at that time.

Senator FEINGOLD. But the things I mentioned happened no later than 1964. I am just asking if you were aware of these tactics that were being used against African-Americans.

Judge PICKERING. I was aware that they were not voting, that they had not voted, and I was aware some counties were more progressive than other counties were in allowing African-Americans to vote.

Senator FEINGOLD. Let me ask you this: Do you recognize that the activities of the Mississippi Democratic Party at the time were discriminatory and unconstitutional, and do you have any regrets about the statements you made concerning those events?

Judge PICKERING. Well, I certainly would not make those statements today.

Senator FEINGOLD. Do you regret them?

Judge PICKERING. Yes, sir.

Senator FEINGOLD. Thank you, Madam Chairman.

Senator FEINSTEIN. Senator Specter, you are next up.

Senator SPECTER. Thank you, Madam Chairman.

Judge Pickering, you have said that you will follow the law on *Roe v. Wade* even though it may be against your own personal views and predilections. Can you cite other situations where you have followed the law where you had personal views which were contrary to the established law, but yet you followed the law?

Judge PICKERING. Followed the law, yes, Senator. I mentioned one of those, which was in the ERISA area, in my opening statement that I very much—I disagreed with what the Federal courts have done to ERISA, to the degree that I wrote 35 pages of explaining why I thought they had interpreted it wrongly, but I followed the law.

In another case that I specifically recall that I did that, there was an employee—it was a labor relations case, the Federal Arbitration Act, and the employee definitely had not carried out a work

order and that is why she had been terminated. She didn't follow to carry out a work order.

Well, the arbitrator had found in her favor, and I affirmed that even though I thought the factual basis was not in the record. But I reasoned that he could have concluded that had she had an opportunity—if the matter had not degenerated into an argument that she would have carried out. So I felt like I have stretched to follow the strong law that the arbitrator's decision bargained for, not a judge's, and I upheld that.

And another issue in that particular case was they made a public policy argument that she had attacked an administrative judge and that she had emotional problems. That was the issue, but they had worked her for 8 years. So even though they urged me on a public policy basis to reverse the arbitrator's decision, I said they worked her for 8 years, they are estopped from coming here now and arguing before me that she was a danger to them, because if she was they had worked her, so they had waived that.

So those are two instances where I disagreed with the law that I followed the law. I have also—as I testified earlier, there have been a number of cases where I have protected—for instance, I haven't had an abortion case, but I have protected sexual privacy rights in other cases and I went over those a few moments ago, one of them involving an apparent lesbian relationship. Another one involved a homosexual.

Senator SPECTER. And those were holdings or conclusions in accordance with established law which were counter to your own personal views?

Judge PICKERING. I didn't say that. I said that I—you had asked about the abortion issue.

Senator SPECTER. I know you didn't say that. I am asking you.

Judge PICKERING. No, no. My personal—the issue, Senator, is, as I see it, not my personal view on any of those issues, but it is whether or not I followed the law, and I did in those cases.

Senator SPECTER. Judge Pickering, there is concern that although you say you will follow the law that at the margins where you have some area of discretion that your own personal predictions will come into play.

What would your view be on that? What assurances could you give that on the cases at the margins that you will follow the intent behind the decisions?

Judge PICKERING. Senator, I think in a situation where there was not a clear situation that I would look at the controlling precedents and I would look at the—if you don't have a clear place, then I think you go back to the statute and if the statute is very clear, of course, you follow that. If not, you look at the legislative history and you try to—I have—one of the criticisms that I had in the ERISA case about the Federal court interpretations is that Congress in that case made a very clear statement of what their intent was in passing that bill. And yet I felt the Federal courts ignored congressional intent in that. I think congressional intent is important.

Senator SPECTER. Judge Pickering, you have cited your testimony against the leader of the Ku Klux Klan and your having attended meetings where the FBI was investigating civil rights violations.

Can you cite other instances in your career, either on the bench or off the bench, where you have been an activist in support of civil rights?

Judge PICKERING. Well, my children in the early 1970's when the public schools were integrated—we were part of the integrating process. My son would bring home when he was playing football two friends, one African-American and one white, and my wife would feed them a steak.

I had not contacted him for a letter of support and 2 days ago he called me and said—wanted to know if he could do anything. And he wrote a very moving letter in which he said, you all made me feel like a member of your family. So we integrated the schools, integrated the dinner table.

When I was chairman of the Republican Party, I solicited and sought invitations to speak to the State NAACP. I hired the first African-American field man, who is here on my behalf, and he likewise—I did not ask for his letter of support. He came through Jackson and he saw that I was being opposed and he called me and said, I want to help. And he, unsolicited, sent a letter to Senator Leahy and he is here today. He reminded me of things that went on during those days that I had forgotten in his letter.

As president of Mississippi Baptists, for the first time in 1983 when I was there we had an African-American pastor address our convention. That is the first time that had been done. In 1988 and 1989, I chaired a bi-racial, bipartisan group trying to promote better race relations in my home county of Jones.

In the 1990's, my son-in-law was a faculty adviser for Sigma Chi fraternity. Chip and I both were Sigma Chi's. There was an African-American who was trying to gain admittance to Sigma Chi. He was being black-balled. We discussed it. Chip flew down from Washington, addressed the chapter. We integrated the Sigma Chi chapter at Ole Miss.

In 1999, I wrote a lengthy article that was published in the Clarion Ledger, "Racial Harmony Requires Commitment." And within the last couple of years, at the University of Mississippi, the Institute for Racial Reconciliation was created. I had written a private letter to the chancellor—

Senator SPECTER. Mr. Pickering, I am reluctant to interrupt you, but I would appreciate it if you would supplement your answer because there are a couple of other questions I want to go over with you.

Judge PICKERING. That was the last one.

Senator SPECTER. OK, we are on the same wavelength.

In reading your opinions, Judge Pickering, I have noted a curious ambivalence. The citation has been made to the Fairley case on the obtrusive language, but the full context says, quote, "When courts perform their responsibility and determine that constitutional criteria are not satisfied, and that an apportionment plan is unconstitutional and order new elections, the courts are being obtrusive into matters that under our Constitution should be discharged by others—elected officials and legislative bodies."

Now, in the dependent clause you say courts are discharging their responsibility on unconstitutional apportionment plans and ordering new elections, and then you say that they are being obtru-

sive into matters that under our Constitution should be discharged by others. So, on one hand, you say they are doing their job under the Constitution, and then you say under the Constitution the matter ought to be decided by others.

Because the red light is about to go on, let me cite another instance where—I don't think it is schizophrenia, but it is a little ambivalence, at least. In *Citizens Right to Vote v. Morgan*, which was a bonding case whether voting rights were violated, you say, quote, "This case is simply another of those which demonstrates that many citizens have come to view the Federal courts as potential solutions for whatever problem comes along. I fear Federal courts have fostered such a notion over the years. Government by court decree is a poor substitute for government by the people. This case is nothing more than a political struggle between those who want an election on a proposed bond issue and those who do not want an election."

Now, it is curious to me that you want to be a Federal judge, Judge Pickering. Of course, you are a Federal judge, but that you want to be an appellate judge because here you are really saying the courts have no business in this, and here you are in the business of having no business in deciding all these cases.

And in the earlier citation, it is hard to follow your reasoning on saying the courts perform their responsibility when something is unconstitutional, but the courts are obtrusive in the matters that under our Constitution should be discharged by others.

What is going on here, Judge Pickering?

Judge PICKERING. Senator, perhaps I could have been clearer in that area, but that is—Federal courts—the jurisdiction is very plain. We are courts of limited jurisdiction. We are not to get into any case that we don't have—that is not granted to us. And over and over, the Federal courts have held that we are courts of limited jurisdiction.

Now, by obtrusive what I intended to convey—and perhaps I didn't do it as well as I could—is that that is the legislature's job. And when they fail to carry out theirs, then we must; yes, we must move in to protect constitutional—and from the standpoint that it is our responsibility, yes, but it is because we are having to get into something that should have been done by the legislature. That was my intent, Senator, in that area.

And in the—

Senator SPECTER. There seems to be quite a strain in your opinions, and there are a lot of them on the record, as well as those that are unpublished, of ambivalence of upholding what you think is the constitutional law, but then sort of decrying the presence of the court to have to decide matters that you would really prefer should be decided by the legislature or somebody else.

Judge PICKERING. Senator, in the *Citizens Right to Vote* case, that was a group of wealthy land owners trying to avoid a bond issue so that—trying to avoid raising their taxes. And they were using the Voting Rights Act to do that and I thought that was an improper use of the Voting Rights Act.

Senator SPECTER. Thank you very much, Judge Pickering. Thank you.

Senator FEINSTEIN. Thanks, Senator Specter.

Senator Durbin, you are next.

Senator DURBIN. Thank you very much, Madam Chair.

Judge Pickering, thank you for returning. This hearing has become a painful recollection of America's past and the civil rights movement. Because you are from Mississippi, in your early days as a professional, as an attorney, as a legislator, elected official, you lived through some historic moments. And I hope you understand the nature of our questions is to explore what happened during that period of time, but more importantly how you feel today.

The appointment you are seeking is a lifetime appointment and it is a very valued appointment. I recall the experience that former President Clinton had in seeking to fill vacancies in this particular circuit court of appeals.

As has been said before in the hearing, this particular circuit has the highest minority population of any in the country. President Clinton proposed four nominees to fill circuit vacancies during the period when the Republicans controlled the Judiciary Committee. One was confirmed, James Dennis, by a voice vote in September 1995. Three others were not even given the courtesy of a hearing, the courtesy that has been given to you.

The troubling thing is that all three were minorities. Alston Johnson, an African-American; Jorge Rangel, a Latino; and Enrique Moreno, another Latino, were not given the courtesy of a hearing before this Judiciary Committee when President Clinton sought to fill these vacancies. So I hope that you understand the historic context of this Committee as this hearing is underway.

We have heard from Senator Hatch that there is an effort to change the ground rules. Well, I certainly hope we do change the ground rules. I certainly hope that every nominee of any President is given a respectful opportunity to present their credentials, and I hope you believe that that has been given to you.

Let me address the Sovereignty Commission for a moment because I have followed your testimony and there is one part of it that I just don't understand.

You have said today when asked why any contact was made with the Sovereignty Commission over the Gulf Coast Pulpwood Association in Laurel, Mississippi, and the Masonite Corporation strike that you were concerned about violence by the Ku Klux Klan in that union and in that strike.

The thing that troubles me as an outsider who has tried to study a little bit on this is it would seem that the Sovereignty Commission of the State of Mississippi would be the very last place that you would go if you are worried about violence and the Ku Klux Klan. By its very charter, by the fact of its creation with *Brown v. Board of Education*, the Sovereignty Commission was certainly not created to police the Ku Klux Klan or violence by those with racial beliefs. From what I have read, it was created to basically assert State sovereignty over Federal rights, particularly after *Brown v. Board of Education*.

Why would you think that the Mississippi Sovereignty Commission was the right agency to approach if you were fearful of Ku Klux Klan violence in your hometown?

Judge PICKERING. Well, they were making an effort, in my impression, to change from what they had been doing in the law en-

forcement. And the gentleman who was head of it—or not the gentleman who was head of it—the man that I was introduced to was introduced as a former FBI agent.

Senator DURBIN. So you believe that rather—you were a State Senator at the time, is that correct?

Judge PICKERING. Well, I think he would have—I felt at the time, Senator—and, again, we are looking at things through the perspective of 2001 as to then, but at the time I thought if there was some indication of violence that was coming up, yes, that he would have information on that.

Senator DURBIN. So as a State Senator, it was your belief that rather than go to the Governor or the attorney general or law enforcement if there was a fear of violence from the Ku Klux Klan, the appropriate place to turn was the Mississippi Sovereignty Commission?

Judge PICKERING. Well, the Governor was on the Sovereignty Commission at that time.

Senator DURBIN. So you believed this was the right place to go to enforce those laws?

Judge PICKERING. Senator, if I were making that decision today, I would not make the same decision that I made then. At the time, I thought that was the best place to—and, again, Senator, I have very little recollection of this. My impression is that it was a casual conversation; that, you know, I think he probably overstated somewhat in trying to keep their agency alive that here there were three legislators that were vitally interested in what he was doing.

My recollection of it, and it is very vague because I did not remember it when I was here before, is that he said, we have got some information in that area. And there was a casual thing: well, if you find out anything, let me know, or something to that effect.

Senator DURBIN. Well, I know that you have probably read the letter which has given rise to these questions which mentions your name.

Judge PICKERING. Yes.

Senator DURBIN. And as I read this letter, I find the Sovereignty Commission calling people who were in labor organizing communist, referring to Mr. Evers and his family as being somehow involved in these outside agitators and infiltrator plots. It just doesn't seem like the right place to turn.

Let me ask you about your former law partner and a person whose name has come up twice today, Carroll Gartin. You said in your opening remarks, and I don't want to misstate your remarks, that either you believed that Mr. Gartin was not a racist or Governor Winter would have believed that Mr. Gartin was not a racist. I will give you an opportunity to clarify that. Then you went on to say, in response to Senator Feingold's question, that someone would have characterized Carroll Gartin, your former law partner, as a progressive leader.

I have here some advertising from Mr. Gartin's campaign in 1959 for lieutenant Governor. It shows a picture of Mr. Gartin and it says at the top, "With this pen, I signed our State's segregation laws and the right to work bill, and with this pen I will veto any effort to weaken our defenses around our Southern way of life."

He goes on to say, "I am a total segregationist. I will close any public school in Mississippi before allowing Federal courts to mix black children with white children. I helped plan and pass the legislation which has maintained successful segregation to this date."

Then after he became your law partner, again when he was a candidate—

Judge PICKERING. When was that? What year was it?

Senator DURBIN. This was 1959,

Judge PICKERING. 1959.

Senator DURBIN. And then in 1961, I believe, you affiliated with him in a legal relationship, partnership. Was 1961 the appropriate year? Is that right?

Judge PICKERING. Yes.

Senator DURBIN. Then in 1963 when he was a candidate, again we find comments by Mr. Gartin: "I am a firm believer in segregation. As lieutenant Governor, I worked for the passage of every law and every program designed to preserve segregation in all phases of life. This I shall continue to do."

I don't doubt the fact that life has changed in America and life has changed in Mississippi, but can you sit there today and tell us that these are the words of a man that you had characterized as either not a racist or as a progressive leader?

Judge PICKERING. Senator Durbin, the statement that I made about—

Senator FEINSTEIN. Could you speak directly into the microphone, please?

Judge PICKERING. Yes. I am sorry, Senator.

Senator FEINSTEIN. You may have to pull it toward you and pull the mike down a little.

Judge PICKERING. I have gotten a little weary and I leaned back. I apologize.

Senator DURBIN. You are entitled.

Judge PICKERING. Senator, the statement that I made about being progressive was a quote that I gave from my conversation with Governor Winter this morning.

Senator DURBIN. Do you believe it?

Judge PICKERING. That he was—that I believe he was progressive?

Senator DURBIN. Yes.

Judge PICKERING. Governor Gartin was defeated by Ross Barnett, who was a segregationist Governor who was viewed as being the one—Carroll Gartin made statements that I do not agree with, do not subscribe to. There was no politician in the South during the 1950's and the early 1960's that held office—even William Winter, who is the most respected civil rights leader, he would have taken similar statements, I think, during that period of time. It is not right, no, but it recognizes the reality of where they were at that particular time.

Senator DURBIN. But on reflection today—I am trying to get your state of mind today. I know the world has changed, but as you look at what was said in those days, can you honestly say that Mr. Gartin was not a racist and was a progressive leader? Do you believe that?

Judge PICKERING. Well, the statements that he made certainly are statements that I would not agree with, that I would not subscribe to today, that were wrong.

Senator DURBIN. Were they racist statements?

Judge PICKERING. They were racist statements. Now, he—I think Carroll was trying to move the State forward as much as he could and be involved in politics, and I think that is what Governor Winter was saying in his statement when he said that Carroll Gartin was viewed as a—the segregationist candidate was always recognized as being Ross Barnett. He was sort of the same rhetoric as was Governor Wallace and the reason Carroll Gartin was defeated.

So you are correct. Those were racist statements, without any doubt, but his philosophy and what he was trying to—would have been not to have been as radical as Ross Barnett.

Senator DURBIN. Let me ask you to fast-forward to a more recent date because this is history; it goes back many, many years. And the year was 1994 and it involved a cross burning case which I am sure you expected to be questioned on. This was a case which was described to us as a very sad and tragic situation, as I read it.

In 1994, in a rural town in Mississippi, two men and a juvenile decided to burn a cross in the front yard of an interracial family, the Polkeys. In the early morning hours, the three defendants constructed an 8-foot cross, dowsed it with gasoline, placed it on the property of the Polkeys and set it on fire.

The defendants, who had been drinking, repeatedly referred to the family—and I apologize to the Committee, but I am going to use the words that were used in the transcript here; I apologize for the use of these words, but this is what it says—referred to the family as niggers and nigger-lovers.

Prior to this incident, this family had been a frequent target for harassment. On one occasion, someone spray-painted “KKK” in the road directly in front of the house. A short while later, they came home to discover a bullet hole in their front door. Two months before the cross burning, the juvenile had fired a bullet through the window of the Polkeys’ house next to the bedroom where their 2-year-old daughter was sleeping.

The juvenile told the other two men what he had done. Two of these individuals decided to plead guilty and to accept a reduced plea to testify against the third individual. The third individual refused to accept a plea bargain and went to trial. You were the judge at that trial.

The thing that I find troubling here is a memorandum given to us by the Department of Justice after the guilty verdict was entered, the lengths that you went to to try to protect this defendant, referring in the sentencing hearing to the fact that this was just a drunken prank.

I read this and wonder did you regularly contact the U.S. Attorney’s office and the Department of Justice in Washington asking for them to give special consideration when it came to using the exact wording of the law, the sentencing of the law, or was this cross burning case an exceptional situation?

Judge PICKERING. Senator, let me tell you fully what I told Mr. Swan when he came before me for sentencing. I advised Mr. Swan this is conduct that will not be tolerated. Your views on interracial

marriage or those of anybody else involved is completely immaterial.

I described the cross burning as a despicable act. I observed that the act was drunk young men doing a dastardly deed that they should not have had in their heart. I further stated cross burning is a heinous crime. So I don't have any feeling that what you did should be swept under the rug or what you did—that you are an innocent person.

I told Mr. Swan, you are going to the penitentiary because of what you did, and it is an area that we have got to stamp out, that we have got to live races among each other and the type of conduct that you exhibited cannot and will not be tolerated. So I don't want you to think that you are going to the penitentiary for something somebody else did. I would suggest that during the time you are in prison that you do some reading on race relations and maintaining good relations and how that can be done.

Senator DURBIN. Judge, my time has run out. I am going to ask one last question. Is it not true that you went to extraordinary lengths in this cross burning case with the prosecuting attorney and the Department of Justice to try to have a reduced sentence for this defendant?

Judge PICKERING. The issue with me was disproportionate sentence. The most culpable racist of the group the Government had brought—and before I knew the facts, they had him enter a plea to a misdemeanor and then when they came on this case, the young man—the Government's recommendation was 7½ years.

The Government had agreed to home confinement for the first defendant, who was the most culpable and who was the only—was the most racist of them. The issue with me was disproportionate sentencing. The statements that I have just read to you were my views of—were my views of what he had done.

Now, the sentence I gave him was 9 months more than the Government offered him if he had taken a plea bargain.

Senator DURBIN. Which he didn't take.

Judge PICKERING. Which he didn't take, and the guidelines provide—would have provided for that 9 months' difference. If he had pled guilty, he would have gotten 9 months less. He got 9 months more because he didn't plead guilty.

Senator DURBIN. Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you, Senator Durbin.

Senator Kyl?

Senator KYL. Thank you, Madam Chairman. Since I had to be in the Intelligence Committee and couldn't be here for most of the questioning, I think it would be unfair if I tried to go through a bunch of questions because undoubtedly a lot of it has been covered.

So I just have one or two, but I do want to comment a little bit on the tone of what I perceive. I was here in the very beginning and then picking up recently, and I just wonder what the public must think watching a hearing like this: a candidate who 12 years ago passed the Committee and the floor unanimously when he became a Federal district judge, who served with distinction, and now is being cross-examined here as if he is almost a criminal. Very

tough questioning on that side of the dais, very negative questioning against this nominee.

Those of us on this side seem to be his defenders, and I suspect the public says, boy, there is politics as usual again. And I don't think that puts this Committee in a good light at all, especially as the Senator from Illinois began his comments saying you have to understand the context, Judge Pickering. Several of President Clinton's nominees didn't get a hearing, or didn't get a hearing quickly.

I don't recall the exact words, but the implication was that if some of those nominees didn't get a hearing or a quick hearing, then maybe that had some relevance to the qualifications of Judge Pickering, which I don't see as being relevant.

I think there is something to this notion of partisanship in a hearing like this, and it bothers me greatly because we have a lot of vacancies on the circuit courts and we have some very good nominees. The American Bar Association, which certainly shares a good reputation on the left side of the dais here, has rated this candidate "well qualified" and "qualified," the majority "well qualified," based upon his temperament, his background, his decisions, the very low rate of reversals and the like. Yet, we are dragging up things about what a candidate for Governor said back in 1959. The answer that the nominee gave here was, well, those statements are racial.

I think as a Committee we have to be very, very careful because history will judge us. And I understand it is the right of outside groups to be as tough as they want to on anybody. They smear us regularly during campaigns. That is their right, and we all defend that right, but I don't think we have to go along with that.

So, Madam Chairman, the only questions, other than the Senator from Illinois, that I heard were your questions in the first round. They were all legitimate, reasonable questions. I found nothing to object to any of them. And they were all answered, and I thought the answers were legitimate, reasonable answers.

I just hope that rather than bringing political views to the hearing and sticking with them regardless of what the witness has said, unless this is all just a show and we are simply going to act out our pre-conceived notions here, we will fairly listen to the answers that the nominee is giving to these questions and the tone in which he is giving them and the spirit in which he is giving them, and we will evaluate those answers in the context of all of this.

I think if one does that, at the end of the day, whatever political prejudices we all have—and we have to all acknowledge we have them—the nominee can be confirmed. I have just found that all of us in politics have an infinite capacity for rationalization and we can defend just about any position. Most of us are lawyers.

Fortunately, Madam Chairman, you are not burdened with that fact, and therefore maybe this doesn't apply to you. But we can all argue either side of a case. Give us a little bit of fact and we can make a big deal out of it, and I just think maybe that is what is happening here.

The question that I have to the nominee is one that I ask most nominees during these kinds of hearings, and it seems like a perfunctory and general question and all nominees answer the question pretty much the same way.

Judge Pickering, you are under oath. You have been questioned in a pretty tough fashion here, so you need to really give this question a lot of thought, I think, before you answer it and I think the answer should carry some weight with the Committee.

You have described in answers to questions how you would rule on cases. Obviously, we all have some differences of opinion on this Committee, and you have differences of opinion with us as to personal political views.

Describe for the Committee how you will approach ruling on cases as a member of the circuit court, especially as it relates to your personal views.

Judge PICKERING. Well, I think my personal views are irrelevant. You look at the Constitution or the statute and you follow the language. If it is an area where you have Supreme Court cases interpreting that statute or that section of the Constitution, to the best of your ability you follow those Supreme Court decisions. If you happen to be in the Fifth Circuit, as I am, you follow the precedents of the Fifth Circuit, unless they are reversed en banc. That is how I would approach it.

Senator KYL. Are you familiar with the standards of the American Bar Association and the basis upon which they rate people under consideration for positions on the court?

Judge PICKERING. Well, I know that they call an awful lot of lawyers who have appeared before you and they get—and the question has been asked if I had asked any of these attorneys to write letters. Well, I don't know who the American Bar Association talks to. They talk to whomever they want to and I never know it unless a lawyer tells me.

And so it was based on they analyze my opinions and see how I have written. They contact the people that have contact with the court and it is based on that, is my understanding of how they—and they do a personal interview, and I must say that is one of the things in this case that was pleasant.

After the American Bar Association representative had interviewed the lawyers and then asked me to meet with him, I drove to New Orleans and met with him and that was one of the most pleasant things that has occurred in the—because at that time he shared with me some of the background that he had picked up, some of the comments that he had picked up, and it was a pleasant experience.

Senator KYL. Now, you said you had rendered about how many decisions?

Judge PICKERING. Approximately—you know, as to how many opinions that I have out there, I should point out that I have never said there were an exact number because I don't know. I gave an estimate that it was somewhere between 4,000 and 4,500 cases that I have handled, and that I estimated I had written opinions in about 25 percent of those, which would be approximately 1,000. And there was close to 100, a little less, of those that were written, so there should have been about 1,000 unpublished.

Senator KYL. I must say I practiced law for 20 years, much of it in Federal court, and very rare was the decision of a court that was actually written—a district court I am now talking about—that was written in the form of an opinion. I can think of three or four

and not many more than that, and we had some pretty substantial cases.

So I think folks should realize that the fact that a district court judge is not writing a lot of opinions is simply to comply with the guidelines that are given to Federal district judges not to burden the West Publishing Company and others with a lot of written opinions.

Madam Chairman, thank you.

Senator FEINSTEIN. Thank you very much, Senator Kyl.

Senator Cantwell, you are next.

Senator CANTWELL. Thank you, Madam Chairman.

Judge Pickering, I want to go over an issue that has been brought up by several of my colleagues, but first I want to assure you that I am not a member of a leftist organization. I certainly respect the work of Senator Hatch, but I believe that the people in my State who are writing to me on your nomination are not members of a leftist organization.

They are concerned about the fundamental right of privacy and its constitutional protection. They are concerned about how businesses handle their medical and financial information. They are concerned about how government obtains and handles personal information about them, and they are concerned about government intrusion into personal decisions.

I think you have gotten the sense of concern about the fact that the Fifth Circuit encompasses three States that all continue to have laws prohibiting abortion on the books, even though those laws are unconstitutional and unenforceable. You can hear the concern today about the constitutional rights in which there was precedent which were decided one way and then overturned. Several of those cases dealt with constitutional rights.

So I heard your answer on the question about looking at controlling precedents and what statutes would say, but how do we have confidence in what you are saying today that you are going to follow precedent? And I want to bring up one issue because this is where America is getting confused on this issue.

I am new to this Committee. I think I am probably only the second or third woman ever in the history of the Senate to serve on this Committee, so I wasn't here when Judge Thomas was nominated to be on the Supreme Court. But when pushed on this question he said, and I quote, in answer to Senator Metzenbaum, "Senator, as I noted yesterday, and I think we all feel strongly about this in the country, our privacy—I do; I believe the Constitution protects the right to privacy." That was his response, and yet shortly thereafter he dissented in the *Planned Parenthood v. Casey* decision.

So we are confused about nominees who come before us who, in the past, had personal views that say one thing, come and tell us they will follow precedent, and yet there are instances in their background where they haven't followed that precedent as it relates to constitutional rights. So I wanted to ask you about this and about where you see that constitutional right to privacy in the Constitution.

Judge PICKERING. The Supreme Court—you know, I was thinking when you were asking the question about the Supreme Court.

Being on an appellate court, the Fifth Circuit Court of Appeals, of course, is different than being on the Supreme Court because the Supreme Court establishes the precedent that we have to follow. I will follow the Supreme Court precedent, so that is one difference in the situation of Justice Thomas and myself.

And I was just thinking that going through this process at my age, this is the last time I will be before this Committee. So I will follow what the Supreme Court has said, and I think that is the difference. The Supreme Court has spoken on the issue. I will follow that decision.

Senator CANTWELL. In October when the Committee met—and I was unable to attend that hearing—you were asked whether you recognized the constitutional right to privacy and you responded that the Supreme Court has recognized that right to privacy and that you would follow that precedent. But you did not say that you personally recognize in the Constitution that right to privacy, so I am asking you do you recognize that.

Judge PICKERING. I think the Supreme Court recognizes—I think the Constitution recognizes rights to privacy and I think the Supreme Court has delineated what those rights are.

Senator CANTWELL. So you believe that the Constitution permits the Federal courts to recognize those rights that are not specifically enumerated in the Constitution, like the right to privacy, like the right to travel? You believe that?

Judge PICKERING. In some instances, certainly.

Senator CANTWELL. What about this right?

Judge PICKERING. You are talking about on abortion?

Senator CANTWELL. Yes.

Judge PICKERING. I will—you know, my personal view—again, Senator, in the October hearing I stated I thought that was immaterial and irrelevant; that I thought that I would follow the decision, and I will. I will follow the Supreme Court precedent.

Senator CANTWELL. But I am asking you about do you recognize—I think this is where the division or diversion has been in the past. Somebody said “I will uphold this,” but I want to know fundamentally—and I am going to ask this of other people who come before us for nomination, where do they see in the Constitution that right to privacy and its protection.

So do you see that the right to abortion is protected in the Constitution under the rights of privacy that are there?

Judge PICKERING. Senator, you know, as to my personal views, again—

Senator CANTWELL. I am asking you whether you see that as a judge, as a lawyer.

Judge PICKERING. I think so, because the Supreme Court has said it is there.

Senator CANTWELL. OK. I am not sure I am getting an answer, but you are answering my question. You are giving me what your opinion is on that.

This is a followup to this. The Fifth Circuit in reviewing cases of legislative acts seeking to restrict abortion basically has a higher standard. It uses a standard of review that requires the challenger to prove that there is absolutely no set of circumstances under which the regulation could be constitutional.

In contrast, five other circuits in reviewing the same type of restriction followed the standard of the Supreme Court's more recent ruling in *Casey v. Planned Parenthood* that a restriction is only constitutional if it does not impose an undue burden. So it essentially reverses the burden of proof.

Do you believe in the standard of review more recent in *Casey*, that that is a more appropriate standard and that is what the Fifth Circuit should be using?

Judge PICKERING. Senator, the Fifth Circuit precedents in the abortion area is not an area where I have done research, but I would say that, you know, I think the Supreme Court decision is the decision that trumps other decisions. I am bound by the Supreme Court precedent, I am bound by Fifth Circuit precedent until it is reversed, and I would follow the Supreme Court precedent and I would follow the Fifth Circuit precedent.

Senator CANTWELL. You might want to look at that a little more clearly about how the Fifth Circuit would use that because that is, in fact, what the other circuits are using, is the Supreme Court standard.

I would like to turn to another issue that I think has gotten many constituents in the Northwest concerned about their rights and how this administration or potential nominees to a court could overrule their rights, and this deals specifically with the issue of assisted suicide.

In Oregon, voters passed an initiative permitting physicians to prescribe lethal quantities of drugs to aid in assisted suicide in very limited circumstances. Last fall, the Attorney General announced that he would prosecute physicians abiding by the voter-passed initiative and remove their licenses.

Now, based on my review of your record, you appear to be very deferential to legislative acts and States' rights. Would you give deference to the popular approved State law in this case?

Judge PICKERING. Senator, that is an issue that may come before me and it is my understanding it is inappropriate for me to say how I would rule in a given case. I will give you the general principles that I would follow, and that is I would follow the Supreme Court precedent and I would follow the precedents of the Fifth Circuit.

I don't feel comfortable going further in that issue. I don't—whatever those precedents are, I would follow them. As far as doing research on assisted suicide, I have not done that.

Senator CANTWELL. I think I still have time for another question.

Your record on employment discrimination issues has been discussed today, and in my State the district court recently upheld that Title VII requires than an employer provide prescription coverage to employees as an obligation, including contraceptive coverage to women. The court held that Bartel's prescription drug plan discriminated against the female employees of that company by providing less complete coverage.

Do you agree that Title VII's guarantee of equal treatment in the workplace logically requires that if an employer provides prescription drug benefits to an employee that it must provide contraceptive coverage?

Judge PICKERING. That is an issue that I have not researched, and I don't think that the Fifth Circuit has ruled on that issue. I don't think there is controlling case law, but if there is controlling case law from the Supreme Court or the Fifth Circuit, I would follow that.

Senator CANTWELL. Thank you, Madam Chair. I see that my time is about expired, so I think I will wait on the others until the second round.

Senator FEINSTEIN. Thanks, Senator Cantwell.

Senator Edwards, you are next.

Senator EDWARDS. Thank you, Madam Chair.

Good afternoon, Judge.

Judge PICKERING. Senator.

Senator EDWARDS. Judge, I want to ask you some questions about an issue that came up briefly earlier, this issue of something that happened in 1994, something that is not in the distant past, this case involving the cross burning that you were the trial judge for.

As I understand it, there were three defendants in that case, two of whom pled guilty, one of whom went to trial before you. Is that correct?

Judge PICKERING. Yes.

Senator EDWARDS. The two who pled guilty admitted their guilt and took responsibility for their actions. Is that correct?

Judge PICKERING. Yes.

Senator EDWARDS. And it is customary in criminal cases in both Federal and State court to provide, either through plea agreement or otherwise, some leniency to those who plead guilty, participate in a plea agreement, take responsibility for their actions, as opposed to somehow who denies their guilt and goes to trial. Is that fair?

Judge PICKERING. Well, the guidelines provide, Senator, that there is a two- to three-level deduction in the guideline range for one who pleads guilty. And in this instance, it would have made the difference in roughly 9 months that he would receive for that. Now, the——

Senator EDWARDS. I don't want to get too hung up on that. I just wanted to ask you that general question——

Judge PICKERING. Yes.

Senator EDWARDS [continuing]. Because I have three areas I need to ask you about, and they cause me concern and I want to give you a chance to respond to them. They cause me concern on two different levels. One is what it was that caused you to take the action you took with respect to that case; and, two, what authority you had as a judge to take the actions you took.

It appears to me from reviewing all these documents that you did three things that are, at least in my own experience and through decades of being a lawyer, outside the ordinary.

One is that you told the lawyers, the Government lawyer, after the conviction—and I might add my understanding is that even after conviction, this defendant who had participated in burning a cross on a couple's lawn with a young child still denied that he had done anything wrong or that he was guilty.

You told the Government lawyers that you would, on your own motion, order a new trial. And when the Government lawyer asked you, and I am quoting now, what would be the basis for such a motion, your answer was “any basis you choose.”

First of all, Judge, looking at the rules, and having worked with them for years myself, I believe the rules provide that a judge has no power to order a new trial on his own motion.

First of all, did you say that you would order a new trial, even though no motion for a new trial had been made?

Judge PICKERING. I did not.

Senator EDWARDS. So you deny that?

Judge PICKERING. Yes. I have reviewed the transcript.

Senator EDWARDS. Yes, sir. Do you deny having said that?

Judge PICKERING. I did not say that.

Senator EDWARDS. OK. The second area I want to ask you about—so if the lawyers who were involved in that case have said that that is a statement you made to them, that would be a lie?

Judge PICKERING. Senator, on the record, I mentioned—

Senator EDWARDS. Excuse me, Judge. This was not on the record. According to the documents that we were provided, this took place in a private meeting that you had with the lawyers where you told the lawyers you would order a new trial on your own motion. And when they asked you—I am quoting now—what would be the basis for such a motion for a new trial, you said “any basis you choose.”

Do you deny having said that?

Judge PICKERING. Senator, I have no recollection of having said that and I do not believe that I said that. Now, I have not seen the document that you are referring to. I have not had the opportunity—the Justice Department did not show me the file that they had.

Senator EDWARDS. Did you have private meetings with the lawyers off the record about this case?

Judge PICKERING. The response that I gave to Senator Leahy on this indicated that after the first—

Senator EDWARDS. I am not asking about Senator Leahy. Did you have private meetings with the lawyers in this case?

Judge PICKERING. With the defense counsel and the private counsel. I had a meeting with them, yes, sir.

Senator EDWARDS. So the private meetings did take place?

Judge PICKERING. A private meeting took place.

Senator EDWARDS. OK, and you deny having had any discussion in that private meeting about ordering a new trial on your own motion, a new trial order that at least from my reading of the law you would have no power to grant on your own. Do you deny having done that?

Judge PICKERING. There was discussion on the record of a new trial on the basis of the instruction, but now I don't have any recollection of any indication that I would do that on my own motion.

Senator EDWARDS. The second area I want to ask you about is you made a telephone call to a high-ranking Justice Department official, according to the information that we have. And you are familiar, are you not, Judge, with the Code of Judicial Ethics that applies to you? You are familiar with that, are you not?

Judge PICKERING. Yes, uh-huh, I am.

Senator EDWARDS. And you are familiar with Canon 3.A.4 of that Code which says that “except as authorized by law, a judge should neither initiate nor consider ex parte communications on the merits of a pending or impending proceeding.”

Did you make a phone call to a high-ranking Justice Department official on your own initiative?

Judge PICKERING. We had had——

Senator EDWARDS. Not “we,” you. Did you make such a phone call?

Judge PICKERING. I called—I have indicated that I called Mr. Hunger and discussed the fact that I was frustrated that I could not get a response back from the Justice Department and I thought there was a tremendous amount of disparity in this sentence.

Senator EDWARDS. Yes, sir. Were the Government prosecutors on the phone when you made that call?

Judge PICKERING. No, they were not.

Senator EDWARDS. So that would be what we lawyers and judges would call an ex parte communication, would it not?

Judge PICKERING. Well, whether the Government attorneys had been on the phone or not, it would have been a question of whether or not the defense counsel would have been on the phone.

Senator EDWARDS. Well, was the defense counsel on the phone?

Judge PICKERING. No. We had discussed that with them and this was a followup conversation as to what we had discussed with defense counsel present.

Senator EDWARDS. Were any of the lawyers in the case on the phone when you called Mr. Hunger?

Judge PICKERING. No, they were not.

Senator EDWARDS. So that was an ex parte communication, was it not?

Judge PICKERING. I was.

Senator EDWARDS. In violation of the Code of Judicial Conduct?

Judge PICKERING. Well, I did not consider it to be a violation of the Code of Conduct.

Senator EDWARDS. Well, can you explain that to me? The Code says you should neither initiate nor consider ex parte communications of a pending or impending proceeding. The case was still pending at that time, was it not?

Judge PICKERING. It was pending, and Mr. Hunger indicated this was not something——

Senator EDWARDS. And you made an ex parte communication, did you not?

Judge PICKERING. I talked with Mr. Hunger.

Senator EDWARDS. Didn't you just tell me that was an ex parte communication?

Judge PICKERING. Well, it was ex parte from the standpoint I was talking, but he did not have responsibility to make a decision in this case.

Senator EDWARDS. In a third area, on the same case, did you also direct the Justice Department lawyers, the line prosecutors, to take your complaints personally to the Attorney General of the United States?

Judge PICKERING. In the order, yes, sir.

Senator EDWARDS. Can you tell me, Judge, in how many other cases, and if you can tell me the names of the cases where you have, after a conviction and prior to sentencing or subsequent to sentencing, told the lawyers in a private meeting that you would order a new trial on your own motion, contacted on your own initiative, contrary to the Code of Judicial Conduct, a high-ranking Justice Department official about a case pending before you, and, third, directed line prosecutors to take your complaints personally to the Attorney General of the United States?

Can I just ask you, have you ever done that in any other case, to your memory?

Judge PICKERING. May I explain my answer then?

Senator EDWARDS. Of course.

Judge PICKERING. I have never had—no, I have never had a case where the disparate treatment was so great as it was in this case, from the most culpable parties. The Government came in and agreed to a plea to a misdemeanor that resulted in a sentence, and the Government agreed to home confinement for those. And then they were recommending 7 1/2 years for the defendant who happened to be a little bit older, but who was—the most racist one of the group was the 17-year-old, and I felt that this was tremendously disparate treatment. I did not feel it was inappropriate to say I want to know that this is the policy of the Government, and asked them to do that.

Senator EDWARDS. Do you believe, Judge, that if you disagree with the law as it applies in a particular case, as apparently you disagreed with the mandatory minimum sentence in this case compared with the other sentences that had been handed down—do you believe that if you have such disagreement that that entitles you, No. 1, to do things that the law does not authorize you to do, or, No. 2, to engage in ex parte communications with people involved in the Department of Justice?

Judge PICKERING. Well, Mr. Hunger was not involved in the decisionmaking process, and then—

Senator EDWARDS. Why did you call him?

Judge PICKERING. I called him—

Senator EDWARDS. Why did you call him about the case if he wasn't even involved?

Judge PICKERING. I called him to discuss my frustration with the Department of Justice and to see his reaction.

Senator EDWARDS. Did you ask him to do anything?

Judge PICKERING. No.

Senator EDWARDS. Wait a minute. I want to get this—you call him about the case. You were concerned about what had happened in the case. He is in the Department of Justice. I know Mr. Hunger. He is someone I like and respect very much, by the way.

But you didn't talk to him about doing anything. You didn't ask him to do anything. You had no conversation with him about doing anything about the case. Is that your testimony?

Judge PICKERING. I called and expressed my frustration about the disparate treatment and I called and expressed my frustration about the fact that I had instructed the attorneys to get an answer, a response, from the Department of Justice in Washington. They had not done that.

Senator EDWARDS. What did you want them to do about it?

Judge PICKERING. Well, at that time I wanted—I guess more than anything else, I wanted to vent with someone the frustration that I was experiencing in not being able to get a response. And he was a friend—

Senator EDWARDS. So you didn't ask him—excuse me. I am sorry. You didn't ask him or expect him to do anything about it?

Judge PICKERING. No, sir.

Senator EDWARDS. Thank you, Madam Chair.

Senator FEINSTEIN. Thank you, Senator.

Chairman LEAHY. Madam Chairman, might I just note one thing? The material that Senator Edwards has quite appropriately quoted from was material we requested from the Department of Justice a week ago. Just barely before this hearing began—I think I was on my way over here—I was told it just arrived, a heavily redacted copy of it.

The Department of Justice told us that it was a heavily redacted thing, but we were restricted to how we could put in the record, and so on and so forth.

We have asked them, Judge, in fairness to you, that a copy also be given to you. I must admit that I am not quite sure why so much stuff is redacted about your conversation or anything else in here, but I just want you to know I made that request. And I repeat that request to the Department of Justice and the administration and White House people who are here to make the same papers available to you. Actually, I would ask them to give you the whole copy, not any part redacted, and give us the part they have held back, too. But I just want you to know that just as I notified them of what areas I would question you about, I want them to give this to you, too.

Judge PICKERING. Yes, sir.

Senator FEINSTEIN. Thanks, Mr. Chairman.

Judge Pickering, are you OK to go on or do you want to take a break?

Chairman LEAHY. You are allowed to.

Judge PICKERING. Yes, I think I would like to take a break.

Senator FEINSTEIN. You would like to take a break?

Judge PICKERING. I would like to take a break, yes. I think it is, what, 10 minutes after five. We have been going—

Senator FEINSTEIN. All right. Is 5 minutes OK?

Judge PICKERING. Take 10?

Senator FEINSTEIN. Ten minutes. We will see you in 10 minutes.

[The Committee stood in recess from 5:11 to 5:32 p.m.]

Senator FEINSTEIN. The hearing will come to order.

Judge Pickering, I know this is tough because the afternoon is always a long one. Having said that, we apparently are going to have two stacked votes at 5:40. Left in this round, Senator Schumer, I believe, is the last person for this round of questions.

There are Senators who do have additional rounds for the next round. So if it is agreeable with you, I would like to go now kind of non-stop until we conclude, and members when the votes comes up just one by one will go down and vote.

Is that acceptable with everybody?

Senator HATCH. Yes.

Senator FEINSTEIN. Good. Then, Senator Schumer, you are up.

Senator SCHUMER. Well, thank you, and I want to thank you, Madam Chairman.

I want to thank you, Judge Pickering, and welcome you back here. This is your second hearing. As you know, the first one was held under very difficult circumstances in the small room over in the Capitol and there were four other judicial nominees on the panel. We hadn't had a full opportunity to review your record. You were nice enough to go through the whole work with us and get all of the other opinions which we have now had a chance to look at, and I want to thank you for being here.

My questions are in two areas. The first is just on general judicial philosophy and where it plays. As you know, last summer I chaired some hearings examining the judicial confirmation process and looked at the role that judicial ideology plays and whether nominees bear a burden of proving themselves worthy of any lifetime seat on the Federal bench.

After chairing those hearings, it seemed to me that we should have the process be more open and honest. We should talk about a nominee's judicial philosophy. We should let that play a role in how we vote for judges. We have always done that, but we have done it beneath the table and it leads to a process that is sometimes less than honest.

I think it is very important right now more than ever for the appellate court. The Supreme Court is taking fewer and fewer cases every year, so that circuit court judges really do have the last word for every American who wants to have his or her day in court.

For somebody like myself who believes in moderation on the bench, we are in an era of unprecedented conservative judicial activism. The Supreme Court is leading the charge and the Fifth Circuit is not far behind. The courts are cutting back, in my judgment, on Congress' power to protect important areas such as the environment, such as workers' rights, women's rights.

It is a simple proposition, but I think many in the courts have lost sight of it recently, and that is Congress makes the laws. Judges are nominated and confirmed to interpret and apply those laws. That is the balance the Framers struck. It worked; it has been working well since *Marbury v. Madison*.

But now, like no time in our past, I think we are seeing a finger on the scale, slowly but surely altering the balance of power between the Congress and the courts. I think Justice Breyer summed it up well, at least for me, in his eloquent dissent in the Violent Against Women Act cases. He said, "Since judges can't change the world, it means that within the bounds of the rational Congress, not the courts, must remain primarily responsible for striking the appropriate State-Federal balance."

We are charged, it seems to me, for better or for worse, with making policy. Your rule, the judge's role, is different. It appears to me, however, that with increasing frequency the courts have tried to become policymaking bodies, supplanting court-made judgments for ours. That is not good for our Government and our country.

I would say that view is particularly prevalent on the Fifth Circuit. It has become one of the most conservative courts in the coun-

try. It is in danger of swimming outside the judicial mainstream. As my colleague, Senator Durbin, pointed out, a number of nominees that would have balanced the court were held up in the last Congress.

So I want to put that in the context of your record. It is no secret you have some strong views. This is America. God bless you for those views, but they are quite different, I would say, not only from mine and the majority of my constituents, but quite outside the American mainstream.

Most Americans believe in the right to choose. You have endorsed amendments to overturn *Roe*. As Senator Kennedy's questions brought out, you look at voting rights differently than I do. What, I guess, troubles me is in your cases, at least the ones that I have read, you have injected your own opinions into the case law, worrying me about what you might do on the bench.

I will give you one example. There was a racial discrimination case, *Foxwood v. Merchants Company*, 1996, and in it you complained about the "side effects"—these are your words—"from anti-discrimination laws," unquote, that cause people protected by such laws to, quote, "spontaneously react that discrimination caused any adverse reaction against them." That is not the law. That is your opinion, and it is a comment, I think, that doesn't indicate just a following of the law.

You have said to the panel repeatedly that you would follow the law, but, you know, we have had that before. We have had judges who come before us and say, look, I am just going to follow the law. Senator Cantwell brought this out, I guess, when now-Justice Thomas was here. He said he would follow the law on *Roe v. Wade* and then, at least in the opinion of many legal scholars, his opinions went outside.

What more can you say to us, to those of us concerned with judicial philosophy who believe that is one of the main ways we vote for judges on two counts? One, how can you convince us, other than just saying you will follow the law, that you will, particularly given the penchant for invoking your own opinions, your own views, in the cases?

And, second, some of my colleagues had argued, my good friend from Alabama, that the Ninth Circuit was too far to the left and needed some judges on the right side to balance it. I believe he said. I may not be right, but I have heard the argument.

Senator SESSIONS. The record demonstrated an extraordinary reversal rate, unlike anything that the Fifth Circuit has. The Fifth Circuit is not outside the mainstream.

Senator SCHUMER. I will reclaim my time.

Senator FEINSTEIN. We will stay, gentlemen—

Senator SCHUMER. I invoked his name and he had every—my good friend, Jeff, had every right to respond. We are good friends, actually.

Second, what about the idea that we should be looking for a more moderate nominee on the Fifth Circuit, at least if you believe that the opinions of the Fifth Circuit are quite far over and that moderation is called for and balance is called for?

Can you answer both of those questions, please?

Judge PICKERING. Well, the first question, Senator Schumer, you were asking about the case—I believe it was the *Flowers* case. In that case—and when I indicated that I felt like this type of reaction really was inimical to not having discrimination in the workplace, these two defendants, or the two plaintiffs in that case had chased down a—they were rather large individuals. I heard the testimony in the case.

There was a rather diminutive African-American that they had threatened to kill because he had come in and he was a Federal agent and he had come in and he had investigated their store for food stamp fraud. And then the company that was giving them credit stopped their credit because of this charge on this situation, which to me this was a frivolous lawsuit.

And my comments had more to do with the fact that this was a frivolous lawsuit and that people are abusing it, and I think that does create problems for everybody who has a legitimate claim and I think it is disruptive to—I think it makes it harder on those who have legitimate claims who make it, and I think it also disrupts race relations whenever people claim discrimination when there is no discrimination. That is what my remarks were intended to reflect.

Senator SCHUMER. I understand, but that didn't have relevance as to following law in the case, did it? It was your own view as to people's reaction to an existing law.

Judge PICKERING. I felt like it was a comment on—the comment was intended to discourage people from bringing frivolous lawsuits.

Senator SCHUMER. OK, but let me ask you to answer the two general questions that I have asked.

Judge PICKERING. All right.

Senator SCHUMER. What more than just words can you do, and maybe there is nothing, to assure us that you would follow existing law rather than in a judicially active way try to change it?

Judge PICKERING. Senator, I don't know but two ways to establish that. One is, of course, your testimony under oath, and the other is your record for 10 years. As the *Legal Times* article in which they analyzed it, they concluded that I had followed the law, that the criticism that I had injected personal views did not keep me from following the law whenever that came down.

I viewed these as I did the one in ERISA. It was a question of public interest, which is one of the bases for publishing, and that opinion was used in the debate for a patient's bill of rights in the House of Representatives. So it is sort in the nature of a law journal article or a dicta. Precedents come from dissents and they come from dicta in cases and they come from law journal articles.

Senator SCHUMER. I may come back to the balance issue, but I don't know how much time I have and I want to get this and I want to give you your chance here.

The case that has been cited, the cross burning case that has been cited by some of my colleagues, I need not tell you is of great concern to many members of this panel. And it wouldn't be fair for us not to give you a full chance to give your views and tell us something, and let me just tell you where at least I come from on this.

It seems to me that cross burning is not just a prank; it is a dagger aimed at the heart of what has been the poison in America,

which is our problems with race. The Founding Fathers knew that was our biggest problem and chose to push it under the table. Many of them, I think, later admitted that that was the greatest mistake they made in the Constitution. When de Toqueville came to America in 1830-something, he said that this country will become the greatest country in the world, except for the poison of race.

I have to tell you, when someone burns a cross, you know that it is not just a prank, it is just even aimed at the person on whose lawn the cross is burned. It is aimed at all of America and it brings up the invidious history we have had in this regard. So a mandatory sentence was established for that reason. This is different than any other kind of prank.

I have to tell you the reasoning that you give for wanting a reduced sentence, the disparity, doesn't wash with me. I haven't heard as many cases as you.

Senator FEINSTEIN. Your time is up.

Senator SCHUMER. Thank you.

I know case after case where someone pleads to the State's evidence and gets a year or two in a murder case, and someone else gets life imprisonment. This happens regularly. So I guess many of us find it to be, I guess, curious—"troubling" would be a better word—that on this kind of case where there should from any citizen, let alone a judge, an unusual sensitivity, an almost extraordinary effort to get a lower sentence, you would go below the mandatory minimum when the disparity is not all that unusual.

I could sum that up. I have talked to some of my colleagues. I think that is a general feeling here, and we would not be fair to you if we were to vote on your nomination without giving you the full chance. It won't satisfy me for you just to say disparity, because there should be greater sensitivity, No. 1. And, No. 2, in my less long, less extensive legal career than yours, I know of many more cases where there is a greater disparity than 27 months in terms of sentencing.

Can you elaborate on what motivated you to go to go to the efforts you did on this particular case? Tell us why, in something as sensitive as cross burning, something inside you didn't say, you know, this is not one to go to the mat on.

Judge PICKERING. Senator, the disparity—the sentence was 27 months different. What concerned me is the Government came in and they pled the 17-year-old to a misdemeanor, and at the very start they told me we have no objection to home confinement. That was the position of the Government to begin with.

I did not know the details at the time that I took the plea. I did tell the Government I have some concern about whether or not this is going to create problems with disparity of sentence. Then they came in and they pleaded the second defendant to a misdemeanor, and he had diminished capacity and they had no objection to his pleading in that manner.

Both of these wound up, by agreement with the Government, with home confinement. There were some terms placed on these that they were limited in certain areas and they were ordered to do some things in the area of race relations and restitution.

Now, when the evidence came in, it turned out that the 17-year-old had shot into the house and the Government did not charge the 17-year-old with shooting in the house. Likewise, the 17-year-old—there was testimony that he had always been a racist. The testimony in the record before me was that he was by far the most culpable, that he had previously shot into the house and the Government did not elect to prosecute him on that and agreed to home confinement.

Then they came in, they offered to have Swan plead guilty. They told him he could not plead guilty to a misdemeanor, but they did allow him, or offer him pleading guilty to a felony that would have resulted in about a 15-month sentence. That is what the Government had agreed with him at the beginning, that if he pled guilty the guidelines would have calculated out about 15 months—15 months, is my understanding from what I have been able to review.

And, again, I have only reviewed the documents that the Committee has seen just very momentarily when I went outside just a few moments ago, and I have not really done anything more than cursorily reviewed that.

Senator SCHUMER. But according to Justice, Swan was the leader of the case, the ring leader.

Judge PICKERING. I heard the evidence and my perception was that he was not. I had that clear perception, and I think that the testimony that was there will indicate that the one that was the instigator of it was the 17-year-old. Swan did go on it.

Now, Swan—the reason he did not plead guilty—he never denied that he went and burned the cross, and he indicated that he was willing to go and apologize to Mr. Polkey the next day. But he went down there and Mr. Polkey was outraged and he decided that he better not, that he might be in danger. But he denied that he had the necessary intent.

Now, in the eighth—there were four of the appellate court judges that reviewed this that said that Section 844 did not apply to cross burning. 844, they said Congress adopted was to apply to arson, the crime of arson, but not to cross burning.

Now, one of the circuits had come out that it did apply to cross burning, and one of them had come out that it did not. So that was a decision the Fifth Circuit had not spoken on. My problem with this and the thing that I really felt was wrong is that the Government was coming in and that they were recommending 7½ years for Swan and that they had recommended home confinement for the other two. I thought that was disparate. I thought it was really the worst case of disparate sentencing that I had ever seen.

Now, I don't want to think for 1 minute that I minimized the seriousness of cross burning. That is why I took a stand, not just that reason, but the acts of the Klan in those areas of trying to intimidate people because of race is something that is despicable, and that is why I took a stand against the Klan in the 1960's.

And when I was sentencing Mr. Swan, I told him this is conduct that will not be tolerated. This is a despicable act. You have got to pay a debt to society. It is a reprehensible crime, it is a dastardly deed. Cross burning is a heinous crime and you are going to the penitentiary for what you have done.

So I view, as do you, Senator, that it is a heinous crime. I so stated in the record. The only problem that I had in this situation was the disparity of sentence of having the most guilty defendant—the Government came in and pled him to a misdemeanor, where he had home confinement, and now they wanted to sentence this one to 7½ years.

There was a split in the circuit, and if I had followed the Lee case, the sentence would have been in this area. When the time came to sentence him, I sentenced him to the mid-range of the guideline line that the Government agreed to in the memorandum of understanding. The guideline was 24 to 30 months. I sentenced him to 27 months. That was 9 months more than he would have gotten had he pled guilty before trial.

Senator SCHUMER. Thank you.

Senator FEINSTEIN. Thank you, Senator Schumer.

We are going to go into our second round now. One last question on the Swan case, if I might. Was it true that Mr. Swan drove the truck and provided the wood for the cross?

Judge PICKERING. It was his truck. Whether or not he—he was intoxicated that night. I don't recall without reviewing the transcript more than I have, Senator Feinstein, Madam Chairman.

Senator FEINSTEIN. Did he provide the wood for the cross?

Judge PICKERING. They went to his barn and got the wood, yes.

Senator FEINSTEIN. OK, all right.

Judge PICKERING. But I did not consider that nearly as much of an indication as the young boy who had come by there and shot into the house, and that there was testimony that he had always had—harbored racial animus.

Senator FEINSTEIN. I understand.

I would like to use my time in a little different way because, in a sense, for many of us this particular seat is as important as a Supreme Court seat. And I want to explain to you why, and in order to do it I would really like to read something that was sent to me on the Fifth Circuit.

“The Fifth Circuit once served as a trailblazer in protecting individual rights. During the 1960's and 1970's, the Fifth Circuit enforced and protected various individual rights, such as, one, requiring desegregation in almost every aspect of the fully segregated South; two, enforcing voting rights; three, prohibiting employment discrimination based upon race; and, four, finding that psychiatric patients who were involuntarily committed to State institutions had a Federal constitutional right to adequate treatment. Four of the circuit's judges exemplified this commitment to protecting individual rights. Known as 'The Four' by opponents, they were accused of destroying the Old South by dismantling the systemic segregation of African-Americans that existed in every aspect of society.”

To a great extent, I think the testimony today has brought out what a different world it was, indeed.

“However, the current Fifth Circuit dismally fails to live up to the legacy of its predecessors. The court is more likely to eliminate to limit rights than to preserve or enforce them.”

That is where your appointment becomes so critical. We all know you are a conservative. That is not really the problem. The problem

really is that—and I am going to talk to you about the Equal Rights Amendment, I am going to talk to you a little bit more about reproductive choice, because this becomes a pivotal position for people who have fought for decades for certain rights. And if you have a conservative—I am not saying you are—unabashedly out of the mainstream, all those rights get set back.

Could you respond to the statement, please?

Judge PICKERING. Well, you know, I was looking back in preparation. I do not think that my activities and all of the things that I have done in my life are outside of the mainstream. I think they indicate someone who has been concerned about these rights, and that I have taken action to protect these rights.

Going back, I don't want to just keep repeating, but we have talked about the cross burning. We have talked about the bi-racial Committees. We have talked about the fact that we have been involved in integration personally in every aspect from religion, to home, to fraternity, to schools. And I am committed to protecting the rights in accordance with the Constitution. I will have to follow the controlling precedent, but I feel like that is an area that I have made a commitment to and I think my life history reflects that.

Senator FEINSTEIN. All right. Now, I supported the Equal Rights Amendment. I did research at the time because I was very much involved in paroling and sentencing earlier, and women did not have equal rights under the law in many criminal actions. It is a fact, Judge.

Now, let me relate that fact to your statement in 1976 at the Russian—at the Republican National Convention, and I quote—

[Laughter.]

Senator FEINSTEIN. We shouldn't laugh. That wasn't funny.

[Laughter.]

Senator FEINSTEIN. "Proponents of the ERA," the Equal Rights Amendment, "won its passage only for psychological reasons. I don't think the Equal Rights Amendment is needed to secure legal rights."

Judge PICKERING. Well, we came out, the subCommittee I was involved in, and we recommended the passage of statutes, of laws, to guarantee equal rights to women. I supported that then strongly and I still think personally that they are entitled to equal rights.

That is the same position that the legislative bodies and the American people have taken to this point. The Equal Rights Amendment was never confirmed, but you do have the laws against discrimination that have been applied, and then the Supreme Court has more recently held that they do have equal rights under the Constitution even without an amendment.

But at the time, I felt like the amendment itself would perhaps take away some of the special—some of the rights that women did have at that area in regards to domestic matters and spouse and in regard to the military. There were a number of areas that I thought that they could lose some preferences that they had.

But I supported at that time, and now support, equal rights. I have 9 grandchildren and 3 daughters, and I certainly would never—

Senator FEINSTEIN. How many are women? How many are girls?

Judge PICKERING. I have 9 granddaughters.

Senator FEINSTEIN. Oh, granddaughters.

Judge PICKERING. I have 9 granddaughters—

Senator FEINSTEIN. That might be a help.

Judge PICKERING [continuing]. And 3 daughters, and I would never take away any of their rights. I have 18 grandchildren, and next month I will have a tenth granddaughter.

Senator FEINSTEIN. I guess what I am trying to say to you is that at the time that you made that statement, women, for certain crimes in certain States, were serving much longer sentences than men. I documented it.

Judge PICKERING. That is not right.

Senator FEINSTEIN. It is not right.

Judge PICKERING. That is one of the—the probation officers, whenever they heard that there had been some question about my sentencing, they came to me on their own and they were discussing the fact that I had been very compassionate in trying to find ways not to send African-American defendants and other defendants who were first-time offenders who did not have violent records—and they were talking about the fact—they said, Judge, really you are a pain because you make us prepare charts for every multi-defendant case so that you can stay equal. So if there was disproportionate sentencing to women at that time, I think that was terribly wrong.

Senator FEINSTEIN. All right. Now, another statement you made at that same convention. Let me give it to you and ask you to respond, quote, “We oppose abortion and support a constitutional amendment to limit abortion. The Supreme Court of the United States allows abortion on demand. It gives the husband no say-so. The taking of life is wrong and we should oppose abortion,” end quote.

Judge PICKERING. Madam Chairman, as I have indicated before, I know the difference between a political decision and position and a personal decision and a judicial decision. I will follow the law.

Senator FEINSTEIN. What do you mean, “I will follow the law?”

Judge PICKERING. I will follow the Supreme Court precedent. The Supreme Court has spoken on the issue of abortion and I will follow it.

Senator FEINSTEIN. You are saying you would uphold *Roe v. Wade*?

Judge PICKERING. I would have no choice but to uphold that because the Supreme Court has decided it and that would be my responsibility.

Senator FEINSTEIN. I am looking for one question here. Let me quickly followup with this. Debate continues in circuit courts and at the Supreme Court regarding the protection afforded a woman’s constitutional right to choose following *Casey*. Senator Cantwell referred to that.

For example, in the 2000 Supreme Court decision *Stenberg v. Carhardt*, the Justices’ opinions revealed a disagreement about the meaning of the *Casey* decision. Justices Souter and O’Connor concurred in the Court’s opinion that the ban on so-called partial birth abortion was unconstitutional because it lacked an exception for women’s health. However, Justice Kennedy dissented, arguing that

Casey had scaled back the previous decisions holding that the woman's health must be paramount.

Which opinion in the *Stenberg* case, Souter and O'Connor, or Kennedy, reflects your view about the role that a woman's health must play in considering an abortion regulation?

Judge PICKERING. Senator, again, I think that might be an issue that I would be called upon to rule upon, and I think it would be inappropriate for me to give a response to that.

Senator FEINSTEIN. Senator Hatch?

Senator HATCH. Well, thank you, Madam Chairman.

Judge Pickering, earlier you were asked about the Swan case. We were all surprised to learn that you had not seen the documents that Senator Edwards asked you about, and I understand that the Department of Justice has just provided you with copies of those documents. Is that right?

Judge PICKERING. Yes, they did. I went over them. I scanned them. I didn't really have—

Senator HATCH. In other words, since that—

Judge PICKERING. That is correct. Since then, I have viewed them very briefly.

Senator HATCH. Well, now that you have had a chance to briefly look over those documents, let me just ask you a couple of questions.

First, I would like to ask about your conversation with Assistant Attorney General Frank Hunger, reflected in one memorandum. What is your recollection of that conversation?

Judge PICKERING. My recollection is simply that Frank was a friend, that I—

Senator HATCH. He is from Mississippi, isn't he?

Judge PICKERING. From Mississippi. We had been—

Senator HATCH. So you knew him? You knew him before?

Judge PICKERING. I know him, and I stated a few moments ago, Senator, that that was an ex parte contact, and it was. I do not consider it to be an ex parte contact—

Senator HATCH. Within the framework of the—

Judge PICKERING. The framework of the Judicial Code of Ethics.

Senator HATCH. Well, he was not one of the attorneys assigned to the case, was he?

Judge PICKERING. That is correct. This was not his area of responsibility.

Senator HATCH. And your conversation with him did not benefit the Government, did it?

Judge PICKERING. It didn't benefit either side.

Senator HATCH. Well—

Judge PICKERING. It did not benefit the Government, no.

Senator HATCH. What is all the hullabaloo about, then? The fact of the matter is I believe that judges talk to U.S. Attorneys all the time. They belong to the Justice Department. I believe they talk to people at Justice when they see injustices or inappropriate prosecution, and so forth.

But the fact is that nobody benefited from that conversation.

Judge PICKERING. That is correct, no one.

Senator HATCH. And certainly the Government didn't benefit from it. Is that right?

Judge PICKERING. That is correct. The Government did not—  
 Senator HATCH. Do you have anything else you would care to say about that?

Judge PICKERING. Well, simply that it was, from the technical definition of ex parte contact—I called him and it was just the two of us that were talking, but again I do not consider that that was a violation of the rule.

Senator HATCH. What was your outrage that you were talking about, that you talked to him about?

Judge PICKERING. The outrage was that the Government came in and, in my opinion, they pled the one that was most guilty and agreed to home confinement, and then they were recommending 7½ years for this other young man. I think the crime, cross burning, is reprehensible and I think we have got to—and I stated on the record I have got no intention of not sending you to the penitentiary, and I sent him to a longer—

Senator HATCH. Your concern was disproportionate sentencing?

Judge PICKERING. Yes, absolutely.

Senator HATCH. That this fellow wasn't as guilty as the other two, and yet he got slammed?

Judge PICKERING. That is right.

Senator HATCH. And he got slammed because he wouldn't plead guilty in advance?

Judge PICKERING. Well, the Government said that that is what they were interested in, was being able to administratively use this to get pleas. They had previously agreed to plead him guilty to a felony that would result in a sentence of about 15 months.

Senator HATCH. I don't know whether you saw this Bob Herbert article in the New York Times today. It is called "A Judge's Past."

Judge PICKERING. Yes, Senator. I was trying to prepare for this and I didn't really want to read things of that nature. At the time, I did glance at it, but I didn't read—

Senator HATCH. Well, I have to admit I think you have answers to everything he has raised in there. I think it is basically a very unfair, one-sided article. Normally, I think hopefully he does a better job, but let me go through a few of the things.

Critics have alleged that in a 1959 law review article, you advocated expanding the law to provide for criminal penalties for interracial marriages, and that you advised the Mississippi Legislature how to amend their laws to continue penalizing interracial marriages.

Now, Judge Pickering, I would like to ask you some questions about the miscegenation note that you authored while you were a law student at the University of Mississippi. You wrote that article at issue in 1959, more than 40 years ago, right?

Judge PICKERING. That is correct.

Senator HATCH. Now, some have alleged in this article that you condemned Mississippi's miscegenation law. In the article, did you condone or advocate a ban on interracial marriage?

Judge PICKERING. No. My perception was that this was an academic exercise of analyzing the law. I stated what was wrong with it. I did not consider that I advocated it at all. But regardless of that article, I do not feel—and I have stated this at the third hearing—I agree that who one marries is a personal matter and States

should not regulate it. That is a personal feeling. I believe it is unconstitutional and I will follow it.

Senator HATCH. In 1967, the Supreme Court decided the case of *Loving v. Virginia*. You are familiar with that case—

Judge PICKERING. Yes, I am.

Senator HATCH [continuing]. Which held that State law bans on interracial marriage are unconstitutional.

Judge PICKERING. That is correct.

Senator HATCH. Now, if you are confirmed, will you strictly adhere to that precedent?

Judge PICKERING. Absolutely.

Senator HATCH. I knew that was your answer, but I thought we had better clarify that.

On the Voting Rights Act, Judge, your critics are the usual suspects in this town.

And by the way, I didn't criticize any of my colleagues. It was criticizing the leftist groups who are here in Washington, who come into these matters almost every time they don't like somebody and I think distort records.

Now, your critics would have people believe that you are single-handedly bringing down the Voting Rights Act. I have looked at the cases that have been raised to suggest that you are against voting rights. I think there are three, to be fair—*Fairley v. Forrest County*, *Bryant v. Lawrence County*, and *Citizens Rights to Vote v. Morgan*.

Your critics seem to have a penchant for misquoting you or quoting you out of context, but the thing that is most striking about questioning you on these cases is that none of them were appealed. Am I right on that?

Judge PICKERING. None of them were appealed.

Senator HATCH. The usual suspects always seem to leave that information out of their statements. In fact, the plaintiff in *Fairley* and the NAACP chapter leader involved in that case have both written Chairman Leahy in support of your nomination. Is that right?

Judge PICKERING. Yes, sir, they have.

Senator HATCH. They say, Judge, that you should always leave the customer satisfied. You seem to be leaving the losing party satisfied.

Judge PICKERING. In the *Lawrence County* case, I would point out, Senator, that that was a case in which I ordered redistricting to create a majority justice court district.

Senator HATCH. Well, I was most interested in *Bryant* because I think in that case you displayed a genuine concern for racial reconciliation and a real desire to further the goals of the Voting Rights Act. You wrote that, quote, "Constitutional guarantees of equality should bring us together, not divide us," unquote.

That is right, isn't it?

Judge PICKERING. After I heard the evidence, I also appointed a bi-racial Committee from the parties that were there, and they got together and tried to resolve the matters so that I didn't have to make a decision on the situation, so that they could work it out.

Senator HATCH. Mr. Chairman, I would like to submit the rather exceptional letter of the plaintiff in the *Fairly* case, Mr. Donnie Lee

Fairley, supporting Judge Pickering's nomination—I would like to put that in the record.

The Chairman

[Presiding.] Without objection, that will be made part of the record.

Senator HATCH. Thank you, Mr. Chairman.

Senator HATCH. Now, Judge Pickering, some have alleged that you are hostile to civil rights. However, I am aware that you have taken actions over the past four decades that express your commitment to civil rights. There is an old saying that actions speak louder than words, and I would like to ask you about some specific instances that illustrate your support for civil rights.

You were chairman of the Mississippi Republican Party from 1976 to 1978. In response to Senator Specter, you had mentioned that you were responsible for hiring the first African-American political worker ever in the Mississippi Republican Party.

Judge PICKERING. Yes, sir.

Senator HATCH. In fact, the Committee has received a letter from this gentleman, whose name is James King, who appeared here today and I think is sitting right over here. In his letter, Mr. King explained that when you hired him, you were adamant that his work not be confined to the African-American population of the State.

Mr. King stated, quote, "Chairman Pickering could have enhanced his personal standing with the group by allowing us to believe that he agreed with our approach to targeting an African-American to the African-American community only. But instead he made the point of reminding us that the party's message was to be the same to both communities, and if the message was the same, it could be delivered by the same individual. I can unequivocally state from my personal knowledge and 25 years of knowing Judge Charles Pickering that he is not a racist, and I believe him to be eminently qualified for a seat on the Fifth Circuit."

Could you tell us a little bit about your decision to hire Mr. King?

Judge PICKERING. Well, I have always thought that the races should be brought together, not divided and not polarized, and there are so many things that do polarize us. I was attempting to build bridges and to give dialog to where African-Americans and whites could discuss their common problems and come to common consensus, and that was—I felt like it was the right thing for the Republican Party to do and—

Senator HATCH. It was.

I understand that in 2000 you joined with an African-American businessman to convene a group in Laurel to develop a program for at-risk kids, particularly African-Americans.

Judge PICKERING. We did. I had supported the Boys and Girls Club during its existence, although I was not an officer in the group. They ran into some problems that caused the Boys and Girls Club to be terminated, and I had always regretted that. And Mr. Walker and I were having dinner together one night and we sort of made a commitment to one another that we would try to get some group together.

We thought we were going to be bringing back a Boys and Girls Club, but we wound out where we worked trying to find something that we dubbed Kids at Risk rather than a Boys and Girls Club.

Senator HATCH. Well, I notice that my time is up, but I want to commend you. You have from the American Bar Association a “well qualified” rating, which is the highest rating they give, by a majority of the Committee, and a “qualified” rating by the rest of them. And they do investigate rather thoroughly nominees before this Committee, and we expect them to.

All I can say is that having looked at your record and knowing what you have stood for all these years, I just hope our colleagues will all recognize that and vote for you. I just want to commend you for being the good judge that you really are, and I think that you could do a great job on Fifth Circuit Court of Appeals and I believe you will do a great job and I believe you will be confirmed.

Thank you, Mr. Chairman.

Judge PICKERING. Thank you, Senator.

Chairman LEAHY. I will just note for the record, Judge Pickering, I am glad that the Justice Department would give you those documents during our break. I had asked them to.

Senator HATCH. Yes, I think that is right.

Chairman LEAHY. They only gave them to us. I wasn’t sure whether Senator Hatch was aware of that. It was at my request, but we had only received them severely redacted just minutes before this. I assumed they had given them to you before. It is only fair that you should have them, and I am not quite sure why the Justice Department seems unwilling, even with the heavily redacted ones, to make them part of the permanent record.

But I will ask them again if they could be made part of the permanent record. And if indeed they will agree to allow the heavily redacted material to be available, I assume there would be no objection then to making them part of the record.

Senator HATCH. Mr. Chairman, I want to compliment you for that. Frankly, I appreciate the things you are trying to do.

If I could just make one comment, that is why I went over this because, yes, it was an ex parte conversation, but you didn’t consider it an ex parte conversation that violated the judicial canon, and certainly the Government did not benefit from it.

Judge PICKERING. Yes, that is correct.

Senator HATCH. Neither party benefited from it. You were just expressing your frustration, and I have to say that I am aware of a lot of judges who have done that. I think some people may try and blow that out of proportion, but I don’t think they should.

Chairman LEAHY. I don’t know if there will be others who will be questioning, but let me just wrap up a few things of mine.

In *Washington v. Hargett*, you rejected the plaintiff’s request for DNA testing that he said would prove his actual innocence. But in that, you stated that an attempt to prove actual innocence was, quote, “the only reason why this court or any other Federal court should be considering a petition for habeas corpus.”

I mention that because you have stated in answer to my questions, Senator Hatch’s questions, and several others that, of course, you would have to follow stare decisis, in your case the Fifth Circuit or the Supreme Court. I say that because your statement is

contrary to the Supreme Court law and statutory law, which says that a prisoner petitioning for a writ of habeas corpus is contesting the legality of his detention, not his guilt or innocence. The Supreme Court said that 2 years before you decided that particular case. Based on the *Herrera* case, Federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution, not to correct errors of fact.

In *Drennon v. Hargett*, you presided over a case in which a habeas corpus petitioner claimed that he had been denied access to the courts and received ineffective assistance of counsel. He had pled guilty to a charge of capital murder at the age of 15 and received a life sentence. But he claimed in his petition that his attorney had threatened him with the gas chamber if he did not plead guilty, and his lawyer did not make important motions, such as a motion to suppress under *Miranda*, and so on. He also claimed that he did not know how to obtain relief in the courts for several years because his representatives had misled him.

You denied his claim. You wrote 3 pages of a 9-page opinion arguing that habeas corpus should not be allowed unless a petitioner can prove actual innocence. You cited the Ninth and Tenth Amendments, the Preamble to the Constitution, and the Declaration of Independence in support of your views.

In *Barnes v. Mississippi Department of Corrections*, you 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 3 days before being given an initial hearing by a magistrate. You denied that petition, and the Fifth Circuit again overruled you.

You stated in that case 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. You cited the Bible and Cook's treatise to make the point that habeas corpus should be limited to petitioners who can prove actual innocence.

I cite that because it seems to go in each of those cases contrary to the Supreme Court, and that is why you were overruled. Have I missed the point there?

Let me ask you this: What do you feel is the standard for granting habeas?

Judge PICKERING. Well, of course, the Congress has passed a law and they have established the standard by which we are to consider habeas. The decisions that you are quoting, I think, were all decided before Congress passed the law.

And as I indicated, I think, Senator Leahy, that the statements that you mention—that I think that I said 10, 15 years or 14 or 15 years after a trial is over, that it really creates all kind of problems on the system to have to go back and re-try cases, when the prosecutors might have changed, the law enforcement officers have changed, witnesses are dead. It just makes it almost impossible.

And I think what I indicated that I felt it would be a better question, if it is that far out, that you should only be considering questions of guilt or innocence. Now, I did not say that I was going to apply that, and I think that I attempted to apply in those cases the law as I understood it from the courts. And, of course, since that

time Congress has come down and said the statute of limitations is 1 year.

Chairman LEAHY. But in *Hargett*, you were talking about the only reason why this court or any other Federal court should be considering a petition for habeas corpus was for actual innocence. But that is not the Supreme Court—

Judge PICKERING. The Supreme Court decided it differently and I was acknowledging that it was sort of like—

Chairman LEAHY. Prior to that, prior to that.

Judge PICKERING. Yes, sir. Sort of like in ERISA, I was saying that I think this is an area where they should be limited to questions of innocence this far down the road. But I attempted to apply, as best I understood the law, the controlling law, not what I felt about the situation.

Chairman LEAHY. I appreciate that. I spent nearly 9 years as a prosecutor and the last thing in the world I wanted to do is have to re-try a case 10 years later—

Judge PICKERING. That was what I was talking about.

The CHAIRMAN [continuing]. Because it was very, very difficult to do.

Judge PICKERING. Yes.

Chairman LEAHY. The witnesses are gone and everything else. But the thing I would hate even more than to have to try a case 10 years later is to think I had somebody locked up who was innocent.

Judge PICKERING. Well, absolutely, and I said that. In fact, I would today—I don't care whether it passed the 1-year statute of limitation, if you had an innocent person. And I suspect that the courts when they get around to interpreting that 1-year statute of limitations, if you come with an actual innocence claim, that they will find some way to keep from being barred by the 1-year statute of limitations.

Chairman LEAHY. But there are other reasons for having habeas than just to prove actual innocence, are there not?

Judge PICKERING. Oh, sure, yes, sir. But what I was talking about was the length of time, 14 and 15 years later.

Chairman LEAHY. That was a DNA case, and DNA testing has exonerated nearly 100 people. Eleven people were on death row. They had been sentenced and they were way beyond the normal appellate time. They were sentenced to die, and then DNA evidence came out that had not been available and proved they had the wrong person.

In Illinois, with something like half the people they had on death row, they found they had the wrong person. In one case, they had the right person locked up somewhere else, but they were about to execute the wrong person. I just mention that because it is an area that I was concerned about.

Judge PICKERING. Senator, on DNA, I feel very strongly that if you create a situation where there is an indication that DNA could likely prove somebody innocent that they should be given that opportunity.

In the case that you are talking about, there was no—my recollection of that case is that I found there was no indication that—he was claiming an expert witness proved that he was likely not

guilty, but that was not my interpretation of that expert witness' testimony. In fact, the expert witness seemed to me to implicate him more than he did to indicate that he was innocent.

But I agree with you. DNA is a marvelous—and I had rather the guilty go free than having an innocent person convicted. I totally agree with that.

Chairman LEAHY. Thank you. Judge Pickering, you have been here a long time. As I said, the questions I have asked you have been on the cases that I notified the Justice Department I would be asking about.

I do not feel, as some Senators on this Committee, that it is somehow inappropriate to ask a nominee questions, especially one who is already holding a lifetime position on the Federal bench, as you are, because of the nature of where you are going. I hope you don't think it has been inappropriate to ask you questions. I am sure the Chair will leave the record open so that you can take a look at your answers, should you wish to add to them or change them. We do want to be fair.

I will not use all my time, Madam Chair, but I also want to mention I have been on this Committee now—I hate to even say this—for over a quarter of a century. Nobody has held a hearing with more fairness to both sides than you have, and I appreciate that.

Senator FEINSTEIN [presiding.] Thank you very much. Thank you, Mr. Chairman.

Senator Kyl, you are next up.

**STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE  
STATE OF ARIZONA**

Senator KYL. Madam Chairman, I had no other questions. I would like, though, to comment on what Senator Leahy just said because he and I had a conversation about it earlier. In some comments I made earlier, I lamented the tone of questions. As the chairman of the Committee knows, I certainly don't think there is anything wrong with asking questions, and I think I made that clear in my comments. But I did have concern with the tone of some of the questions—neither of the two majority members who are here right now. But I hope that my comments aren't misunderstood in that regard.

Thank you.

Senator FEINSTEIN. Thank you, Senator.

Senator Sessions?

**STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM  
THE STATE OF ALABAMA**

Senator SESSIONS. Thank you, Madam Chairman. There were a number of things I think we just should mention. I know you are deeply concerned about the right to abortion, and deeply committed to the *Roe v. Wade* decision.

A lot of people didn't agree at that time. The now-Minority Leader of the House of Representatives, Dick Gephardt, in 1976 stated—when were you making these comments about a constitutional amendment?

Judge PICKERING. 1976, I believe.

Senator SESSIONS. 1976. Well, in 1976 he said, "In the case of an issue so basic to our society as the right to life, a constitutional amendment is necessary to clarify our belief in due process and the sanctity of life." His press release stated at that time that he would sponsor and work for a constitutional amendment to prohibit abortion. Al Gore wrote, "I strongly oppose Federal funding of abortions. It is my deep personal conviction that it is wrong." Others have said the same thing over the years.

Certainly, favoring a constitutional amendment is not a suggestion that you don't follow the rule of law. That is the rule of law. If you disagree with a Supreme Court decision, if somebody thinks it is in error or should be corrected, you do it by a constitutional amendment, not by violating a Supreme Court ruling. Isn't that correct?

Judge PICKERING. Senator Sessions, I believe very strongly in the adage that we are a Government of laws, not of men, and I greatly respect the rule of law. If we don't do that, then there is no way, in my opinion, that we can render effective justice. We have got to follow the rule of law.

Senator SESSIONS. In the comments, you were asked why you bothered to ask the Sovereignty Commission about the union violence there that had occurred in your neighborhood in a casual meeting, a chance meeting, it appeared.

I would just offer this for the record. Charles Harrison, the first African-American hired in the Laurel, Mississippi Police Department in the 1960's, wrote in support of your nomination and said this, quote, "Klansmen had committed violent acts, including murder, at the Masonite pulpwood plant. County Attorney Charles Pickering helped investigate the Klan and signed an affidavit to indict Dubie Lee, a Klansman, for a murder at that Masonite plant. Charles Pickering worked with the FBI to investigate and prosecute violent KKK members, and even testified against the Imperial Wizard of the KKK, Sam Bowers. He put his, his wife's, and his children's lives at risk by doing this. If any person would have mentioned union activity to me that affected Jones County, I would have asked about it, too, as would anyone who knew the violent history of unions at the Masonite plant. That would have had nothing to do with segregation. It would have had to do with protecting people, black and white, from violence. In the end, the Sovereignty Commission"—and I am quoting this letter from this African-American—"In the end, the Sovereignty Commission allegations only prove that Charles Pickering fought against the Klan and for the people of Jones County."

I think that pretty well says it all, and I know you would appreciate that being made a part of the record, which I will do.

As a former United States Attorney, I think judges sometimes think they have a right to complain about prosecutors. They work for the Government. You hold United States Attorneys and Assistant United States Attorneys, most judges do, to a higher standard, don't you, Judge Pickering?

Judge PICKERING. I do.

Senator SESSIONS. In my 12 years as United States Attorney, I have had a number of occasions when Federal judges say I think this assistant did the wrong thing; I think you were incorrect in

this, or I don't know why you sought to bring that case. Maybe, technically, that is not the best way to do things, but it gets some feedback from the courtroom and I think in the long run it is helpful.

I know you were concerned about this disparity of sentences, seeing a person who had fired in the house of this interracial couple with a gun. Let me ask you, did you know at the time that that person pled to a misdemeanor and probation, that he had fired a gun into the house?

Judge PICKERING. I did not, not at the time that the plea was taken.

Senator SESSIONS. Did the Government attorneys know that at that time, or do you know?

Judge PICKERING. I am not sure whether they did or did not. I have reviewed some records that indicate to me that they should have.

Senator SESSIONS. But it would strike me that it would be a colossal error and really a breach of ethics for a prosecutor to withhold that from a judge, as you evaluate what kind of a sentence to make, if they knew it at that time.

Judge PICKERING. Well, of course, I had that information at the time I did the sentencing. When I did not have it was when they took the plea.

Senator SESSIONS. When you accepted the plea—

Judge PICKERING. Yes.

Senator SESSIONS [continuing]. Under the recommendation?

Judge PICKERING. Well, the Government brought—they called, as I recall, and this has been several years back. It is difficult for me to remember what happened last month.

Senator SESSIONS. I know.

Judge PICKERING. But this was at least 5 or 6 years ago. My recollection is the case was scheduled for trial and they called and said can we come down. And they came down fairly late one afternoon and said we want to have this defendant enter a plea of guilty. And they indicated the reasons why they thought it was an appropriate sentence—or appropriate plea, and I took it. That is my recollection.

Senator SESSIONS. Well, I don't believe that—

Judge PICKERING. They did not mention that he had shot into the house before I took the plea, not to my recollection.

Senator SESSIONS. Madam Chairman, I thank you for allowing Judge Pickering to have a chance to respond to these charges. I think he has responded to each and every one of them. I believe, as the five Mississippi people who came here with him on his behalf, three of whom are African-Americans prominent in their communities, they said he has been one of the good guys. They said from the beginning he has been on the right side. He has stood up when it was not popular against violence and against the Klan, and to have him now accused of misconduct is odd.

One of the lawyers, a plaintiff's lawyer, said he is a populist judge, he is for the little man; he consistently rules for the little guy, and that is who I represent, he told me. Everybody knew he was a man of integrity. When he saw something in this cross burning case that didn't strike him as right, it offended his sense of

right and wrong. And I believe Judge Pickering has a sense of right and wrong that is important in a judge to be successful. I just believe that his record is good on that.

Judge Pickering, I know a lot of people have their children in private schools. Did your children go to public or private schools?

Judge PICKERING. My young daughters—the first year that they paired schools, which meant that they would be going to a majority-black school; it was a previously all-black school—they went to the previously black school and that is where they got their education. We stayed with the public schools. We helped integrate the public schools. And as I have indicated, we had contact with African-American children and we encouraged our children to do that.

Senator SESSIONS. Well, I think that is just another example of setting a good example in your community, of being the kind of community person that brought people together rather than setting them apart. I believe you deserve recognition and credit for that, for a really terrific career, and I thank you for your fine testimony.

I think the problem at this point is not going to be with you, Judge Pickering. It is going to be with the people on this Committee. They will have to wrestle with their conscience, and I think if they don't allow the political hubbub to overcome good judgment, you will be in good shape.

Thank you.

Judge PICKERING. Thank you, Senator.

Senator FEINSTEIN. Thank you, Senator.

It has been a long afternoon, Judge Pickering, but the ranking member has prevailed on me to have a brief—how many seconds?

Senator HATCH. Fairly short.

Senator FEINSTEIN. And admitting to his seniority and his perspicacity—

Senator HATCH. And friendship.

Senator HATCH [continuing]. And friendship—

Senator HATCH. And care and love.

Senator FEINSTEIN. How about 120 seconds? That is 2 minutes.

Senator HATCH. Let me see what I can do. I don't think I can get it in 2 minutes, but I will try to be very short.

I just wanted to close. I personally wanted to thank Madam Chairwoman for conducting a fair hearing. She is fair, and she is a decent and wonderful Senator as far as I am concerned and I have certainly appreciated having her on this Committee.

Now, don't count that in my time.

[Laughter.]

Senator HATCH. I would just like to make the following observation, if I may. We have heard a lot today about Judge Pickering's record with respect to the Swan case and I would like to just make one closing comment on that. Basically, I want everybody here to listen to this and really hear this.

You have already mentioned some of this in your earlier testimony, but I think it really is important. I would just like to read an excerpt of your comments during the sentencing phase of Mr. Swan's case. At the sentencing hearing on August 15, 1994, you stated, quote, "This is conduct that is reprehensible. It cannot, it will not be tolerated, and your views on racial or interracial mar-

riages or those of anybody else involved is completely immaterial. You just cannot intimidate people in their homes," unquote.

Then again at the November 15, 1994, sentencing hearing you described a cross burning as a, quote, "heinous crime," unquote, and stated, quote, "If you interpret it that I think it is all right to have prejudice that manifests itself in burning crosses, that is incorrect. I think it was just as reprehensible in the Lee case and I think it was reprehensible in this case, and I think the defendant has got to pay a debt to society for a reprehensible crime that he committed. And nobody made him get drunk and go do what he did that night. He did that," unquote.

Then at the January 23, 1995, sentencing hearing you reiterated your position by saying, quote, "You are going to the penitentiary because of what you did. And it is an area that we have got to stamp out, that we have got to learn to live races among each other. And the type of conduct that you exhibited cannot and will not be tolerated. You did that which does hinder good race relations and was a despicable act. I would suggest to you that during the time that you are in the prison that you do some reading on race relations and maintaining good race relations and how that can be done," unquote.

I personally appreciate you and appreciate those comments. I know that that is what you truly believe, and I believe you will make a great judge.

I want to thank our chairwoman here today for the excellent way she has conducted these hearings.

Senator FEINSTEIN. Thanks, Senator Hatch.

We will keep the record open for additional questions or statements for 1 week.

Judge Pickering, you are free to submit any material for the record that you would like to. In any way that you would wish to more fully address the questions, you certainly have that opportunity. I want to thank you and I want to thank everyone.

This hearing is adjourned.

Judge PICKERING. Thank you, Madam Chairman.

[Whereupon, at 6:35 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

## QUESTIONS AND ANSWERS

### RESPONSES OF CHARLES W. PICKERING, SR. TO WRITTEN QUESTIONS OF SENATOR JOSEPH R. BIDEN, JR.

#### Cross-Burning Case

The facts of the *Swan* case were reviewed in detail at your hearing. I will not restate them in full here, but I do have some additional questions.

According to court documents, Swan and his friends met at a store in Improve, Mississippi, where they discussed burning a cross in the family's yard. They then left the store and gathered materials to build the cross, including a flammable liquid to set it on fire, returned to the store and put the cross together, loaded it into a pickup truck and drove it over to the Polkey home, carried it to the Polkeys' front yard, poured the liquid, stood the cross up, leaned it against a tree, and lit it on fire. Yet, you have characterized the activity as merely a "drunken prank."

1. Would you today still characterize these activities as a "drunken prank?" Why or why not? If your view has changed, explain why.

With all due respect, I do not think that the record supports the premise that I felt the cross-burning incident was merely a "drunken prank." I have not and do not today characterize these activities as a "drunken prank." The best indication of how I characterized the cross burning incident in this case is what I said, as reflected in the transcripts made at the time. Let me review chronologically what I stated. "[T]his is conduct that is reprehensible. It cannot -- it will not be tolerated. And your views on racial or interracial marriages or those of anybody else involved is completely immaterial. You just cannot intimidate people at their homes." (Tr. 8/15/94, pp. 4, 5) I stated of Swan, "he committed a reprehensible crime . . . And he's going to pay a price for it." (Tr. 11/15/94, p. 5) Referring to Swan's conduct I said "I think it was reprehensible in this case. And I think the defendant has got to pay a debt to society for a reprehensible crime that he committed and nobody made him get drunk and go do what he did that night." (Tr. 11/15/94, p. 8)

I went on to state that the conduct in this case involved "[s]ome drunk young men doing a dastardly deed that they should not have had in their hearts to do . . ." (Tr. 11/15/94, p. 11). I also stated "[t]here's not any question in my mind I'm going to impose some incarceration. Don't take the fact that I've been pointing out the inconsistency of the Justice Department's positions, . . . that I ever had any thought that this defendant would not spend some time in the penitentiary. I have never entertained that thought. . . . The only thing that I'm concerned about is the length of that incarceration." (Tr. 11/15/94, p. 13-14).

After defendant Swan stated, "I know I done wrong, Your Honor. Like I said at the trial, I wasn't meaning anything to burn the cross. I was in just with the rest of them. I think, like I said then, if they find me guilty on these charges, they're going to sentence an innocent man on

these charges. I think I'm innocent on the charges I've been charged with. . . .", I responded, "Mr. Swan, I can't agree with you on that. I heard the testimony. And true, the testimony was undisputed that you basically are not a racist and that you have not had problems with African-Americans and that you've not been one to set out to create disharmony between the races. But on this particular night, you went with a young man who said he had shot into the house. And there was talk about the 'old N-lover.' . . . you were going to go down there and burn a cross in front of the old N-lover's house. And that's exactly what this statute was passed to stop people from doing things based on race, trying to intimidate and harass. Burning a cross in front of a man's house, I don't understand how you can say that's not intimidation or harassment. Now to you, it might have been primarily just a lark, just a fun time because I'm drunk. But you're stepping on somebody else's rights. I don't understand your saying that they're sentencing an innocent man. But cross burning is a heinous crime. . . . I don't have any feelings that what you did should be swept under the rug or what you did, that you're an innocent person." (Tr. 11/15/94, p. 20-21). I also told defense counsel "I assume that the defendant is aware that under the guidelines and the conviction that he is facing some penitentiary time. The only question we are talking about is how much." (Tr. 11/15/94, p. 24).

I told Swan "[w]hat all three of you all did was wrong. The Congress of the United States has determined that this type of activity will not be tolerated. . . from what I have heard of you and the other two, I think all three of you learned a lesson. But sometimes youthful pranks under the influence of alcohol on a cold winter night can get you in a heap of trouble. And that's what happened. You're not going to the penitentiary because of what somebody else did. You're going to the penitentiary because of what you did. And it is an area that we've got to stamp out; that we've got to learn to live races among each other. And the type of conduct that you exhibited cannot and will not be tolerated. So I don't want you to think that you are going to the penitentiary for something somebody else did. What you did was a despicable act." (Tr. 1/23/95, p. 6-7) I further advised "I would suggest to you that during the time you're in the prison that you do some reading on race relations and maintaining good race relations and how that can be done." (Tr. 1/23/95, p. 10)

2. Even if it were just a "prank", would that excuse this behavior? Why or why not?

I do not consider these activities to be just a "prank." However, even if some may think that they were, such characterization would not excuse his behavior, and I so advised Swan. Cross burning conjures up terrible memories of grievous past injustice. It is a heinous crime as I indicated at that time.

You were concerned about the disparity in the sentences between Mr. Thomas and Mr. Swan, because they were being convicted for the same incident.

3. Did the government offer Daniel Swan the opportunity to plead guilty in exchange for dismissing the most serious charge in the indictment? Did Swan reject any such offer? Did Swan boast to his friends, prior to trial, that he would receive no prison

**time? If Swan had accepted a plea offer to dismiss the most serious charge, would his sentence have been "absurd, illogical and ridiculous," as you said in your January 4, 1995 order? Why or why not?**

The government offered Swan a plea agreement under which he would have received a sentence of approximately eighteen months, some nine months less than the sentence I imposed after trial. Swan rejected this offer. Although he admitted that he engaged in the cross burning, he denied that he had the requisite animus for conviction. I did not agree with Swan's contention. When the FBI started investigating the cross burning, Swan did tell his friends that he thought that the charge would be trespassing, that it would be a misdemeanor and that they would have to pay a fine and be placed on probation. I did not perceive this to be boasting but rather a misperception on Swan's part regarding the seriousness of what he had done. This too is borne out by the record. I clearly advised Swan on the record that this was a misperception on his part.

I do not believe that Swan's sentence, if he had accepted the plea agreement offer, would have been "absurd, illogical, and ridiculous." It would not have been "absurd, illogical, and ridiculous" because a sentence of one and a half years in view of the fact that Swan was not a juvenile, and was not suffering from mental weakness, would have been comparable to that of the other two defendants. I believe this to be the case even though the juvenile was much more culpable, as indicated by the fact that the juvenile had previously shot into the home, was trying to intimidate the Polkeys into leaving their home, and had said that he "hated N\_\_s," and had become involved in a fight at school with African Americans that resulted in his suspension for two days. Neither would I think that a two to three year sentence for the juvenile would have been absurd, illogical or ridiculous. As I indicated in my order of January 4, 1995, I "expressed both to the government and to counsel for the juvenile serious reservations about not imposing time in the Bureau of Prisons for the juvenile defendant." Mr. Berry, counsel for the Civil Rights Division of the Department of Justice, admitted in open court "perhaps the lesson - the lesson that I take from that, your honor, is that perhaps the government should have been more tough - should have asked for a more stringent or stronger or longer sentence for the other defendants in this case."

4. **Isn't it true that you were powerless to address the disparity yourself? That the only legal issue was whether a particular statutory provision applied to cross-burning, not whether the disparity was permissible?**

The record indicates that I discussed with the government attorneys and counsel for the defendant three or four legal issues. One had to do with whether Section 844 applied to cross burning, with the 8th Circuit having ruled one way (U.S. v. Lee, 935 F.2d 952 (8th Cir. 1991)) and the 7th Circuit having ruled another way. (U.S. v. Hayward, 6 F.3d 1241 (7th Cir. 1993)). I also discussed, in view of the great disparity in the sentences of the three defendants involved in this instance, and the greater culpability of the juvenile, whether the result was so glaringly unjust as to require an examination of Congress' intent as discussed in Chanman v. U.S., \_\_\_ U.S. \_\_\_

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111 S.Ct. 1919, 1926-27, 114 L.Ed.2d 524 (1991). Another question was whether or not a specific instruction on animus should have been given as required under the second Lee case decided by the 8th Circuit. United States v. Lee, 6 F.3d 1297 (8th Cir. 1993), cert. denied, 511 U.S. 1035, 114 S.Ct. 1550, 128 L.Ed.2d 199 (1994). I also discussed with counsel the "safety valve" measure adopted by Congress, (codified at Section 5C1.2 of the Guidelines Manual) which allows a downward departure from mandatory sentences in certain cases including cases under § 844. The government offered to brief this issue, but did not do so. I could have followed the 8th Circuit and there would have been no great disparity in the sentence. Based on my perception of the evidence, I may could have departed downward using the "safety valve" in the Guidelines and have likewise avoided the great disparity in sentence.

According to the prosecution, you said that if the Department did not agree to a motion for a new trial, you "might well write a nasty opinion."

5. Did you say that you "might well write a nasty opinion," or any other words to that effect? Why or why not?

The comment about "a nasty opinion" was not mine, but was a note by a Department of Justice representative. I have no recollection of making any statement about a "nasty opinion" and do not believe that I did so. What I may have said was that I was inclined to write an opinion which would discuss the Department of Justice's position in all other cross burning cases throughout the country which is the information that I requested from the government in my January 4, 1995, order. The Department of Justice representative may have perceived that to be a "nasty opinion" from the government's perspective, but I certainly do not believe that I made any such statement.

On November 29, 1994, Bradford Berry, a line prosecutor on this case, wrote to the Justice Department regarding the in-chambers conference you conducted off-the-record on November 15. To my knowledge, this is the only record of what transpired during the conference.

6. Did you memorialize that in-chambers conference in any fashion?

I did not. I would note that Mr. Berry's letter was dated some two weeks after the meeting. He apologized for it being late.

Berry wrote: "He [Judge Pickering] thinks the Department is probably right on the law, but the result in this case would clearly be unjust." Your January 4, 1995 order stated: "This Court agrees with the Seventh Circuit that the language of the statute is unambiguous." In light of the legal conclusion you reached, how does the existence of a circuit split serve to explain your conduct in this case?

There is authority that a court can look to the intent of Congress if there is an ambiguity in a statute or if the result is "glaringly unjust." *Chapman v. U.S.*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1919, 1926-27, 114 L.Ed.2d 524 (1991). I might point out that the two counts as to which Swan was sentenced, Title 18, United States Code, § 241, and Title 42, United States Code, § 3631, are the only two statutes of which I am aware passed by Congress applying to hate crimes that covered this incident. Section 844 was not passed as a hate crime statute. Consequently, the 24 to 30 month range sentence was the punishment that Congress and the drafters of the guidelines found to be appropriate for these two hate crimes. The 8th Circuit panel and one member of the 7th Circuit panel found that Congress did not intend that § 844 apply to cross burning but that it was Congress' intent to apply § 844 only to arson. I reiterate that although I conveyed my serious concerns about the gross disparity in sentence to the Department of Justice, the Department of Justice did not have to agree with my concerns. All the Department of Justice had to do was to ask me to rule on the § 844 issue and appeal my ruling to the Fifth Circuit. I had no discussion with the Department of Justice as to how the Memorandum of Understanding that was presented to Swan on January 13 was drafted or regarding what it would contain. When it was presented to me on January 23, the government advised that they were agreeing with Swan that if he would accept and not appeal sentences under the hate crime statutes, the government would not contest his motion to dismiss the count based on § 844. Ultimately the Civil Rights Division of Attorney General Janet Reno's Justice Department agreed with the sentence I imposed.

7. Did you tell the prosecution that you thought the "Department was probably right on the law," or any other words to that effect? Why or why not?

It is difficult for me to recall specifically a conversation that took place seven years ago as to which I made no notes. I think, based on my review of the record, that I likely would have told Mr. Berry it was difficult for me to see an ambiguity in the statutory language.

8. In your view, is it ethical for a judge to threaten a particular legal ruling, knowing that that ruling would be wrong on the law, as a way to force an advocate to moderate his position? Why or why not?

No, I do not believe it is appropriate for a judge to threaten to misstate the law. I do not believe that I threatened to make a particular legal ruling that I knew was contrary to the law. There were a number of issues that had been discussed, including that the 8th Circuit had ruled one way and the 7th Circuit ruled another way on the application of § 844 to cross burning; whether the "safety valve" applied (Section 5C1.2 of the Guidelines); whether the specific animus instruction required by the second *Lee* opinion should have been given; and whether this was a glaringly unjust sentence when considered in light of those received by the other defendants. I think all of these issues have to be considered in the context of my comments about Mr. Swan's actions, all of which have been set out fully above.

You described the prosecution as "wanting seven years for a young man that got drunk." In your letter to Senator Hatch, you described the defendants as "a

juvenile, an adult with a low IQ, and a 20-year-old, Daniel Swan, all of whom had been drinking.”

9. Is that a fair description of Mr. Swan's actions? Why or why not?

Taken in context with all of my comments on the record regarding the heinous and despicable nature of the crime I think this was a fair description of the overall situation involving all of the defendants.

10. Was this case primarily about drunkenness? Why or why not?

No. Drunkenness was involved, but this was primarily a case about a cross burning.

11. In your view, was the drunkenness of the defendants an aggravating factor, a mitigating factor, or of no effect in evaluating their culpability? Why? If it was of no effect, what do you keep referring to it in explaining your motivation?

As set out above, I certainly concluded that the drunkenness was no justification or excuse for Swan's conduct. I think it was one of many factors that should have been taken into consideration. In view of the considerable testimony that Swan had never demonstrated any hostility toward minorities, I thought it was appropriate to consider the fact that his actions that night took place on one of the four times that he had been intoxicated in his life. It was my conclusion that Swan did a drunken dastardly act in response to the juvenile's boast that he had previously shot into the Polkey home.

According to the prosecution, you said that “in the current racial climate in that part of the State, such a harsh sentence would serve only to divide the community.”

12. Did you say that “in the current racial climate in that part of the State, such a harsh sentence would serve only to divide the community,” or any other words to that effect? Why?

While I have no specific recollection of having made the statement quoted above, I have stated many times that the best chance that we have for moving forward and promoting racial harmony is for men and women of good will, both black and white, to work toward that end. Anytime that a white person does something that is offensive to African Americans, in my opinion, it sets back the cause of good race relations. The same is true in the white community. If whites perceive something is excessive in regard to race or racial matters, that likewise hinders the advancement of good race relations. It is an extremely delicate balance. My comments above indicated that I thought the cross burning was offensive, that it had a seriously detrimental effect on positive race relations and that the defendant had to serve time in the penitentiary as a result. I attach a copy of the article that I wrote for the Clarton Ledger in 1999, previously furnished to the Committee, which sets out my feelings on racial reconciliation. I also enclose an

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editorial from the Sunday, February 17, 2002, edition of the Clarion Ledger, which comments on my 1999 article on promoting racial harmony, as well as a copy of remarks that I made before the Mississippi Senate on February 21, 2002.

13. **Do you believe that a mandatory 5-year sentence for a cross-burning serves only to divide the community? Why or why not?**

In view of the serious inconsistency on the part of the government regarding the sentencing of the three defendants, I think that the application of the mandatory sentence would not have been conducive to promoting good race relations. I likewise think it would not have been conducive to good race relations if I had not sent Swan to the penitentiary at all. I sentenced him to what Congress and the Sentencing Commission determined is the appropriate sentence for this particular hate crime. The government, by offering Swan a plea bargain, advocated a sentence of nine months less than I gave him.

14. **Do you believe that such a system would ever serve to divide the community more than the act of burning a cross on the lawn of a minority or mixed race family? Why or why not?**

I thought burning the cross on the lawn in front of a mixed race family was extremely divisive and that it had to be punished. My comments on the record bear this out.

**You seemed to think that the fact that the Polkeys were not awakened by defendants' actions was a mitigating factor. You described it as "[s]ome drunk young men doing a dastardly deed that they should not have had in their heart to do went out and did something that they thought was aggravating somebody. And it did aggravate them. But it didn't aggravate them that night while they were burning the cross."**

The above statement was made in response to Mr. Berry's argument. Mr. Berry argued "We would further submit, your Honor, that the facts of the Lee case - - although this again was a case that was brought by the Department of Justice, and I am here as a representative of the Department of Justice - - the facts of the Lee case may explain, may explain why the court came out the way that it did. Again, your Honor, the facts were that the cross was so far removed from the families that there was not the evidence of harm to specific individuals." (Tr. 11/15/94, p. 10) I went on to explain that the burning of the cross "had a devastating effect on [Mrs. Polkey]. But it did not have as much effect as shooting out the windows in the room where she and her children - - and the government was willing to come in here in that case and say, 'we will take a lesser plea. And we have no objection to home confinement.'" (Tr. 11/15/94, p. 11) I advised Mr. Berry "I told the government at that time before that ever took place that one of my problems with this case is the great disparity of punishment." (Tr. 11/15/94, pp. 11, 12) In my Order of January 4, 1995, as mentioned above, I expressed my concern about not giving the minor some jail time.

The testimony in the Lee case was that some of the occupants were drinking and that they had concluded that the son of an African American woman (Ms. Jones) had assaulted a white child. They burned a cross about 386 feet from the apartment building hoping it would have the effect of intimidating the African American family into moving out of the complex. Ms. Jones, her family and friends saw the cross burning and it frightened them. Mr. Berry in trying to distinguish the Lee case from the case before me, said "this is not a case like Lee, your honor, where there was trouble in the neighborhood, where the defendants claim they were trying to fix her problem with crime, where there was any other motivation other than the race of the victims." (Tr. 11/15/94, p. 8) To which I responded "I find one just as reprehensible as the other. . . . I think it was just as reprehensible in the Lee case. And I think it was reprehensible in this case." (Tr. 11/15/94, p. 8) My discussion of the fact that Mr. and Mrs. Polkey did not see the cross burning at night was in response to Mr. Berry's argument that the court had reduced the sentence in Lee because the cross was some 386 feet from the apartment building. It had the same effect. It was frightening to Ms. Jones. I did not believe that whether they were awakened by the cross burning had anything to do with the severity of the crime or the punishment. These comments were strictly in response to Mr. Berry's argument that this was a more egregious case than the Lee case, and that this was the reason the Lee court had decided not to apply the mandatory sentence.

15. Do you believe that whether a couple is awakened by a cross burning on their front lawn is relevant to the severity of the crime or the punishment? If so, why? If not, why did you make the above-quoted statement?

This question is answered in my response to question 14.

According to the prosecution, you said you "did not like being told what [you] had to do," and that the prosecution's sentencing brief appeared to be doing just that.

16. Did you say that you "did not like being told what [you] had to do," and that the prosecution's sentencing brief appeared to be doing just that, or any other words to that effect? If so, why?

The record indicates that I conveyed to Mr. Berry that his brief seemed to say that I had no choice in how I would decide the case - - in other words that I was required to follow the Hayward decision. I told Mr. Berry that "if the Hayward decision was decided - - a decision by the Fifth Circuit, I think you would be exactly correct." (Tr. 11/15/94, p. 7) I would have to follow that decision. Mr. Berry then stated "The Lee decision which your honor obviously could choose to follow or the Hayward decision which your honor could choose to follow, the Hayward decision is much more persuasive." (Tr. 11/15/94, p. 10) It is appropriate for counsel to argue strongly that one case is more persuasive than the other. However, when there is a split among the circuits, other than the district court's own circuit, the district court judge is free to choose, as Mr. Berry acknowledged, to follow whichever circuit the judge determines to be most persuasive.

In other words, although a trial judge is required to follow precedent from his own circuit, he is not obligated to follow precedent from any other circuit.

17. In this case, the five-year-mandatory minimum was imposed by Congress, was it not? Do you believe that it is appropriate for judges to attempt to circumvent Congress' wishes as to sentences? Why or why not?

I do not believe it appropriate for judges to attempt to circumvent Congress' wishes regarding sentences. However, it is necessary for judges to consider Congress' intent in applying sentencing statutes. As I previously mentioned in answer to question 4, at least three of the circuit judges who had reviewed the statute previously had concluded that it was not Congress' intent for this section to be applied to cross burning. In light of the fact that there was no Fifth Circuit precedent on point, I felt it was appropriate to consider guidance from other circuits as to Congress' intent in this regard.

18. How many sentencing cases have you had as a judge involving a conviction that carried a mandatory minimum sentence (e.g., distribution of >5 grams of crack cocaine)? Have you ever contacted the Justice Department regarding an alleged sentencing "disparity" in any of these cases?

I have had a number of cases involving mandatory sentencing under criminal drug statutes. If the defendant before me had previous felony convictions, I never hesitated to at least impose the mandatory minimum. If the defendant did not have previous felony convictions, I have sought to use the safety valve or other appropriate means to depart downward to avoid a harsh criminal sentence. The probation officers who appear before me regularly have indicated to me that it is their opinion that I cause them to do more work trying to maintain uniformity of sentencing or proportionate sentencing than any of the other judges that they appear before. In any multiple defendant cases I require probation to prepare a chart showing each defendant's sentence. I frequently confer with the Justice Department through the AUSA if I consider that there is a disparity in sentencing, if I feel the sentence is too harsh, and that the defendant has a good chance of rehabilitating himself. The manner in which I usually do this is that after I have reviewed the presentence investigation report and heard the position of the parties, I will ask the AUSA and defense counsel along with the probation officer to come to side bar and I will convey to them my feelings. It is my impression that judges around the country convey to the government and defense counsel their feelings when they feel that a sentence is disproportionate or too harsh. I never before have had the Justice Department take such a disproportionate position as they did in this particular case.

If you wish, I can give you names of defendants where I have conferred with the AUSA, defense counsel, and probation in this manner. I feel confident that the probation officers, who regularly appear before me, will confirm the fact that in cases involving youthful non-violent defendants, without prior felony convictions that I attempt to reduce their sentences, or avoid sentencing them to the penitentiary altogether, if I can find any way to do so that does not violate

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the Guidelines. If you wish to contact them, two of the probation officers who appear before me are Ken Ferrell, 601-582-5256, and Ken Johnson, 601-965-4447. I have gone to great lengths to do this in numerous cases, mostly involving African Americans. It is not unusual for me to try to avoid making a lifetime criminal out of someone who did not have previous felony convictions.

19. Are you regularly in the habit of departing downward from mandatory minimums for convicted felons? Why or why not?

Please see my response to question 18.

In another case, *Loper v. U.S.*, which dealt with a drug offense, you were reversed by the 5<sup>th</sup> Circuit for being too quick to *enhance* a sentence, yet in the *Swan* case, you advocated effectively to reduce the sentence.

20. Why? Are hate crimes not as serious as drug crimes?

Hate crimes certainly are as serious as drug crimes. I have departed downward in far more drug cases than in hate crime cases. But, I have heard far more drug cases than hate crime cases.

Loper was a previously convicted drug felon. This was not his first felony drug conviction. The presentence investigation report indicated that the sentence should be enhanced. Neither the government nor defense counsel objected to the PSI. I sentenced Loper accordingly. His conviction was appealed. The Fifth Circuit affirmed. The issue of the enhanced sentence was not raised at sentencing and it was not raised on direct appeal to the Fifth Circuit. Loper later filed a § 2255 motion. I denied the motion. Loper appealed to the Fifth Circuit. He did not argue that the enhancement was inappropriate, but that he had not been given notice that his sentence could be enhanced. The Fifth Circuit reversed on the notice issue, not on whether the enhancement was applicable. The Fifth Circuit was right.

William S. Moody was a 32-year-old African American male who appeared before me in Criminal Case No. 2:93cr23PG-006. He did not have a previous felony conviction. The Department of Justice did not bring him before me for sentence until well over five years had elapsed from the time he committed the crime. Under the guidelines he had an offense level of 15 which required a sentence in prison of from 18 to 24 months. I continued his sentence for one year so that he could demonstrate that he could live a law-abiding life under supervision. I used this as a basis to grant a seven level downward departure so that I could sentence him to the time he had already served before he made bond and sent him back to his family on supervised release. I have continued sentencing for other drug defendants in this same vein.

This is an indication that I do not treat congressional statutes differently. I treat defendants differently based upon the particular facts of their case. I am especially inclined to



was not pleasant. Mr. Berry in his interview with Committee staff stated "The Judge was, you know, civil . . . he was professional. He, you know, put forth his view. I understood what he was saying." Mr. Lacy in his January 5th letter to the Department of Justice stated that Judge Pickering "never directly asked us to do anything."

24. What is your philosophy on an appropriate judicial temperament?

I think it is a judge's responsibility to listen to both sides of a case with courtesy and to be fair and impartial.

Despite the fact that the jury had found racial animus in convicting the defendant, you questioned whether Swan's acts - which involved burning a cross on an interracial family's lawn - involved racial animus. You said you were considering overturning the verdict and more specifically instructing the jury on racial animus in a retrial.

25. How does the purposeful burning of a cross on the lawn of an interracial couple not involve "racial animus?"

Respectfully, the specific language I used was "The court is also concerned as to whether or not it should set aside the guilty verdict and order a new trial in which the jury would be more specifically instructed as to the animus required of the defendant as reflected in the second Lee opinion." Animus used in the context of my order regards the specific intent required to find a defendant guilty of the crimes charged. I referred many times in the transcript and order to the fact that defendant Swan did not have nearly as much racial animosity as did the juveniles who admitted that he "hated N\_\_s" and had previously shot into the Polkey home.

The second Lee opinion, United States v. Lee, 6 F.3d 1297 (8th Cir. 1993), cert. denied, 511 U.S. 1035, 114 S.Ct. 1550, 128 L.Ed.2d 199 (1994), reversed a conviction under 18 U.S.C. § 241 because the court determined that the instruction on intent was insufficient when compared with the wording of the statute. The general instruction on intent I gave at Swan's trial was very similar to the instruction rejected in the second Lee case. The racial animus or animosity of the defendant relates to the specific intent requirement of the statute and is a factual finding to be made by the jury. It was my concern, in view of the language of the Lee opinion, that the jury may not have been completely or properly instructed on the finding of specific intent required under the statute.

26. Did you ever suggest that Mr. Swan or one of the other defendants should do yard work for the Polkey family as part or all of their punishment?

I did not. In sentencing Mickey Herbert Thomas, the other adult with limited mental capacity, I directed that he make restitution. I directed that the money could be turned over to probation since "the Polkeys may not want any direct contact with him. If they don't, that should

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be honored." I further directed that Thomas's community service "should be something that would promote better relations between the races." And as to the juvenile, I directed that in addition to the other terms of his sentence, he should make restitution and should write a letter of apology to the Polkeys. I didn't suggest that they do anything at the Polkey home because I did not think the Polkeys would want them around. I did encourage all of the Defendants to do something to improve their ability to get along with people of other races.

27. Did you raise the Swan case to representatives of the U.S. Department of Justice who were appearing before you on matters other than the Swan case? If so, please give details and explain why.

I have no recollection of raising the Swan case to representatives of the Department of Justice who were appearing before me on other matters. However, I was generally concerned that I could not get a response from the government on my request for information.

Federalism QuestionsCommerce Clause

In 1995, the Court held the federal gun-free school zone act was unconstitutional in the Lopez case on the grounds that Congress exceeded its authority under the Commerce Clause.

28. Do you believe that case was correctly decided? Why or why not?

If I am fortunate enough to be confirmed as an appellate judge, it will be my duty to follow Supreme Court precedents. I do not think it appropriate for me to discuss whether I think the case was correctly or incorrectly decided. I do believe that acts of Congress are presumed constitutional, and that great deference should be given to findings of Congress.

In United States v. Morrison, the Supreme Court invalidated the Violence Against Women Act despite voluminous findings by Congress of the substantial effects of such violence upon interstate commerce. In doing so, the Court supplanted its traditional rational-basis test -- in which the Court asked only whether Congress had a rational basis for finding that the regulated activity had a substantial effect upon commerce -- with a new, stricter standard of review.

29. Do you agree with the Court's new approach? Why or why not?

If I am fortunate enough to be confirmed as an appellate judge, it will be my duty to follow Supreme Court precedents. I do not think it appropriate for me to discuss whether I think the case was correctly or incorrectly decided. I do believe that acts of Congress are presumed constitutional, and that great deference should be given to findings of Congress.

In United States v. Lopez and in United States v. Morrison, the Supreme Court invalidated acts of Congress on the grounds that the legislation in question exceeded Congress's powers under the Commerce Clause. As I read those decisions, the Court has reverted to a categorical conception of the Commerce Clause, permitting Congress, whenever it is regulating intrastate activities that substantially affect interstate commerce -- as opposed to direct regulation of the channels or instrumentalities of interstate commerce, or regulation of persons or things in interstate commerce -- to regulate only activities that are economic in nature.

30. Do you agree that the Supreme Court has created this categorical distinction? Why or why not?

The United States Supreme Court has affirmed that Congress may properly exercise its authority to regulate interstate commerce under the Commerce Clause in three specific situations.

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Third, Congress may regulate activities which substantially affect interstate commerce. Under these two cases, economic activities that in the aggregate substantially affect interstate commerce may be regulated by Congress.

In the wake of decisions such as Lopez and Printz, it has been suggested that Congress's Commerce Clause power is limited to interstate transactions.

31. Can Congress restrict the killing of endangered species, if even those animals never cross state lines? Why or why not?

In order for me to make an analysis of the specific question posed, I would have to review the factual background of the case, the statutory scheme imposed by Congress, the constitutional authority of Congress to regulate interstate commerce as determined by prior precedent of the United States Supreme Court and the Fifth Circuit Court of Appeals, and carefully consider the briefs of the parties. I do not have sufficient information at this point to make that decision. Further, I would hesitate to prejudge this issue and perhaps have to recuse myself if such a case should come before me if I was to state an opinion one way or the other.

Section 5, 14<sup>th</sup> Amendment

In 1997, in *City of Boerne v. Flores*, the Court struck down the Religious Freedom Restoration Act on the grounds that Congress exceeded its authority under section 5 of the 14<sup>th</sup> Amendment by creating new substantive rights.

32. Do you believe that case was correctly decided? Why or why not?

If I am fortunate enough to be confirmed as an appellate judge, it will be my duty to follow Supreme Court precedents. I do not think it appropriate for me to discuss whether I think the case was correctly or incorrectly decided. I do believe that acts of Congress are presumed constitutional, and that great deference should be given to findings of Congress.

Likewise, in 2000, in the *Morrison* case, the Court invalidated the civil damages remedy of the Violence Against Women Act – not only on Commerce Clause grounds – but because Congress allegedly exceeded its authority under section 5 of the 14<sup>th</sup> Amendment by regulating private, as opposed to state, conduct. In so doing, the Court held that the notorious 1883 decision, *The Civil Rights Cases*, was still good law and that “state action” must be shown in order to invoke the protections of the 14<sup>th</sup> Amendment. Specifically, the Court in *Morrison* ignored the fact that in a previous case, *United States v. Guest* (1966), five justices stated that Congress could reach purely private conduct pursuant to section 5 of the 14<sup>th</sup> Amendment.

33. Do you believe that Morrison's ruling on section 5 of the 14<sup>th</sup> Amendment was correctly decided? Why or why not?

If I am fortunate enough to be confirmed as an appellate judge, it will be my duty to follow Supreme Court precedents. I do not think it appropriate for me to discuss whether I think the case was correctly or incorrectly decided. I do believe that acts of Congress are presumed constitutional, and that great deference should be given to findings of Congress.

10<sup>th</sup> Amendment As Limit on Congressional Power

In *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994), you struck down the Brady gun law's provision dealing with interim background check regulations, as violating the 10<sup>th</sup> Amendment. Ultimately, the U.S. Supreme Court endorsed your view in *Printz v. United States*, 521 U.S. 898 (1997), albeit by a 5-4 split. That debate between the majority and minority opinions frames perfectly, in my view, the debate over the appropriate reading of the 10<sup>th</sup> Amendment. The majority – and you – favor an expansive reading of the 10<sup>th</sup> Amendment as a way to limit Congressional power. The minority – and many of us in the Congress and some of your colleagues in the federal judiciary who addressed this issue at the time – believe that the 10<sup>th</sup> Amendment does not narrowly limit Congress's powers.

34. Do you believe that the 10<sup>th</sup> Amendment forbids the Congress from doing anything that is not specifically permitted by the Constitution? Why or why not?

If I am fortunate enough to be confirmed as an appellate judge, it will be my duty to follow Supreme Court precedents. The Supreme Court has established a number of precedents upholding acts of Congress in cases in which there is no express grant of authority in the Constitution for the congressional act. However, if the Constitution specifically prohibits certain congressional actions, then I think the prohibition should be respected. I do think there are areas, not specifically addressed in the Constitution, in which congressional action is appropriate. Certainly I will follow Supreme Court precedent where the Court has previously approved such acts.

11<sup>th</sup> Amendment As Limit on Congressional Power

In 1996, the Supreme Court ruled in *Seminole Tribe v. Florida* that, under the 11<sup>th</sup> Amendment, Congress can only authorize suits against states when acting pursuant to section 5 of the 14<sup>th</sup> Amendment, not when acting under the Commerce Clause power or other powers. This overruled *Pennsylvania v. Union Gas* (1989), in which the Court ruled that the Congress can override the 11<sup>th</sup> Amendment by using any of its constitutional powers.

35. Do you agree with the holding in *Seminole Tribe*? Why or why not?

If I am fortunate enough to be confirmed as an appellate judge, it will be my duty to follow Supreme Court precedents. I do not think it appropriate for me to discuss whether I think the case was correctly or incorrectly decided. I do believe that acts of Congress are presumed constitutional, and that great deference should be given to findings of Congress.

In 1999, the Court ruled in *Florida Prepaid v. College Savings Bank* that Congress cannot authorize suits against states for patent violations, overruling our attempts to apply the Lanham Act to the states. The Court ruled that Congress improperly attempted to create new rights under section 5 of the 14<sup>th</sup> Amendment, and, incredibly, held that there was no proof before Congress of any widespread theft of patents.

36. Do you agree with the holding in *Florida Prepaid*? Why or why not?

If I am fortunate enough to be confirmed as an appellate judge, it will be my duty to follow Supreme Court precedents. I do not think it appropriate for me to discuss whether I think the case was correctly or incorrectly decided. I do believe that acts of Congress are presumed constitutional, and that great deference should be given to findings of Congress.

In 1998, you issued an 11<sup>th</sup> Amendment ruling in *Kinnison v. Mississippi*, 990 F. Supp. 481 (S.D. Miss. 1998). Even though this was a suit by a state citizen, challenging a state law, with no federal interest besides the priority of a federal court venue for the suit, you went out of your way to give a sort of primer on the role of the federal government – i.e., the legislative and executive branches – not merely the judicial branch. For example, you wrote: (1) “[t]he federal government is a government of limited power,” (2) “all powers not delegated to the federal government are reserved to the states,” and (3) “[t]he founding fathers, for good reason, adopted the doctrine of ‘separation of powers.’ This doctrine is clearly enunciated in the Constitution, is still controlling, is supported by sound logic and ought to be controlled and followed by federal courts.”

Your comments go beyond the narrow question presented – whether a *state* citizen may sue a *state* agency in federal court – and into broader views of federalism, congressional power, and state sovereign immunity.

37. Given your statements in *Kinnison*, is it fair to say that you agree – as a matter of constitutional policy, as opposed to merely following Supreme Court precedent – with the Rehnquist court's aggressive reading of the 11<sup>th</sup> Amendment as a means of limiting congressional power? What is the basis for your agreement or disagreement?

All of the quotations from my Kinnison decision are from established Supreme Court precedent, which I am obligated, and if I am confirmed, will continue to be obligated to follow. This should not be taken as an indication that I agree or disagree with recent Supreme Court decisions. Regardless of how the Supreme Court interprets the 11th Amendment, it is and will be my responsibility to follow that precedent.

38. Did you not concede in Kinnison that while the "specific wording of the Eleventh Amendment does not bar a suit against the state by its own citizens," the Supreme Court's ruling in extending the Amendment to cover all such suits is "entirely appropriate"? Why or why not?

The entire quotation from Kinnison is "Since federal courts have limited jurisdiction, this is entirely appropriate." I could have written this sentence with a little more clarity. I am bound to follow Supreme Court precedent, and the Supreme Court has clearly ruled that the 11th Amendment bars suits by a state's own citizens, unless there is a waiver of sovereign immunity. I am bound to follow that precedent, whether I agree with it or not. Hans v. Louisiana, 134 U.S. 1 (1890).

39. Given that the 11<sup>th</sup> Amendment is entirely silent on whether a state may be sued by one of its own citizens in federal court, are you not making a value judgement when you term it "entirely appropriate" to deny access to the federal courts for citizens to vindicate their rights against states that violate them? Why or why not?

Please see my response to question 38.

Voting Rights

You have decided cases on a broad range of voting rights issues, from the one-person, one-vote doctrine, to redistricting, to majority minority districts. In these cases, you expressed direct disapproval of not only the Voting Rights Act, but significantly, the federal enforcement anticipated by this Act. In at least two of your voting rights opinions you have expressed the view that federal courts should leave resolution of election matters to state courts and to local officials.

40. Do you believe that the federal courts have a legitimate role in securing voting rights for historically disenfranchised groups? Why or why not? If so, why have you criticized efforts to have the federal courts enforce voting rights?

I do believe very definitely that the federal courts have a legitimate role in securing voting rights for historically disenfranchised groups. The Constitution provides for such rights and Congress has passed legislation in that area which should be enforced.

Under our form of government, redistricting is primarily the responsibility of the legislative branch. Consequently, when courts are asked to review a legislative action on the grounds that it has failed to protect constitutional rights, the courts are of necessity, entering into an area that is delegated to the legislature. However, as I noted in Fairley, "This does not suggest in any way that local governments should be allowed to discriminate or that legislative malapportionment having a significant impact on a voter expressing his will should be permitted." I further observed that this court "is bound to follow the precedents established by prior controlling judicial decisions." In other words, even though this is a legislative responsibility, when the legislature fails to protect recognized constitutional rights, it is the absolute responsibility of the courts to do so.

In the Reynolds case, the case that first recognized the one person one vote principle, the Supreme Court stated that federal courts should involve themselves in reapportionment only when a legislative body fails to reapportion itself "in a timely manner after having had an adequate opportunity to do so." 377 U.S. at 586 (1964). State courts and local officials should discharge their responsibilities. Federal courts should allow them time to do so. But if state authorities fail to enforce the Voting Rights Act, the federal courts absolutely should step in and enforce the Act.

At least two state court judges, one an elected democrat, have voiced similar concerns about their roles in redistricting after the 2000 Census. (See Deborah Baker, "Judge says he's 'damn mad' about having to do legislature's work, Associated Press, December 14, 2001; John Sanko, Judge prepared to draw map, Rocky Mountain News, October 26, 2001 (noting that the judge stated: "I had absolutely no desire to take the place of the legislature."))

41. **Why have your opinions expressed a hostility to those constitutionally protected rights?**

With deference, I do not interpret my opinions as expressing either hostility or disdain of federal courts' ensuring constitutionally protected rights. In fact, my view is quite the opposite. What I intended to convey was that redistricting is a responsibility that should be primarily discharged by elected officials in legislative bodies and not by the courts. The Supreme Court recognized this same principle in the case of Abrams v. Johnson, 512 U.S. 74 (1996), when it noted that "the task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies." However, it is equally well established that federal courts should intervene when necessary to protect constitutional rights.

In the Fairley opinion I stated "most all states resisted reapportionment. It could be said that they were brought kicking and screaming into court." But, I further observed that state legislatures have "reluctantly learned that they must live with" one-person, one-vote. I think legislative bodies, like most bodies and like most people, generally resist change. However, over time, legislative bodies have become much more aware of their responsibilities and they are discharging those responsibilities with much less resistance. It is my firm belief that when legislative bodies fail to discharge their constitutional responsibilities, courts within their limited jurisdiction, have a definite responsibility to correct such constitutional deficiencies. I said as much in Fairley, when I noted that "the federal judiciary is freed from having to justify its actions to the voters, the citizens or the taxpayers. It is free to correct abuses without fear of political reprisal." Fairley, 814 F.Supp. 1335. I also noted that I was bound to follow controlling precedents in voting rights cases. Id. at 1338, footnote 4.

The fact that I ordered the creation of a majority black justice court district in the Lawrence County case is an indication that I am not hostile to these constitutionally protected rights. I would note that none of the voting rights cases that I decided were appealed. In fact, the named plaintiff in the Fairley case has submitted a letter in support of my nomination.

As a state legislator, you saw that state actors are not always willing to protect constitutionally secured rights, yet your opinions express a disdain for federal courts doing so.

42. **Who in your opinion then should be charged with ensuring the equal voting rights if state actors aren't willing, as the Mississippi Senate was not in the 1960s and 1970s? Why?**

The federal courts are charged with ensuring equal voting rights if state actors do not protect those rights, and I will do so. It should be noted that the one-person, one-vote principle was not enunciated by the Supreme Court until 1964 in the Reynolds decision. Consequently, Mississippi as well as many legislatures in the 1970's did not have the capability to enforce one-

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person, one-vote with the precision available today, because of the newness of the rule, the lack of readily available sophisticated computer technology, and the lack of specific census data. It is my perception that most of the controlling case law regarding the drawing of voting districts under the Voting Rights Act was decided after the 1980 Census. There was much less litigation after the 1990 Census and it is my perception that there will be even less litigation following the 2000 Census.

Things have changed since the 1960's and 70's. All of us have changed. Mississippi has changed. Mississippi juries would not convict murderers of civil rights activist Vernon Dahmer in the 1960's. Neither would Mississippi juries convict the murderer of Medgar Evers. However, in the 1990's Mississippi juries convicted Sam Bowers in the fire bombing death of Mr. Dahmer and Mississippi juries convicted Byron De La Beckwith for the murder of civil rights activist Medgar Evers.

Law Review Article on Miscegenation

I would like to ask you about the article you wrote in 1959 advising the Mississippi legislature how it could close a loophole in a particular state law. That law provided up to a ten-year prison term for interracial marriage. As I understand it, in 1958, a decision by the Mississippi Supreme Court held that a problem with the language of that statute made the criminal law unenforceable. Your article specifically explained to the legislature how it could fix the problem in the statute, by declaring that interracial marriage was not incest, so as to make it enforceable, which means that a black person could then be prosecuted and sentenced to up to ten years in prison for marrying a white person.

43. At the time you wrote this article, did you personally believe that laws prohibiting interracial marriage were unconstitutional under your own reading of the Constitution? Why or why not?

As I explained in my 1990 testimony before this Committee, in the 1959 Law Journal article I noted that approximately half the states at that time had miscegenation laws, and that the Supreme Court had declined to review these laws on at least two occasions within the previous five years. I further noted that it would appear that the Supreme Court would not allow those laws to stand over time. But, to reconstruct my personal belief from 43 years ago as to a constitutional interpretation would be disingenuous. It is my personal belief and has been my personal belief for a long time that state laws banning interracial marriages are unconstitutional. I believe this; the Supreme Court so ruled in Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed2d 1010 (1967), and I will follow that precedent.

44. If you believed such laws were unconstitutional, why did you suggest ways to improve an unconstitutional law? If you thought such laws were constitutional, why did you think so?

This question is largely answered in response to question 43. This was a case note, which was not an extensive treatment of the subject. It merely pointed out the current status of the Mississippi statute in terms of other state laws, the Supreme Court's failure to take the issue up, and the deficiencies in the law. I did not intend it to be, and do not interpret it to be, an advocacy of miscegenation laws.

45. Has your view of the constitutionality of such laws changed since 1959? If so, why?

I believe this question has been largely answered in response to questions 43, and 44. Whereas I do not have a definitive recollection of my view of the constitutionality of such laws 43 years ago, I do now have a very strong feeling that they are unconstitutional. America has changed tremendously since 1959. I think all of us have matured in our views toward race. I certainly have. I think laws banning interracial marriages are clearly unconstitutional and I will follow Loving.

**Habeas and Prisoners' Rights**

In *Barnes v. Mississippi Department of Corrections*, you discussed *Withrow v. Williams*, a 1993 Supreme Court case. You stated that the Supreme Court "acknowledg[ed] in *Withrow* that the Miranda warning is not a constitutional mandate." However, *Withrow* states only that: "We accept petitioner's premise [that Miranda is not constitutionally required] for purposes of this case."

46. Based on this, would you say that you mischaracterized *Withrow*? Why or why not?

I do not believe that I mischaracterized *Withrow*. Justice Souter, writing for the majority, and quoting Chief Justice Earl Warren, wrote the "Miranda court 'recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.'" 507 U.S. 691 (1993). Justice O'Connor, in her dissent, was even more specific when she wrote "[h]is Court repeatedly has held that *Miranda's* warning requirement is not a dictate of the Fifth Amendment itself, but a prophylactic rule." 507 U.S. at 702. My reading of *Withrow* is that the Supreme Court held that *Miranda* was not constitutionally mandated. Nevertheless, the Supreme Court in *Withrow* clearly stated that the *Miranda* warning was a right that the federal courts had to protect. Some six years after my opinion in *Barnes*, the Supreme Court in *Dickerson v. United States*, 530 U.S. 428 (2000) concluded for the first time that the *Miranda* warnings were constitutionally required. I will follow that precedent.

47. Do you believe that *Miranda* is constitutionally mandated? Why or why not?

Yes. The Supreme Court so held in *Dickerson*.

In *Rudd v. Jones*, you presided over a prisoner's civil rights claim before the enactment of the Prisoner Litigation Reform Act. You noted that the Supreme Court required that a *pro se* plaintiff is "entitled to have his complaint liberally construed." You admitted that, under this rule, the complaint "could be construed to state a cause of action." Nevertheless, on your own motion, you ordered the plaintiff to refile the complaint with more specific allegations or have the case dismissed, before defendant had to respond.

48. Are you aware that Federal Rule of Civil Procedure 8 requires only notice pleading, and that the Supreme Court has held that complaints that meet the requirements of notice pleadings cannot be dismissed?

The Supreme Court has indeed directed federal courts to interpret *pro se* complaints more liberally than those who have counsel. Although we have notice pleadings and complaints of *pro se* plaintiffs are to be liberally construed, a "district court must insist that a plaintiff suing a

public official under Section 1983 file a short and plain statement of his complaint, a statement that rests on more than conclusions alone." Shultra v. Wood, 47 F.3d 1427 at 1433 (5th Cir. 1995).

I gave Rudd very specific suggestions as to how he could redraft his complaint. It was my feeling that the specific suggestions I gave Rudd would help him in handling his complaint. I certainly was not trying to prevent him from submitting a legitimate complaint. My statement that Rudd's complaint "could be construed to state a cause of action" was probably overly generous. I noted that Rudd's complaint was a "confusing rambling petition that [was] barely coherent." I directed Rudd to "allege who violated" his "constitutional rights," and to "identify the constitutional rights that were allegedly violated." I went further by telling him that he could present testimony of witnesses, or documentary evidence, but that conclusory statements were legally insufficient to state a cause of action. It was my conclusion that the defendant could not respond to the complaint and that I could not try the case without more notice from the plaintiff regarding the basis of his complaint. No complaint can proceed without this basic information.

I would further note that Rudd followed the admonitions of the court, amended his complaint with more specificity and proceeded. His complaint was not dismissed because he failed to state a cause of action. I also noted that Rudd had "filed numerous other complaints in this court which had been dismissed as frivolous."

I noted in that opinion that I was "committed to protecting the valid constitutional rights of prison inmates." I noted that the courts were drowning in frivolous prison litigation and that frivolous prisoner litigation threatened meritorious prison cases that might come along. Some seven years before the Fifth Circuit addressed this same problem. Gabel v. Lynaugh, 835 F.2d 124 (5th Cir. 1988). In 1995 Congress responded to the problem which I and others had identified by enacting the Prison Litigation Reform Act. This act requires prison litigants to exhaust all state administrative remedies before filing certain types of lawsuits, and directs the courts to dismiss actions it deems frivolous or malicious.

In Garlowe v. Mississippi Department of Corrections, 2:93cv246, I wrote "The court does not mean to indicate to prison officials in any manner that they can deprive inmates of constitutional rights that are consistent with imprisonment."

49. Is there an exception for cases that the judge has good reason to believe are unlikely to be successful?

No.

50. Indeed, hadn't the Supreme Court instructed federal courts to interpret *pro se* complaints more liberally than those filed by represented parties, not less liberally?

Yes.

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51. You did not cite any authority other than your own experience to dismiss the case; on what power were you relying?

I did not dismiss the case. I instructed plaintiff to amend his complaint within twenty days to allege who violated his constitutional rights, the approximate dates, times, and places that these rights were violated and to identify the constitutional rights violated. I gave Mr. Rudd twenty days to file his amended complaint.

In *United States v. MacCachran* you denied a habeas corpus petitioner's motion for recusal without referring the matter to another judge. The petitioner filed valid affidavits stating that you had a personal bias against him. The relevant statute states that when affidavits alleging personal prejudice are made, another judge shall be assigned to hear such proceeding. 28 U.S.C. § 144.

However, you decided the case yourself, stating that the affidavit was false. In support of your decision, you cited the dissent in a Fifth Circuit case.

52. Why did you do this?

To answer this question, I must point to some of the facts of the case, and the specific allegations that were at issue. This was a case in which the defendant MacCachran pled guilty to defrauding numerous innocent victims of hundreds of thousands of dollars. He obtained several continuances. While he was out on bond awaiting disposition of the charges before me, he was arrested in Oklahoma for another allegedly fraudulent scam. The plea agreement which he entered into with the government, before his plea before me, specifically provided that one of the conditions for his guilty plea in Mississippi was that the government would not prosecute MacCachran on the Oklahoma charges. When Mr. MacCachran pled guilty, I questioned him extensively as to whether he was pressured in any way to plead guilty. His unequivocal, under oath, statement was that he was not coerced in any manner. The record clearly showed that his affidavits were not true.

Under controlling law, MacCachran did not file valid affidavits stating that I had a personal bias against him. To the contrary, I found specifically in my order denying the motion for recusal that the affidavits were not valid under controlling law in asserting a personal bias against me and cited controlling Fifth Circuit and United States Supreme Court precedents to support that conclusion. *United States v. Merkt*, 794 F.2d 950, 960 (5th Cir. 1986); *United States v. Reeves*, 782 F.2d 1323 (5th Cir. 1986); and *Litely v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, 127 L.Ed.2d 474 (1994). This order was appealed to the Fifth Circuit and the appeal was dismissed.

While I cited Judge Edith Jones' dissent in *U.S. v. Anderson*, 160 F.3d 231, 235 (5th Cir. 1998), wherein she said that federal judges "must not cower before heavy-handed attempts to stifle their independence by false attacks on their integrity" my decision, as indicated above, was

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based on controlling Fifth Circuit and Supreme Court precedent, not the statement of Judge Jones. Judge Jones' statement was nothing more than a bedrock principle of judicial independence. To my knowledge there is no legal precedent suggesting otherwise.

53. **Regardless of the law, would it not have been more prudent to reassign the case?**

It was my duty to follow the law. This I did. Although defendant appealed this decision, the appeal was dismissed. The Fifth Circuit did not disagree with my determination. While it might or might not have been prudent for me to reassign the case, it would not have been consistent with controlling law. Under my oath to uphold the Constitution and laws of the United States of America, I do not have the luxury of disregarding the law. What I did was consistent with controlling Supreme Court and Fifth Circuit case law.

54. **Is it appropriate, in your role as a judge, to declare false an affidavit that makes allegations against you?**

In my order denying recusal I analyzed controlling cases and complied with the dictates of that precedent. Various orders entered by me in this case have been the subject of at least three appeals to the United States Court of Appeals for the Fifth Circuit. Each and every single appeal has been dismissed by that Court. Clearly, if I had stepped outside the bounds of any authority granted me by the Constitution and laws of the United States of America, the Court of Appeals would have taken remedial action. My actions in the MacCachran case were consistent with the duties and obligations imposed upon me by the Constitution and controlling case law.

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RESPONSES OF CHARLES W. PICKERING, SR.  
TO WRITTEN FOLLOW-UP QUESTIONS OF SENATOR JOHN EDWARDS

1. These questions concern your off-the-record communications regarding *United States v. Swan*, 2:94cr3PR (S.D. Miss. 1995).

A. On January 30, 2002, Senator Patrick Leahy asked you to disclose all oral communications with the prosecution team, others at the Department of Justice, or the defense regarding charging and sentencing decisions in *United States v. Swan*, No. 2:94cr3PR (S.D. Miss. 1995), that are not reflected in transcripts made of proceedings in open court. In your reply, dated February 6, 2002, you stated that "on November 15, 1994, I had a conference with defense counsel; Mr. Bradford M. Berry, who was one of the trial counsel in the criminal division of the Civil Rights Division ...; and Mr. Dolan Self, AUSA." You also mentioned two further inquiries of Assistant U.S. Attorney Jack Lacy in December 1994 and January 1995 and a call to Assistant Attorney General Frank Hunger in January 1995.

B. At your hearing last week, you and I had the following exchange:

*Senator Edwards.* . . . Did you have private meetings with the lawyers in this case?

*Judge Pickering.* With the defense counsel and the private counsel. I had a meeting with them, yes sir.

*Senator Edwards.* So the private meetings did take place?

*Judge Pickering.* A private meeting took place. [Tr. 125]

C. A letter from Assistant United States Attorney Jack Lacy to Civil Rights Division supervisor Linda Davis, dated January 5, 1995, states:

As you probably know, this case has had a history of off-the-record conferences with this Judge, in which his displeasure at our insistence on the §844 count has never been far below the surface. He has had conferences on several occasions with Brad Berry and me, both during trial and after, and subsequently with our criminal chief, first assistant, prior U.S. Attorney, and our new boss, Brad Pigott.

D. The case file in *Swan* contains a one page document, entitled "Criminal Docket Before U.S. District Judge Charles W. Pickering, Sr., August 15, 1994,"

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which reads in part: "In chambers conference held prior to appearance in courtroom."

E. The Committee has now interviewed one of the lead attorneys in this case, Brad Berry. Mr. Berry has indicated that, before the government changed its position regarding the §844 conviction, you had commented on Swan to Assistant U.S. Attorneys other than Jack Lacy in connection with matters unrelated to the Swan case, seeking a way for the government to change its position.

To summarize: Although you told me that "a private meeting took place," and told Senator Leahy about a single off-the-record conference with multiple counsel, the letter from Jack Lacy refers to "conferences on several occasions," including conferences with individuals (such as Brad Pigoff) who you did not indicate were present at the November 15, 1994 conference. In addition, the docket sheet mentions an "[i]n chambers conference" on August 15, 1994 that you did not mention in your February 6, letter. Finally, although that letter mentioned three contacts with individual government lawyers (two with Assistant U.S. Attorney Lacy and one with Assistant Attorney General Hunger), Mr. Berry has indicated that you raised the Swan case with Assistant U.S. Attorneys other than Mr. Lacy who were appearing before you in other cases.

My questions are as follows:

- Beyond the November 15 off-the-record conference identified in your letter to Senator Leahy, did you have any other off-the-record conferences with counsel in Swan?
- Beyond the two conversations with Mr. Lacy mentioned in your letter to Senator Leahy, did you have any other off-the-record conversations about Swan with individual Assistant U.S. Attorneys?
- For each such conversation or conference, please state the date, the participants, and the context of the contact to the best of your recollection.

I have no independent recollection of any off-the-record conferences or contacts in the Swan case other than those described in my letter to Senator Leahy dated February 6, 2002 or my response to you. However, I don't ever recall trying a case in which there were not off-the-record conferences. Sometimes these conferences are requested by counsel for one side or by counsel for both sides, and on occasion by me. Many procedural issues are resolved in a much shorter time by these conferences and many times the parties are able to better understand the position of the opposite side and unnecessary testimony is thus eliminated. As you are aware, I have responded to

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numerous requests for information from the Committee. Prior to responding to Senator Leahy, and prior to answering your questions I reviewed my Order of January 4, 1995, and sentence hearing transcripts relative to Daniel Swan dated August 15, 1994, November 15, 1994 and January 23, 1995. I did not review any docket sheets or other records.

People for the American Way requested of my court reporter copies of sentencing transcripts in the Swan case dated 11-15-94, 1-3-95 and 1-23-95. There was no hearing transcript of 1-3-95. However, there was an additional transcript of 8-15-94. I advised my court reporter to so notify People for the American Way and if they wished the transcript of 8-15-94, to include it when she forwarded the other two. It is my understanding that she did this.

I do not have any independent recollection of any conversations other than the ones that I mentioned. However, in view of my practices outlined above, it would not surprise me if other conversations related by Mr. Lacy in his memo may have occurred. If they did, I am confident that they involved procedural questions, ways that the trial of the case could be speeded up, or were much the same as my previous conversation with Mr. Lacy- that I was concerned that I had not received a response from the Justice Department. All of these contacts in my opinion would have been consistent with my response to Senator Leahy and my Court Order of January 4, 1995 which sets out the issues discussed with counsel for all parties. I do not recall any conversations with Mr. Pigott or other AUSAs about this matter.

2. On November 13, 2001, Senator Leahy requested from you in writing "a list of the captions of all of the criminal cases to come before you (to include the names of all defendants in each case)." In a letter of January 14, 2002, you stated that you had received the Committee's request for "the captions and names of defendants in all criminal cases to come before me." You stated that you "complied with that request on the same day by express mail." You provided the names of more than 300 criminal cases. You did not include the caption for the Swan case or the names of defendants Daniel Swan or Mickey Herbert Thomas. Please state why.

Senator Leahy's November 13, 2001, written request was received in my Chambers on November 26, 2001, about two weeks after it was written. I was led to believe that if I provided that material that day that my nomination would be voted on in December. Consequently I responded that same day. In that response, I stated "I attach a fifteen page report showing all criminal cases which we were able to locate from docket files in my chambers handled by me (including the names of all defendants in each case)." This was a computer generated list from the Court Docketing system, Chaser. It began with the first entry after electronic docketing was implemented in this district. According to the clerk's office that implementation was May 1, 1994 for criminal cases. The first case actually filed in Hattiesburg after the implementation was on May

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3, 1994, and was 2:96cr6, the case of Swan's juvenile co-defendant. The Daniel Swan case, 2:96cr3, was filed in March 1994 and was, and currently still is, maintained only in paper docket sheets which are located in the Clerk's office.

According to the Clerk's office, there is no listing of cases maintained anywhere of these paper docket sheet cases. In order to generate such a list, one would have to go through several books of paper docket sheets located in the Clerk's office and manually prepare such a list. As I pointed out in my November 26 response, the report attached was generated from the docketing system in my Chambers and represented the readily-available information I used to promptly respond to Senator Leahy's request and explicitly stated to Senator Leahy how the list was developed. This was the first time I was aware the Committee wanted this list. We prepared it the same day we received the request.

You will note that a summary of the search criteria employed is contained at the end of the report previously furnished. This indicates that all criminal cases assigned to me and filed or terminated prior to November 26, 2001, were requested. An identical search performed this date did not include the Swan/Thomas case for the reasons set forth above - they simply are not contained in the computer docketing system.

There certainly was no intent on my part to purposely omit the Swan and Thomas cases from my letter to the Committee. The fact that the case of Swan's juvenile co-defendant is the first case listed on the computer printout, to me is an indication that I had no such intent.

RESPONSE OF JUDGE CHARLES W. PICKERING, SR.  
TO QUESTIONS FROM SEN. RUSS FEINGOLD

1. One of the letters supporting your nomination that the Committee received is from Melanie Rube, a Deputy U.S. Marshal who works in your courtroom. Like the letters I asked you about during the hearing, this letter was dated October 25, 2001, and was faxed from your chambers to the Justice Department.

Did you ask your current employees to write letters in support of your nomination? If so, whom did you ask other than Ms. Rube? Please provide copies of all letters written by your current employees if they have not already been sent to the Justice Department to be forwarded to the Committee.

I did not ask current employees who had not first indicated a desire to help to write letters in support of my nomination. Let me explain what happened in regard to the letter from Melanie Rube. After I returned from my first hearing on October 18, 2001, Melanie Rube approached me as I was coming into my chambers, and expressed very strongly her concern about the allegations that had been made against me and noted how unfair she thought they were. She wanted to know, what, if anything, she could do to help me. I responded, spontaneously, that if she would like to write a letter that would be fine.

Ms. Rube's phone number is (601) 582-8464. I would be happy for you, or any member of your staff, to contact Ms. Rube to hear her version of how this letter came about.

An African American Deputy U.S. Marshal, Dermanis Coleman, who works with Ms. Rube, also works in my courtroom. Sometime back, he stopped by my bench and told me how much he appreciated my effort in trying to be fair in sentencing. I have not talked with Mr. Coleman about my confirmation or about writing a letter, but I feel that he would have been supportive had I asked him to write a letter. His phone number is (601) 582-8464. I would feel perfectly comfortable with you or a member of your staff contacting Mr. Coleman.

One day subsequent to my October 18 hearing, while I was holding court, I noticed an African American gentleman sitting in on the proceedings. When I came back to my chambers, he came back and requested an opportunity to see me. He, Ken Johnson, works for the U. S. Probation Office. It had been almost a year since he had been in my court and I did not at first recognize him. He conveyed to me that he felt the criticisms against me were unjust and that he wanted to help me. Not realizing that he worked for probation, I mentioned that others had agreed to submit letters of support, but I did not ask him to write a letter. He later told me that he had had lunch with the state NAACP president, and according to what he conveyed to me, he told the state NAACP president that they were wrong in their criticisms of me. He also asked the state NAACP president if he would sit down and talk with me about my views and record. The president of the NAACP told Mr. Johnson he would let him know. Mr. Johnson advised that the next day the state NAACP president told him that he did not want to meet with me to discuss my

record. Mr. Johnson's phone number is (601) 965-4447. Again, all of the actions taken by Mr. Johnson were at his own initiative.

Additionally, there are three probation officers who regularly appear before me. One of them, Ken Ferrell (601-582-5256), came to see me as a spokesman for all three and likewise told me how unfair they thought the criticisms of me were. They wanted to know if there was anything they could do. I did not ask them to write letters. They did point out to me some of the cases in which I showed leniency and compassion.

Senator Feingold, with all deference, a nominee is confronted with a very difficult situation. He is attacked and criticized by interest groups and the national press and can't make any statement until he appears before the Committee. When a person is in politics and attacked, that person can defend himself. It was my impression and my understanding that nominees, Democrats and Republicans, in the past have all requested and submitted letters just as I have done.

If you will recall, the anthrax letter to Senator Daschle that closed the Hart Senate Office Building, was discovered either the day before or the day I came to Washington for my first hearing on October 18, 2001. My first hearing was the first notice I had of any opposition to my nomination. Prior to that time, attorneys had offered to write support letters and I had discouraged them from doing so. After that time, I told these attorneys, that if they still wanted to write letters, they could do so. Because the anthrax scare ground mail services to the Senate office buildings to a halt, the Department of Justice instructed me to have the letters faxed to my chambers and for me to fax them to the Justice Department. I followed the Department's instructions.

2. At your hearing, I asked if you were aware of attorneys who you asked to write letters for you who declined to provide letters. You answered as follows:

"I am not aware of any. I am not saying there are not - well, there were a couple that said they were going to write letters and later came back and said that pressure had been put on them and they would rather not.

- a. Other than the attorneys who informed you that they had been pressured not to write letters, did everyone who you asked for a letter provide one? If not, approximately how many attorneys did you ask for letters who did not to write them?

To the best of my recollection every other attorney with whom I discussed a letter wrote a letter. Actually, one of the two individuals I mentioned at my last hearing was an attorney, and the other was a public official. Again, I certainly did not put pressure on anyone to write letters nor try to tell them what they should say in the letters.

- b. Please elaborate on your testimony that some lawyers informed you that pressure had been brought to bear on them. How many individuals told you that they had been pressured? Do you know who was pressuring them? If so, please provide any details of these activities of which you are aware.

The attorney that I contacted about a letter I mentioned in my previous answer had been called by a reporter for comments shortly after I was nominated. His comment about me was positive. I talked with him about writing a letter and he told me that he would do so. He later told someone else that he was receiving pressure not to write the letter. After I learned that he was being pressured, I had no further contact with him. The only other individual I recall talking to about a letter, and who did not send a letter was a public official. He had opposed my confirmation eleven years ago, but he had been in court before me as a public official and I had the perception that perhaps his impression had changed. I called him and asked that if he felt inclined to write a letter, I would appreciate his endorsement. He told me that he would do so. He did not write a letter. Later, I was told that he felt pressured not to write the letter. After I was told that he felt pressure, I did not contact him again.

I attach a copy of a newspaper article that appeared in the New York Times on Sunday, February 17, that reports on this same pressure. I quote from that article:

"The judge's widespread popularity in his home town has been frustrating to the many civil rights and abortion rights groups that have worked to portray him as an ideological relic of the old South.

Several opponents of his nomination have tried unsuccessfully to get his supporters to change their minds, and their inability to do so reflects the distance between national liberal groups and many Southern Blacks in small towns."

Additionally, while I was in the process of answering these questions, on February 21, I was advised by a friend that Rev. Ken Fairley, who has written two letters supporting my nomination, was contacted on that day by a representative of the National NAACP. I was told by Rev. Fairley that this representative of the NAACP requested that Rev. Fairley no longer support my nomination.

- c. Did you have follow-up conversations with any of the lawyers who ultimately wrote letters for you prior to receiving these letters?

Given the press attention to my nomination arising after my first hearing, almost every time I go in a public place or speak to a person in Mississippi, I am asked how my confirmation is going by lawyers and nonlawyers whom I have known for many years. Accordingly, I have had conversations with them regarding many items, including my confirmation and letters. Some of these conversations were undoubtedly with attorneys from whom I had previously requested a letter. Nonetheless, I do not recall having any follow-up conversations with any attorney for the

purpose of requesting again that the attorney write a letter which I had not yet received or involving the content or substance of any letter that I had not yet received. I honestly do not feel that anyone who wrote a letter on my behalf felt any pressure to do so.

3. In one of your unpublished opinions in a gender discrimination case, you wrote:

"Some seem to think that every time an adverse employment action is taken against one protected by Title VII that discrimination has occurred and an action can be brought under Title VII. That is one of the unfortunate side effects of attempting to provide protection for a legitimate public interest -- eliminating discrimination. That is unfortunate. It creates unfulfilled expectations, it makes it more difficult for courts to recognize legitimate instances of discrimination and it creates tension in the workplace."  
*Thomson v. Walker*, C.A. No. 2:94cv278 (Oct. 17, 1996).

You have used very similar language in cases alleging race discrimination as well. For example, in two separate employment discrimination cases, one and a half years apart, you wrote the following: "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." You continue in both opinions, "The Courts are not super personnel managers charged with second guessing every employment decision made regarding minorities. The Court should protect against discrimination but it can do no more. This case has all the hallmarks of a case that is filed simply because an adverse employment decision was made in regard to a protected minority." *Seely v. City of Hattiesburg*, C.A. No. 2:96cv327PG (Feb. 17, 1998); *Johnson v. South Mississippi Home Health*, C.A. No. 2:95cv367PG (Sept. 4, 1996).

Based on these statements, do you believe that an employee with a legitimate employment discrimination claim might be concerned that you do not have an open mind toward these types of claims?

With deference, I do not believe that employees with a legitimate employment discrimination claim should have any basis for concern that I would not have an open mind toward their lawsuit. But as a matter of law, there must be proof of discrimination. I agree with federal laws that prohibit discrimination based on race, gender, and age. These laws must be enforced. I also feel that frivolous lawsuits are detrimental to legitimate discrimination claims and to employer-employee relations. But I don't know of any way to avoid all frivolous lawsuits and provide protection against discrimination. Plaintiffs who do not do their job are reluctant to accept responsibility for poor work performance and employers who discriminate are reluctant to admit discrimination.

My record on the bench indicates that I am fair to employment discrimination plaintiffs.

From 1992 until 2001, I closed 170 employment discrimination cases. Sixty-eight of these cases settled, 51 were disposed of on summary judgment, 11 were voluntarily dismissed, five were transferred to a magistrate judge for disposition, and three were tried to verdict. The others were remanded to state court or were disposed of for other reasons. During this time, I granted summary judgment in only 30 percent of the employment cases before me, in contrast to the 40 percent that settled.

I attach a copy of a letter to the editor written by attorney Jim Waide of Tupelo. This letter was unsolicited. Mr. Waide has appeared before me no more than four or five times during the 11 years I have been on the bench, but does know of my reputation on the bench. He is one of the most prominent employment lawyers in the state. The bulk of his practice is representing employers in employment discrimination cases. He doesn't feel that I have been unfriendly to employees in such cases.

I also attach a copy of a letter from Mary Baltar who had an employment discrimination case before me in the early 1990's. She indicates that she felt that her employment case, which I handled, was handled fairly.

4. Among your opinions, including the several hundred unpublished opinions you have provided, there do not appear to be any cases in which you ruled in favor of a woman complaining of sex discrimination. The sole case of which we are aware in which you found for the plaintiff in a gender discrimination case involved a male plaintiff.

In your eleven years on the bench, have you ever had a case before you involving, in your view, a meritorious claim by a woman of sexual harassment or employment discrimination based on gender bias? If so, please describe the facts and issues raised in those cases and why you believe the claim or claims were meritorious, and please provide the committee with copies of your opinions in these cases.

I have had numerous employment cases before me that I felt had merit. The 68 cases before me that settled would likely not have settled, if I had not felt they had merit. If a case is going to be dismissed on summary judgment, an opinion must be written. If summary judgment is going to be denied, it is not necessary to write an opinion, since the motion can be denied without a written opinion.

In almost all of the employment cases that I felt had merit, I expressed my impressions to counsel and most (68 cases) settled. Although I did not write an opinion in almost any of the 68 cases that settled, I did write an opinion in Sandra Hughes v. Jewel Crown Investment Corporation, et al, No. 2:95cv192PS. The plaintiff was the marketing manager for the local Howard Johnson Motel in Hattiesburg, Mississippi. Her complaint alleged that while at work she was harassed and subjected to sexual discrimination by one of the owners of the motel. One of the issues presented was whether or not the plaintiff had properly raised appropriate

defendants. After resolving the matter in favor of plaintiff as to the corporate defendant and one of the individual defendants, I dismissed one of the other individual defendants. I further ruled that the defendants were not entitled to summary judgment on the bulk of plaintiff's Title VII claims and further that the plaintiff's state law claims of wrongful discharge, negligent infliction of emotional distress and invasion of privacy were viable. After entry of the summary judgment opinion on June 12, 1996, the parties negotiated a settlement on August 26, 1996. A copy of my opinion entered in this case on June 12, 1996, is attached.

I have presided over several other meritorious sex discrimination cases. Although opinions were not entered in the following cases, I have been able to reconstruct the issues and my conclusions about these cases.

In the case of *Freda Spriggs v. Lowe's Home Centers, Inc.*, No. 2:97cv225PG, Plaintiff was a female sales clerk at the defendant's store in Hattiesburg, Mississippi. She filed a claim alleging discriminatory denial of promotion, disparate treatment in the payment of wages, sexual harassment based on her gender, and for retaliation. Plaintiff asserted that she had been harassed by a male co-employee who had used abusive language toward her. She also alleged that because of her gender she was denied promotions and paid disparate wages. A review of the evidence presented to me on summary judgment indicated that the plaintiff's claims for disparate wage payment and denial of promotions was not strong. But, there was evidence that a co-employee had been verbally abusive toward her and had made harassing statements to her. The question presented to me was whether management was aware of the abusive remarks and whether the plaintiff had timely reported such remarks and requested the intervention of management. At a pretrial conference on April 1, 1999, I conveyed my feeling about the case to the attorneys and the case settled, before I entered an opinion.

The case of *Baltar v. Stockett, et al.*, No. 3:92cv621, involved a non-jury case in which plaintiff had alleged that she was not being paid wages comparable to similarly situated male employees. She filed an EEOC complaint. Her employer terminated her. I conveyed my impression to counsel that the case had merit and it was settled for a considerable amount of money. I felt plaintiff had an exceptionally strong case on the issue of retaliatory discharge. As indicated, Ms. Baltar has submitted a letter supporting my nomination which is attached to these responses.

*Teresa Graham Ushaw v. State of Mississippi, et al.*, No. 2:99cv87PG, involved allegations that a nurse working for the Mississippi Department of Corrections had been harassed by a staff physician. I discussed my impression of this case with the parties. This was the second case that had been before me where there had been an allegation that prison officials were attempting to plant contraband on employees they wanted to discharge. The other plaintiff had carried his evidence to the FBI and they had found no basis to investigate. The Mississippi Department of Corrections had also investigated the other plaintiff's allegations and found no basis for action. Since this was the second time I had heard these allegations, I suggested to the parties that a third party investigation should be conducted by the Mississippi Department of

Public Safety. The parties agreed and this investigation was ordered. If the Mississippi Department of Corrections was planting contraband on employees, I wanted to know, and stop it. Although the investigation by the Mississippi Department of Public Safety did not confirm plaintiffs' allegations about the planting of evidence, nevertheless, shortly after the investigation was completed, and based upon my assessment of the case, the parties settled the claim.

In *Jennifer Gens v. L & A Contracting*, No. 2:00cv135PG, plaintiff filed an employment discrimination case against her employer after she was terminated within one month after being hired. She was fired as a construction laborer and alleged that she was the only female who was employed in that position. She alleged that three male co-employees who were similarly situated were not fired. She claimed that she had a tape recorded conversation wherein her supervisor admitted that she was terminated because she was a female. After proceeding through discovery, I conducted a pretrial conference in the case. After reviewing the facts with the parties and the likelihood that the case would proceed to trial based on a conflict in the parties' factual assertions, the case settled.

As indicated in question number 3. above, I have granted summary judgment in favor of the defendants in employment discrimination cases only 30 percent of the time. The vast majority of cases settled prior to the entry of any kind of opinion.

5. Throughout the 1990s, culminating with the Prisoners Litigation Reform Act ("PLRA") enacted in 1996, Congress considered and enacted legislation providing for sanctions against prisoners who file repetitive and frivolous federal claims. Beginning in late April, 1995, when the Act was signed into law, two specific types of sanctions were authorized by Congress. First, if a prisoner files three frivolous claims that are dismissed, the prisoner permanently loses the right to file *in forma pauperis* claims, unless the prisoner is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g). Second, if a prisoner files a claim that is not only frivolous, but is also filed for a malicious purpose, to harass a defendant, or supported by knowingly false testimony, a court may order revocation of a prisoner's "good time" credit that has not yet vested. 28 U.S.C. § 1932.

In a substantial number of prisoner cases filed in your court during your time as a U.S. District Judge, you threatened prisoners who filed pro se cases with serious sanctions never authorized by Congress. For example, in *Bridges v. Coleman* in September, 1995, you dismissed on your own motion a civil rights claim by a prisoner claiming inadequate medical treatment. Your order does not refer to any previous claims by the prisoner, but states that you considered this claim frivolous and threatened specific sanctions not authorized by the PLRA if he filed another suit that you considered frivolous. In particular, you stated:

"Specifically, this Court gives notice to Charles D. Bridges that should he file another frivolous complaint under 42 U.S.C.

1923 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 Plaintiff for a period of from three to six months and/or that the Court will also consider other appropriate [sic] sanctions."

You used almost exactly the same language in at least 19 other opinions and orders dismissing prisoners' claims. Yet in the section of each of these opinions and orders dealing with possible future sanctions, you do not cite a single federal statute, rule of procedure, local rule or case as support for your threat to impose sanctions.

- a. Did you ever order actual restrictions on prisoner rights and privileges pursuant to such orders? If so, please provide a copy of any such order.

None of the inmates in the cases that you referenced filed any further frivolous complaints that I recall. Consequently, I never ordered any such restrictions in these cases.

As you mentioned, my Order said that I would "seriously consider and very likely order," certain sanctions. But I never ordered any sanctions. Before I would have ordered such sanctions, I would have done further research in determining what could and should have been done.

- b. What specific restrictions of prisoner rights and privileges did you contemplate imposing if another frivolous suit was filed by the inmate subject to the order (e.g. imposition of solitary confinement, loss of exercise privileges)?

Since I was never presented with this issue, I never determined what restrictions I would impose.

- c. On what specific legal authority were you relying when you threatened to impose these sanctions?

Under Rule 11, Federal Rules of Civil Procedure, when an unrepresented party has violated his or her certification that the pleading is not being presented for an improper purpose, or that the claims are warranted by existing law, or that the allegations and other factual contentions have evidentiary support, the Court may impose appropriate sanctions to include directives of a non-monetary nature or payment of penalty. These sanctions are limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.

Nasser v. Calcasieu Television and Radio, Inc., 894 F.2d 696 (5<sup>th</sup> Cir. 1990) involved a case in which the District Court, acting under its inherent powers, assessed over \$1M in sanctions and attorneys' fees, disbarred one attorney for three years, suspended another attorney

for six months, declared one attorney ineligible to practice in the District Court for five years, and reprimanded another attorney. The Fifth Circuit affirmed the District Court and said:

It is a given that federal courts enjoy a zone of implied power incident to their judicial duty. From the Judiciary Act of 1789 forward its functional necessity has not been seriously questioned.

894 F.2d at 702. The Fifth Circuit observed that Justice Harlan in the *Link* case, *infra*, said that the source of the power to dismiss came from the court's "inherent power," not Rule 41. *Id.* at 703. The Court went on to say that the Court through its inherent power "may impose other sanctions in order to control the litigation before it." (Footnote omitted) *Id.* The Supreme Court granted certiorari and in *Chambers v. Nasco, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 116 L.Ed.2d 358 (1991), held that federal courts have the inherent power to manage their own proceedings and to control the conduct of those who appear before them. Referring to the inherent powers of a court, the Supreme Court quoted a statement from the *Link* opinion that was also quoted by the Fifth Circuit as follows: "[t]hese powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962). 501 U.S. at 43. The Court also held "the inherent power extends to a full range of litigation abuses." *Id.* at 46.

Rule 37, Federal Rules of Civil Procedure, also gives the Court the discretion to, among other things, stay the proceedings or dismiss the action.

- d. What was the authority for your threat to impose such sanctions for a period of three to six months in particular?

I never ordered a sanction in any of the referenced cases. My objective was to stop prisoners who were filing frivolous litigation from doing so. The authority was as outlined above.

- e. In those cases where you entered such orders after the effective date of the PLRA, what was the authority and reason for your decision to ignore the sanctions specifically prescribed by Congress and threaten to impose sanctions of your own choosing?

I never ordered a sanction in any of the referenced cases. My objective was to stop prisoners who were filing frivolous litigation from doing so. The authority was as outlined above. On numerous occasions I did apply the sanctions authorized by Congress, but I never recall imposing any other sanctions.

- f. Do you believe it is appropriate for a federal judge to threaten sanctions against an inmate other than those that are specifically authorized by a law

that directly addresses the issue of frivolous lawsuits?

No. Based upon my answers to the above questions, I do not feel that I threatened sanctions not authorized by law.

g. Are you aware that some landmark constitutional decisions originated with pro se complaints filed by prisoners?

Yes.

h. Can you understand how the threats in your orders might chill legitimate complaints by the prisoners subject to the threats or other prisoners who became aware of your orders?

With deference, I do not believe that legitimate complaints by prisoners were chilled by this approach, or for that matter by any other approach. Nationwide the courts have experienced the same problems I have discussed.

In 2000, throughout all the district courts in the United States, prison litigation comprised 22.4 percent of all filings. (Federal Judicial Library, Federal Court Management Statistics, at <http://www.uscourts.gov/cgi-bin/cmsd2000.pl>.) In the Southern District of Mississippi during that same time period prison litigation comprised 25.1 percent of the total docket. (Federal Judicial Library, Federal Court Management Statistics at <http://www.uscourts.gov/cgi-bin/cmsd2000.pl>.) During my time on the bench prisoner complaints have comprised 32 percent of my total docket. Between 1980 and 1996 the number of petitions filed in U.S. District Court by federal and state inmates increased threefold. (Federal Justice Statistics Program, Prisoner Petitions in the Federal Courts, 1980-1996, at <http://www.ejp.usdoj.gov/bjs/abstract/ppfc96.htm>.)

During 1995 only 1.2 percent of prisoner complaints were adjudicated in favor of the plaintiff. (Federal Justice Statistics Program, Prisoner Petitions in the Federal Courts, 1980-1996, at <http://www.ejp.usdoj.gov/bjs/abstract/ppfc96.htm>.)

During the eleven years that I have been on the bench, it has been my impression and the impression of most judges that the vast majority of prisoner lawsuits filed are frivolous. Indeed that is why Congress passed and President Clinton signed the Prison Litigation Reform Act in 1996. However, there are also some legitimate lawsuits filed by prison inmates. My experience is consistent with the experience of others who have written about this problem and is consistent with the national statistics cited above. The fact that only 1.2 percent of prison litigation nationwide is successful is an indication to me that the present system is not very efficient nor effective. I think that more than 1.2 percent of the lawsuits filed by prisoners have had merit. The system is simply not effective.

As I testified in response to a question from Senator Kennedy at my first hearing, I have

wondered if perhaps it would be more effective if there was some other system adopted such as the appointment of ombudsmen to represent prison litigants. But that is an issue for Congress, not the courts.

Let me point out some actions that I have taken while I have been on the bench that I think protected prisoner rights.

Shortly after I went on the bench, a lawsuit was filed against my home county, Jones County, because the jail did not meet constitutional requirements, (Crosby et al v. Jones County, Mississippi et al, No. 2:92cv23SPG.) That point was pretty well conceded. A bond issue was before the voters at that time to construct a new jail. The bond issue was defeated. I then convened the attorneys and suggested that the taxpayer group that had opposed the new jail should be brought in as a party. The parties liked the suggestion, the taxpayer group was brought in, I appointed a committee representative of all parties, and they came up with a plan for a new jail. The taxpayers who had opposed the original bond issue became the proponents of the second bond issue and the constitutional rights of inmates were protected. Toward the end of the litigation, the Justice Department under the Clinton Administration joined in and helped develop rules of operation for the jail. The Clinton Administration touted this lawsuit as a case that brought about the protection of prisoner rights.

In another prisoner case, (Watkins v. Bradford et al, No. 2:97cv288PG), I prevailed on a local attorney, Alex Brinkley, to represent a prisoner who had been convicted of murder, was serving a long sentence, and had made an allegation that his constitutional rights had been violated when he was in custody of the local sheriff. There was no source of funds for this appointment and I have no authority to require an attorney to undertake such a representation.

On other occasions, I have likewise encouraged Magistrate Judge Louis Guirola to persuade private lawyers, on a pro bono basis, to represent the rights of prisoners in cases that have appeared to have merit or in instances where presentation of the evidence was going to be difficult without a lawyer being involved.

RESPONSES OF CHARLES W. PICKERING, SR.  
TO WRITTEN FOLLOW-UP QUESTIONS OF SENATOR EDWARD M. KENNEDY

Question #1

Judge Pickering, at your hearing last week, you acknowledged that your 1990 testimony about your relationship to the Mississippi Sovereignty Commission was partially incorrect. Specifically, you stated that after reviewing a 1972 memorandum from the Commission's public records you now have "a vague recollection" of contacting an employee of the Commission in relation to a labor strike at the Masonite Corporation in Laurel.

In your opening statement to the Committee, you explained that you had concerns about infiltration of the labor union by the Ku Klux Klan. However, the 1972 memorandum does not mention the Ku Klux Klan or the possibility of violence. The subject of the memorandum is infiltration of the union by a well-known civil rights organization, the Southern Conference Educational Fund (SCEF). The memorandum states: "Senator Charles Pickering [is] very interested in these developments and has requested to be advised of developments in connection with SCEF infiltration of CWA" — the union — "and full background on James Simmons" — the union's president.

A. Please explain why the memorandum states that you were interested in "infiltration" by SCEF rather than with Klan infiltration? Were you aware at the time that the Southern Conference Educational Fund was an organization devoted to civil rights?

First, let me state that I did not draft the 1972 memorandum found in the files of the Sovereignty Commission. That memorandum was drafted by an employee of the Commission, which stated that I was one of three legislators who purportedly expressed an interest in the activities of the Sovereignty Commission. I still have only a vague recollection of this contact. However, I remember very vividly the Masonite strike which started in Laurel on the night of April 21, 1967. My middle daughter, Allison, was born that night, and the District Attorney and I had tried a car theft case that day. The defendant in that case had close connections to the Klan. The jury acquitted the defendant and it was our belief that the Klan had infiltrated the jury and caused a not guilty verdict despite clear proof of the defendant's guilt. I argued the case to the jury, went to the hospital where my daughter was born and Masonite went out on a very bitter labor dispute all on the same night. The strike was violent from the beginning. Bricks and other objects were thrown at the manager's car as he left the plant that night.

As I explained in my opening statement, the Klan infiltrated the union at the Masonite wood processing plant in Jones County in 1967 and thereafter the union had turned violent and deadly. In fact, the strike at Masonite in 1967 turned so violent that I joined with the District Attorney in filing murder charges against a Klansman who was also a union member. When the strike was over, the national union placed the local union under trusteeship.

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Accordingly, when five years later in 1972, a Commission employee mentioned the Gulfcoast Pulpwood Association -- another union that would deal with the Masonite plant in Jones County -- I would have recalled the previous Klan-union violence at the same plant. While I do not recall the SCEF, I would have recalled the union violence. To the best of my recollection, that is why I wanted to be kept informed.

Again, I don't recall specifically what information Mr. Fortenberry passed on in our brief conversation, other than that he had information about union organization at the Masonite plant. To the best of my recollection I simply said, "well, keep me informed." I have no recollection of asking to be kept informed about any organization or any individual.

- B. The labor union involved in the 1971 strike, the Gulfcoast Pulpwood Association (GPA), was wholly distinct from the International Workers Union that was dominated by Klan members in the late 1960s. In fact, the GPA attracted considerable local and national media attention due to its success in organizing a unified interracial coalition of workers. In describing the GPA strike in 1971, the Wall Street Journal underscored "the remarkable racial harmony that existed between the workers." Consistent with this, a former member of the SCEF who worked with GPA on the strike has written to me explaining that the 1971 strike grew out of work by the Student Nonviolent Coordinating Committee and SCEF to organize "poor and working white southerners" with African-Americans. According to his letter, former Klan members were involved with the GPA but they were, under the leadership of the SCEF and other groups, now working with African-Americans "to build a union and improve their lives."

As the State Senator representing Laurel, whose largest employer was the Masonite Corporation, were you aware of the circumstances surrounding the 1972 strike? What was your basis for suspecting that active Klan members had infiltrated the GPA?

I was aware that there had been another strike at the Masonite plant in the early 1970s involving pulpwood haulers. This strike had not been as intense as the 1967 strike that had resulted in violence and murder. I was also aware that the Gulfcoast Pulpwood Association hauled pulpwood to the Masonite wood processing plant in Jones County. In my opening statement, I explained that the Klan had infiltrated a union at the Masonite plant in Jones County in 1967, that violence had erupted, and that the AFL-CIO took over the local union. I was aware of these facts because I had been County Attorney for Jones County in 1967. When, in 1972, the Commission employee mentioned another union -- GPA -- that had dealings with the same Masonite plant at which a union-Klan member had committed murder five years earlier, I would have wanted to be kept informed. Because I was a state senator in 1972 and no longer the County Attorney, I was not privy to the make-up of the GPA union, whether its members intended to escalate a strike to a violent level, or whether its members included former or current Klansmen. Your information that the GPA union included former Klansmen, however, supports my concerns that were based at the time on another union's history of violence at that same plant.

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In sum, I would have wanted to be kept informed because of past union-Klan violence at that same plant that had resulted in violence and murder.

I agreed with the position of the GPA that pulpwood haulers were entitled to better pay. Pulpwood haulers have always been underpaid. My impression is that the GPA was never interfered with, and that they probably did help to improve the lives of the people they represented. The pulpwood haulers also were entitled to be protected from violence. That was the only concern I had.

Question #2

At your hearing, you testified that you will follow Roe v. Wade, 410 U.S. 113 (1972) as articulated by the Supreme Court. But by and large, States are not passing laws that ban abortion, and adhering to the Court's basic pronouncement in Roe is not difficult. The question is whether you can make judgments consistent with the *meaning* of Roe and Planned Parenthood v. Casey, 505 U.S. 833 (1992). Given your record as a state legislator and party leader, I remain concerned. It appears likely that you will read those cases so narrowly that an increasing number of burdens will be imposed on women who seek access to reproductive health care.

Your views regarding a woman's right to choose are unambiguous. As chairman of the Human Rights and Responsibilities Subcommittee of the 1976 National Republican Party Platform Committee, you led the Republican Party to call for an amendment to the United States Constitution banning abortion. As a Mississippi state Senator, you voted for a resolution calling for a constitutional convention to propose an amendment to ban abortion and against legislation that would fund family planning programs and ensure the dissemination of information about contraceptives.

As a district court judge, you have not had a reproductive rights case before you, but your over-all record as a judge proves that when you have strong views about the law, they are reflected in your opinions.

Furthermore, you have expressed views that could lead the Committee to believe that you do not always believe judicial precedent is binding. In the Randolph v. Carvantes, 2:95-CV-259PG (1996) case you stated, "when judicial precedents have gone beyond literal meaning, the past legislative as well as judicial history should be considered as well as the potential consequences and effect of what another judicial extension would entail." Slip op. at 12-13

A. Given your comments regarding judicial precedent, do you believe that Roe and Casey flow from a "literal meaning" of the Constitution and that the decisions are binding on all cases involving reproductive rights?

The Due Process Clause does not by its express terms guarantee the right to an abortion.

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However, the Supreme Court has interpreted the Due Process Clause to provide that protection, and it is my opinion that any lower court, including the Fifth Circuit Court of Appeals, must follow that decision. It is binding precedent. Consideration of any abortion case by a lower court requires adherence to previous Supreme Court decisions, including Roe and Casey.

I interpret my remarks in Randolph v. Cervantes, 2:95cv259PG (1996), to apply only in situations where there is no governing judicial precedent, so that the court is required to consider "another judicial extension." In the abortion area there is controlling judicial precedent, Roe and Casey.

B. Do you see a role for the federal courts as the guardians of reproductive rights?

Yes, as set forth in Supreme Court precedents, and lower court decisions applying those precedents.

### Question #3

In 1974, when you were in the Mississippi State Senate, you voted for a resolution requesting that the Mississippi congressional delegation take action to repeal the Occupational Safety and Health Act (OSHA). The resolution stated that OSHA's regulations would destroy "rights and privileges once enjoyed and always held sacred" by men and women—that is the right to run a business with a "minimum of interference from government." Further, the resolution claimed that OSHA's regulations were "ridiculous, outrageous and wasteful" that enforcement of these regulations was akin to a "Communist or Fascist state dictatorship" which would lead to "total control over our entire economy; destroy any privately owned business and privately owned farm in this country; and, among other dangers, enslave us all."

A. Please explain why you supported this resolution.

Senator Kohl asked basically the same question. Please allow me to give the same response that I did to Senator Kohl, which I think answers all of your questions except for the last one to which I respond in part B below. My response to Senator Kohl was as follows:

"I do not now hold those views about OSHA. This was a political issue a short time after OSHA was adopted, before the effects the federal standards would have on businesses were really known, and in retrospect was obviously an over reaction. Further, I recognize the difference between a political position, a personal opinion, and a judicial decision. Legislation is the responsibility of Congress. It is the responsibility of a judge to enforce statutory enactments - I have done so as a district court judge, and, if given the opportunity, will continue to do so as a circuit court judge."

"Today, over 30 years after the passage of OSHA, I do believe that the

federal government has an important role to play in ensuring the safety of our workers. The way in which OSHA regulations and jurisprudence have evolved has proven that the federal government's role in setting standards and ensuring a safe and healthful work environment can be done in a way that is both efficient and beneficial. As a practicing attorney during the 1980s, I used the OSHA regulations and standards in several cases to protect the rights of workers. As a judge, I will faithfully follow OSHA statutes and controlling precedents interpreting OSHA."

- B. Over the last 30 years, OSHA regulations and enforcement have helped reduce workplace fatalities by half and occupational injury and illness rates by 40 percent. Declines in workplace fatalities and injuries have been even greater in those industries, such as manufacturing and construction, where OSHA has targeted its standards and enforcement activities.

Do you continue to hold the views expressed in the resolution about the enforcement of OSHA and its regulations? How can you assure this committee that you will fairly resolve claims brought to enforce OSHA's protections?

I do not now hold the views expressed in the resolution about the enforcement of OSHA and its regulations, as I explained more fully in my response to the preceding question.

As to your last question, I don't know of any way to answer that question other than to say that I believe in the adage that we are a government of laws and not of men, and that I firmly believe in the rule of law. I have tried to do that while I have been on the bench. For instance, I rendered an opinion in the Suggs case which involved ERISA. I felt, and still feel, that the federal courts have misinterpreted ERISA, contrary to the language of the Act, and contrary to congressional intent. The results have been to deprive people of benefits. I wrote an opinion of some 70 pages, approximately half of which was devoted to analyzing and applying controlling law and the other half was devoted to explaining why I think federal courts have misinterpreted the ERISA statute. Despite my disagreement, I followed controlling law. However, that part of my opinion disagreeing with controlling authority, the dicta, was widely quoted in the House of Representatives this past year in support of the Patient's Bill of Rights.

In another case involving the Federal Arbitration Act, I disagreed with the factual determination of the arbitrator, but nevertheless, because the law dictated that I should affirm his opinion, I did.

During my eleven years on the bench, I have handled some 4000 to 4500 cases. I have been reversed only some 26 times. That means that I have been reversed in whole or in part in only slightly more than one-half of one percent of the cases that I have handled. I think that is an indication that I try to follow controlling precedent. If I have failed to follow controlling precedent, it was by accident, not by intent.

**Question #4:**

In 1999, you presided over a civil rights case styled Mosley v. Mississippi Department of Corrections, Civil No. 2:98CV357-PG. In that case, Britton Mosley alleged that his former employer discriminated against him on the basis of race and retaliated against him after his wife, also an employee, filed a successful discrimination claim against the agency. Specifically, Mr. Mosley alleged that his supervisors had attempted to plant drugs on his person in an effort to bring about his discharge.

According to a letter in the case file, while the case was pending, you requested that the Mississippi Department of Public Safety conduct an independent investigation of Mr. Mosley's allegations. Investigators with that Department conducted several interviews—including one with the plaintiff—and concluded that the plaintiff's supervisors "were not involved in a conspiracy to plant drugs on Britton Mosley." The investigators provided a tape of the interview with Mr. Mosley and other witnesses along with their final report.

- A. At what stage of the litigation did you request this investigation? Did you direct the parties to refrain from discovery while the investigation was pending?

The decision to request the investigation was made approximately one month after the initial Case Management Conference which was held on August 5, 1999. The case had been filed on December 29, 1998, and an amended complaint was filed on March 1, 1999, before the defendants filed their answer.

No, I did not stay discovery pending the investigation. Counsel for Mr. Mosley for his own reasons decided not to begin discovery pending the receipt of the investigative report. This is indicated by his letter of November 5, 1999, written while this case was ongoing. A copy of Michael Cooke's letter dated November 5, 1999 is attached.

- B. Why did you request an independent investigation of the plaintiff's allegations? What was the legal authority for this request?

I requested the investigation because a subsequent case, Upshaw v. State of Mississippi et al, 2:99cv87PG, contained similar allegations of misconduct on the part of state officials. A white female employee had filed an EEOC complaint alleging sexual harassment against a staff physician of MDOC. Shortly thereafter, she alleged that she received information that prison officials were attempting to frame her for drug possession by the use of an inmate and she quit her job. Her complaint was similar to Mr. Mosley's complaint. Ms. Upshaw was represented by Jim Waide, one of the state's foremost attorneys representing employees in employment discrimination cases. He wrote an unsolicited letter to the editor which was published in the Clarion Ledger in support of my confirmation. A copy of his letter is attached.

An internal MDOC investigation was conducted as to Mr. Mosley's allegations. Mr.

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Mosley also requested an FBI investigation, but the FBI declined to investigate. I attach a copy of the page of the MDOC report stating that the FBI declined to investigate. Even though that page is marked Confidential Report of Interview, it was introduced into evidence, as a part of the public record. I also attach a letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, to Congressman Gene Taylor, responding to an inquiry made to the Attorney General by Congressman Taylor on behalf of Mr. Mosley. This letter assures Congressman Taylor that if the FBI can develop evidence in this case that appropriate action will be taken. Mr. Mosley provided a copy of this letter to the court. Also attached is a certified copy of three pages of the transcript of Mr. Mosley's trial in which Mr. Mosley testified that the MDOC investigation found no cause to support his allegations.

The authority I relied on was the express agreement of the parties, and the inherent power of the Court to manage its docket. It greatly concerned me that the same allegation was made in two separate lawsuits against a state agency. If it was true, I wanted it stopped. The plaintiffs seemed to be having difficulty in proving their cases. I asked if they would like for me to request an investigation by another agency of the state. All parties agreed that they would like such an investigation. I felt I was protecting the plaintiffs in both cases by trying to ferret out the evidence if in fact Department of Correction officials were manufacturing evidence against employees they wanted to fire. The attorneys for both plaintiffs understood this. I was doing this in an effort to protect plaintiff's rights, not to diminish those rights.

I felt empathy for Mr. Mosley because I became convinced that he genuinely felt that someone had made an attempt to plant evidence on him. I so stated on the record. The problem was that he had no facts to prove his case. I submitted the case to a jury and the jury found against Mr. Mosley.

Mr. Mosley claimed to have a tape that would prove employees of the Department of Corrections were trying to plant drugs on him. My staff listened to the tape and could not understand it. It was unintelligible. The transcript of the trial reveals the following colloquy between the court, and Mr. Michael Cooke, attorney for Mr. Mosley:

The Court: "Mr. Cooke, do you propose to introduce the tape?"

Mr. Cooke: "No, your honor, the tape I have is no -- I don't think it is legible. It has been transcribed, but I don't think it is legible. We don't intend to use it."

A copy of the trial transcript is attached, reflecting the above colloquy as indicated above. Additionally, I have gone back and reviewed the testimony of Mr. Marvin Thomas who was called as a witness on behalf of the plaintiff. Plaintiff claimed that Mr. Thomas wore a tape recorder and recorded a conversation with correction officials, trying to get Mr. Thomas to set plaintiff up by planting drugs on him. The problem is that Mr. Thomas did not so testify. He did not testify to the substance of any conversation to which he was allegedly a party and which was recorded. There was absolutely no testimony offered as to the substance of any conversation contained on the tape. And as stated above, neither the tape nor a transcript of the tape was ever

offered into evidence.

According to press reports, the NAACP held a press conference in Jackson about one week before my second confirmation hearing and announced that they were going to take a tape to Washington, and that it was going to be the basis for defeating my nomination. I understood that reference to be to the tape you are inquiring about. Mr. Mosley was present at that press conference according to reports that I have reviewed. He stated that I refused to let the tape into evidence. The truth is Mr. Mosley's attorney did not offer the tape into evidence because he said it was not legible. As noted above, a certified copy of a portion of the transcript of Mr. Mosley's trial, showing that his attorney said he was not going to offer the tape and that it was not legible is attached to these responses.

- C. Did you give notice to the attorneys on both sides that you were going to request an investigation? Did you raise the matter with them in open court? If so, please furnish a transcript of that conversation. Did you share the final report with both parties or their attorneys in the case?

Yes, I discussed and gave notice to all Counsel of the proposed investigation. I acted with their express agreement. No, it was not raised in open court, so there is no transcript. This issue arose during a case management conference at which Counsel for both parties were present, and which is routinely not on the record and not transcribed. This is true in all chambers of which I am aware. Yes, the final report was disseminated to all Counsel in the case.

- D. Did the results of the investigation ever factor into any decisions you made in the case? Was the final report or the tape of witness interviews ever admitted into evidence in the case?

No, the result of the investigation did not factor into any decision I made. In fact, as indicated above, the case was submitted to a jury. I made no adverse decision against Mr. Mosley. However, the jury found against him. Neither this report nor any taped witness interviews relating to these interviews were offered into evidence at trial. In fact, I am not aware that the investigators taped interviews of any witnesses. The report does not reflect any such taped interviews. Mr. Mosley's attorney has acknowledged that Mr. Mosley did not have sufficient evidence to support a jury verdict.

- E. Did Mr. Mosley's attorney ever make a request or motion, either verbally or in writing, to recuse you from the case? What was your ruling? On what basis did you make that ruling? If there was a recusal request or motion, please furnish the relevant pleadings or transcripts.

No, Mr. Mosley's attorney never made any request or motion, verbal or written, that I recuse myself. I attach a copy of a letter from Mr. Mosley's counsel Michael D. Cooke to Chairman Leahy dated February 1, 2002, discussing this case. This letter gives you Mr. Cooke's perception of how I handled this case.

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According to Mr. Cooke's letter, "I felt that Judge Pickering allowed the case to go to the jury when, in fact, there was really not enough proof to avoid a judgment as a matter of law. . . . It was simply a matter of not being able to prove the allegations made by my client. The case was so poor that I did not participate in any appeal. . . ." I feel that I made every effort to allow Mr. Mosley an opportunity to establish his case. Mr. Mosley's allegations have no factual basis, and the transcript and the letter from the attorney who represented him at trial demonstrates that I gave him a fair trial. Incidentally, Mr. Cooke had never been in my Court before this case and has not been in my Court since.

## SUBMISSIONS FOR THE RECORD



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**University of Mississippi**  
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Faculty  
Law Center  
Post Office Box 1848  
University, MS 38677-1848  
(662) 915-7361  
Fax: (662) 915-5842

October 30, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: United States District Judge Charles W. Pickering

Dear Senator Leahy:

Please let me add my support to the nomination of United States District Judge Charles Pickering for service on the US Court of Appeals for the 5<sup>th</sup> Circuit. For the past 30 years I have served as a member of the University of Mississippi School of Law faculty, and I served as President of the Mississippi Bar Association during 1998-1999. It has been my pleasure to have a number of dealings with Judge Pickering, both as a law faculty member and as a member of the Bar. I have always found Charles Pickering to be a person of high intelligence, impeccable integrity, and a person who administers justice fairly to all members of society. Charles Pickering has been a leader in every group in which he has been a participant. As you know, he has been a national leader for his church, and has been a true leader for the Mississippi legal community. The investigation by your committee will find that Charles Pickering has been an excellent United States District Judge. He runs his court just as he conducted his law practice. All people that come before him are treated equally, and all people are treated with dignity and respect. In my opinion, Charles W. Pickering will make a valuable addition to the US Court of Appeals for the 5<sup>th</sup> Circuit. I urge your committee to confirm his nomination.

Yours very truly,

Guthrie T. Abbott  
Professor Emeritus

CC: Judge Orrin Hatch

ADELMAN & STEINER, P.A.  
POST OFFICE BOX 268  
224 SECOND AVENUE  
HATTIESBURG, MISSISSIPPI 39403-0368  
TELEPHONE: (601) 844-8291

MICHAEL ADELMAN\*  
ALISON STEINER\*\*

ATTORNEYS AT LAW

E-MAIL: ADELST22@AOL.COM  
FAX: (601) 844-1481

\*ALSO ADMITTED IN MICHIGAN  
\*\* OF COUNSEL

October 29, 2001

Senator Patrick Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: Nomination of Charles W. Pickering, Sr. to United  
Court of Appeals for the Fifth Circuit

Dear Senator Leahy:

I am writing this letter in support of the nomination and confirmation of Charles W. Pickering, Sr. to the United States Court of Appeals for the Fifth Circuit. While I have represented both civil litigants and criminal defendants before Judge Pickering, I am writing this letter primarily from my experience as defense counsel in numerous criminal cases before Judge Pickering. In that capacity, I have represented both indigent defendants as court-appointed counsel and those defendants who have had the financial resources to retain my services. I have represented African American, as well as Anglo American defendants, female, as well as male defendants.

In 1991 and again in 1997, I was one of several defense attorneys in the so-called "Sherry" murder conspiracy trials. These trials involved numerous defendants, including my client, Sheri LaRa Shupe. I was court-appointed for both trials, each of which lasted approximately six (6) weeks. Although time-consuming and exhausting, I consider both trials to be among the highlights of my legal career, and in no small measure, a tribute to the presiding Judge, Charles W. Pickering, Sr..

Judge Pickering has been scrupulous in treating indigent and non-indigent, minority and non-minority, female and male defendants each with the same degree of fairness and dedication to the rule of law. At the very outset of the first "Sherry" murder

Senator Patrick Leahy  
Chairman, Committee on the Judiciary  
October 29, 2001  
Page Two

conspiracy trial, Judge Pickering made clear that bias because of sexual preference would have no place in his courtroom. I have observed on numerous occasions, that in sentencing those defendants who have either been found guilty or pled guilty, Judge Pickering consistently expresses concern and care that they find a way to turn their lives around in a meaningful manner. Perhaps most importantly from the perspective of a trial attorney, Judge Pickering adheres to the concept that only a fully prepared trial attorney can provide criminal defendants with truly effective assistance of counsel.

In my opinion, Judge Pickering combines a keen legal mind with the compassion necessary to hold the position for which he has been nominated. As indicated at the outset of this letter, I wholeheartedly support the nomination and candidacy of Judge Pickering to the United States Court of Appeals for the Fifth Circuit.

Thanking you for your consideration, I remain

Yours truly,



Michael Adelman

MA/jbw

cc: Senator Orrin Hatch

bcc: Honorable Charles W. Pickering, Sr.

ALSTON & JONES
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A Professional Limited Liability Company  
 ATTORNEYS AT LAW  
 121 NORTH STACY STREET  
 PO BOX OFFICE DRAWN 1532  
 JACKSON, MISSISSIPPI 39216-1532  
 Email: [alston@alstonjones.com](mailto:alston@alstonjones.com)

ALEX A. ALSTON, JR.  
 DIRECT NUMBER  
 601 973-7437

October 26, 2001

TELEPHONE 601 946-6902  
 FACSIMILE 601 946-6902

Honorable Patrick J. Leahy  
 Chairman  
 Committee on the Judiciary  
 United States Senate  
 224 Dirksen Office Building  
 Washington, D.C. 20510

Re: Honorable Charles W. Pickering, Sr.

Dear Senator Leahy:

I have had the honor of knowing Charles W. Pickering, Sr. since graduating from the University of Mississippi School of Law. Upon commencing my practice in Jackson, Mississippi in January, 1964, I recognized Charles Pickering to be one of the outstanding lawyers in this state and was fortunate to have the opportunity to work with him on a number of matters until he was appointed to the United States District Court for the Southern District of Mississippi in 1990. In his practice of law, Mr. Pickering conducted himself in the highest traditions of his profession, not only zealously protecting his clients' interests but by being sensitive to the needs of others. He represented a wide range of clients, being equally zealous in his representation of minorities, women and men.

Since that time I have had the privilege of appearing before him as a United States District Judge in a number of cases. I also had the opportunity to work with him while serving as President of The Mississippi Bar in 1991-1992. I have also watched him as he has conducted the business of his court and listened to his presentations as he has assisted fellow lawyers by devoting time to lead educational programs. During all of this time I have been impressed with his unrelenting desire to be fair to all with whom he came in contact. While President of The Mississippi Bar, he worked closely with me in understanding that both state courts and federal courts must work together for the betterment of all our citizens.

Honorable Patrick J. Leahy  
October 26, 2001  
Page Two

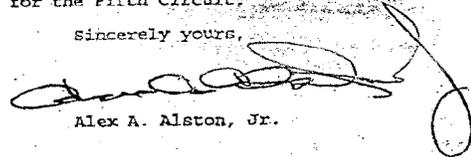
He has served with utmost integrity, wisdom and sensitivity for over 10 years as United States District Judge. The attorneys in this District have frequently applauded his even-handed justice. I personally have had the pleasure of presenting difficult constitutional questions to Judge Pickering which he handled with skill and knowledge of our Constitution and its impact on the states and the people under our federal system of justice.

Judge Pickering has shown the utmost impartiality in his court proceedings, treating all lawyers and parties with great courtesy and without regard to color, creed or sex. Lawyers have frequently commented on the natural fairness he has demonstrated to any party appearing before his court.

Another important trait of Judge Pickering is his uncanny ability to solve problems and get to the essence of issues before him and resolve those issues judiciously.

This great country of ours will be well served with Judge Charles W. Pickering, Sr. sitting as a member of the United States Court of Appeals for the Fifth Circuit.

Sincerely yours,



Alex A. Alston, Jr.

AAA, Jr./jgs

cc: Senator Orrin Hatch

**PHELPS DUNBAR LLP**  
COUNSELLORS AT LAW

New Orleans, LA  
Baton Rouge, LA  
Houston, TX  
London, England

SkyTel Centre  
200 South Lamar Street • Suite 500  
Jackson, Mississippi 39201  
P. O. Box 23066  
Jackson, Mississippi 39225-3066  
(601) 352-2300 • Fax (601) 360-9777

Jackson, MS  
Tupelo, MS  
Gulfport, MS  
Tampa, FL

REUBEN V. ANDERSON  
Partner  
Resident in Mississippi  
Direct (601) 360-4339

www.phelpsduanbar.com

January 8, 2002

Senator Patrick Leahy, Chairman  
Senate Judicial Committee  
433 Russell Senate Office Building  
United States Senate  
Washington, DC 20510

Re: Judge Charles Pickering

Dear Senator Leahy:

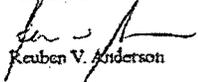
It has come to my attention that Judge Pickering is under consideration for a position on the Fifth Circuit Court of Appeals. As a past President of the Mississippi Bar and former Justice on the Mississippi Supreme Court and the first African-American to hold either of these positions, I would like to take this opportunity to recommend Judge Pickering for this position.

I have known Judge Pickering for at least a quarter of a century. At all times I have found him to be an honorable man. I have had the opportunity to appear before Judge Pickering as an attorney and he was extremely fair and impartial to all the parties. I likewise had the occasion to serve with Judge Pickering on the Racial Reconciliation Committee at the University of Mississippi and through that fully understand his commitment to racial justice.

Judge Pickering would be an asset to the Fifth Circuit Court of Appeals and I recommend him without reservation.

Sincerely,

PHELPS DUNBAR LLP

  
Reuben V. Anderson

RVA:fsw  
cc: Sen. Orrin Hatch  
JD 00150866 1

GARRISON SCOTT GAMBLE & ROSENTHAL, P.C.

6641 HERWAY 98 WEST, SUITE 104  
BIRMINGHAM, MISSISSIPPI 39402

MAILING ADDRESS:  
POST OFFICE BOX 18500  
BIRMINGHAM, MISSISSIPPI 39404-8500

BIRMINGHAM OFFICE:  
2224 1ST AVENUE, NORTH  
BIRMINGHAM, ALABAMA 35203  
(205) 326-3336

TELEPHONE: (601) 268-1000  
FACSIMILE: (601) 268-1998  
FAX: 1-888-462-6644  
<http://www.gsrattys.com>

W. LEWIS GARRISON, JR.\*  
ROMAIN S. SCOTT, III  
J. CALLEN SPARROW  
F. PAGE GAMBLE  
RICHARD R. ROSENTHAL  
THOMAS C. ANDERSON†  
RONZA J.F. PRICHAL  
JENNIFER S. PRICISE  
WILLIAM L. BROSE

\*ALSO ADMITTED IN GEORGIA  
†ALSO ADMITTED IN ALABAMA

November 6, 2001

Honorable Patrick J. Leahy  
United States Senator  
Chairman, Senate Judiciary Committee  
224 Dirksen Office  
Washington, D.C. 20510

Re: Nomination of the Honorable Charles W. Pickering, Sr. for Circuit Judge of the United States Court of Appeals for the Fifth Circuit

Dear Senator Leahy:

I am writing to express my support for the confirmation of Charles W. Pickering, Sr. as a Circuit Judge for the United States Court of Appeals for the Fifth Circuit. Judge Pickering is a man of high moral character and integrity who has served with distinction as a United States District Judge since taking the bench in 1990. I have had the pleasure of representing both plaintiffs and defendants in cases pending before Judge Pickering, and know that regardless of the outcome, Judge Pickering has always applied the law in a fair and impartial manner.

I can think of no finer person to fill the vacancy on the Fifth Circuit and urge your support for his confirmation. Please feel free to contact me if I can provide you with any further information. With warmest personal regards, I remain

Sincerely,

Garrison Scott Gamble & Rosenthal, P.C.



Thomas C. Anderson  
For the Firm

TCA:ta

cc: Honorable Orin G. Hatch  
United States Senator

HERMAN L. AYCOCK  
205 MILLER LANE  
ELLISVILLE, MS 39437

February 2, 2002

Chairman Patrick J. Leahy  
Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Dear Mr. Chairman:

I am writing on behalf of U. S. Federal Judge Charles W. Pickering, whom I have known all of his adult life.

I am a former member of the City of Laurel Police Department and retired as Chief of Police in 1976. Judge Pickering served as Jones County Prosecuting Attorney during my police career. He was always an upstanding, fair and impartial prosecutor during his years as prosecuting attorney. During the 1960's, times were unsettled in our county and I worked with Judge Pickering during these violent times. He stood for law and order and every law enforcement officer in the county knew him to be just and impartial in providing fair and equal protection for all. I also know that Judge Pickering took a strong stand against the Clan violence.

Since my retirement, I have followed his career as a practicing attorney, as a Mississippi State Legislator and as a U.S. Federal Judge. I know that Judge Pickering has not changed his philosophy regarding upholding the law and the constitutional rights of all citizens. It is my personal belief that the Committee could search long and hard and still not find a man who is any more dedicated to his judgeship and the fair and impartial performance of his duties.

I strongly urge you to accept and appoint Judge Pickering to the U. S. 5<sup>th</sup> Circuit of Appeals.

Sincerely,



Herman L. Aycock, Ret.  
Chief of Police  
City of Laurel, Mississippi

CC: Senator Orrin Hatch

Herman Aycock  
205 Miller Lane  
Elbisville, Mississippi 39437

February 5, 2002

Senator Orrin Hatch  
Senate Judiciary Committee  
224 Dirksen Building  
Washington, DC 20510

Dear Senator Hatch:

I am a 71-year-old, long-time resident of Jones County, Mississippi. In the 1960s and 70s, I served as a policeman and later Chief of Police for Laurel, Mississippi. I personally worked with Charles Pickering who served as the County Attorney for Jones County during the 1960s. I have known Charles Pickering for 40 years. The allegation made by certain political groups that Charles Pickering intentionally misled the Judiciary Committee in 1990 when he did not remember a contact with a Sovereignty Commission employee, is ridiculous.

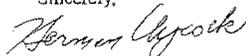
The Sovereignty Commission document in question simply indicates that in 1972 - 18 years before his 1990 hearing - then-State Senator Charles Pickering was in a group of state legislators that asked a Sovereignty Commission employee about union activity. Because Charles did not inquire about the main purposes of the Commission, furthering segregation or fighting civil rights of our black citizens, it would be easy for him to forget such an 18-year-old conversation. In fact, his inquiry shows just the opposite of what those who challenge his civil rights record allege.

The pulpwood union mentioned in the Commission document hauled wood to the Masonite Corporation in Jones County. As a policeman, I was aware that during the late 1960s a similar union at the Masonite plant in Jones County had been infiltrated by the KKK. Klansmen had committed violent acts, including murder, at the Masonite plant. Charles Pickering had been County Attorney in Jones County during this violent period and later, he actually signed the affidavit to indict Dubie Lee, a reputed Klansman, for the murder at the Masonite plant.

If any person, Commission employee or otherwise, would have mentioned union activity that affected Jones County, I also would have asked to be kept informed, as would anyone with law enforcement experience. As County Attorney, Charles Pickering knew of this violence first hand. In fact, Charles worked with the FBI to investigate and prosecute violent KKK members and even testified against the Imperial Wizard of the KKK, Sam Bowers. He put his, his wife's, and his children's lives on the line by doing this.

The political operators in Washington, D.C., who now accuse Charles Pickering of being insensitive to civil rights, would wet their breeches if they had to face down the cold, violent, murdering Klansmen that Charles Pickering did in the 1960s. In 1990, Charles may have forgotten a 1972 conversation that had nothing to do with the segregationist purposes of the Sovereignty Commission, but instead had to do with protecting Jones County's black and white residents from union and Klan violence. Charles will never forget the Klan's beatings, shootings, and murders. And I'll never forget how Charles Pickering fought all of these things. No political smear job will change these facts.

Sincerely,

  
Herman Aycock  
Chief of Police Retired

**JOHN BALTAR**  
39 McLain Ct.  
Jackson, MS 39211  
Phone No. (601) 956-2400  
Fax No. (601) 956-0974

January 30, 2002

Senator Patrick J. Leahy, Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Dear Senator Leahy:

I have known Judge Pickering for 30 years and I have been an active Democrat in many political campaigns in this state. It has been my privilege to work in the top directive groups of several campaigns in Mississippi, including gubernatorial, senatorial, judicial and congressional races.

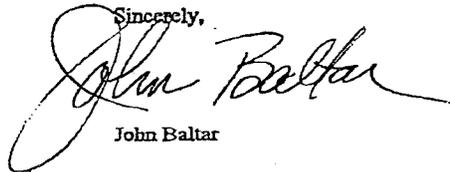
Even though Judge Pickering is in the opposite party, I have worked with him on many issues when he was in the Senate. I have observed his tremendous intellect and his inexhaustible energies in working for the people of this state.

Judge Pickering has always been fair and reasonable in his approach to issues involving his constituency. He has been moderate and effective in his working for the best interest of the people of this state. He treats all of the people with respect and he advocates dignity and equality for all.

Though not a lawyer, I have been in contact with a number of people who have been before his court. Judge Pickering has a fine reputation for honesty and integrity and for equal treatment for all who appear before him. I am confident that he will be an outstanding judge on the Fifth Circuit.

I hope that you agree with my recommendation and that your committee will report his nomination favorably and that the Senate will confirm his nomination.

Sincerely,



John Baltar

**MARY BALTAR**  
39 McLain Ct.  
Jackson, MS 39211  
Phone No. (601) 956-2400  
Fax No. (601) 956-0974

January 30, 2002

Senator Patrick J. Leahy, Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Re: Charles W. Pickering, Sr.  
Appointment to Fifth Circuit

Dear Senator Leahy:

Because my mother, father, brother and I were close long-time personal friends of the late J. P. Coleman, Fifth Circuit Court of Appeals, I feel that I know what is expected and wanted in the person that is appointed to this important position.

As general manager of one of the largest convention hotels in the state of Mississippi, located within six blocks of our state capitol, I have had the opportunity to meet and observe many dignitaries of our great state and our great nation. I have met and observed Presidents, Vice-Presidents, U. S. Senators, Congressmen, Judges, as well as our State Officials and Legislators for the past thirty years.

Ten years ago, it was necessary for me to file a sex discrimination suit against my employer. Knowing that Judge Charles Pickering was selected to hear my sex discrimination suit, I elected to not have a jury. Knowing that Judge Pickering was an honest and fair man, I felt blessed and quite comfortable when he was chosen to be the Judge hearing my complaint. Even though I knew that Judge Pickering was well acquainted with my employer, a male, I felt that he would listen to both sides and make a fair decision for both.

During the months and months of negotiations, Judge Charles Pickering always made sure that I was treated with the utmost respect. At times, that was a very tough job. Judge Pickering made sure that 'Big Business' never took advantage of me because I was a woman entering middle age. I was fired in retaliation for filing suit and Judge Charles Pickering felt my pain when I found it difficult to find another job as a result of my filing a necessary complaint.

I feel that I am well qualified to recommend to you, Senator Leahy, and your committee, Judge Charles Pickering for the position of Fifth Circuit Court of Appeals.

Sincerely,



Mary Baltar

October 25, 2001

Senator Patrick Leahy  
Chairman of Senate Judiciary Committee  
U. S. Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

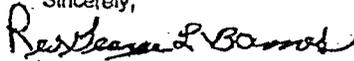
Dear Senator Leahy:

I am an African-American citizen of Jones County, Mississippi and reside in Laurel. I have known Charles Pickering all my life. His father and my father grew up together and played together as children in the Hebron community. I pastor the New Homer Missionary Baptist Church in the Rose Hill community and assist with the pastoral duties at Sweet Hope Missionary Baptist Church in Laurel.

I have always known Judge Pickering to be a fair man that offered help to many individuals regardless of their beliefs or race. He is an open-minded person and has a reputation of being accessible to all individuals. He has started a local program to try to positively influence the young people of the African-American community in Jones County.

He is an understanding man who believes in the equal rights of all people. Without any hesitation, I urge the confirmation of Judge Pickering to the post to which he has been nominated.

Sincerely,



Rev. George L. Barnes  
2939 Carter Avenue  
Laurel, MS 39440  
Home phone: (601) 425-0485  
Business phone: (601) 649-3891

cc: Senator Orrin Hatch

October 18, 2001

Honorable Judge Charles Pickering,

I am writing this letter out of gratitude for all you have done for my family and me.

First of all, I want you to know that I have learned a valuable lesson that I am working to instill in my children, Ashley and Robert. That lesson is:

**ALWAYS do what is right, no matter what. It doesn't matter who might tell you to do wrong, if you know it is not right, DON'T DO IT!**

Second, it has been rough at times with my son, Robert having four different brain surgeries and myself having numerous hospitalizations and surgeries as well. But, thanks to God and my family, I have been able to stay strong.

Last, but not least, this time has brought our family closer together. My husband, Farrell, has changed in many positive ways. He has found God and taken many classes and received certificates to better himself and improve his qualifications for a good job when he comes home. These changes have been witnessed by myself, my children, and others in the way he communicates with people, his family included. I also know from speaking to other prison wives that he has been a positive influence on others. He has used his incarceration time to improve himself, not just wasted time.

I want you to know that I have a good job, with a great company and have proven myself to be a qualified, hard working employee, moving from clerk to senior clerk in just one year. I am also training people in our office and in other locations of our company.

So again, I want to thank you for your part in all of this, and I can assure you that your thoughtfulness and just consideration is greatly appreciated and will never be forgotten.

Sincerely,

*Angela Barnett*

Angela Barnett

RECEIVED

OCT 25

U.S. DISTRICT COURT

**BENNETT LOTTERHOS  
SULSER & WILSON, P.A.**  
ATTORNEYS AT LAW

ONE JACKSON PLACE - SUITE 1400  
168 EAST CAPITOL STREET  
JACKSON, MISSISSIPPI 39201-2127  
TELEPHONE (601) 644-0986  
FAX (601) 944-0467

MAILING ADDRESS:  
POST OFFICE BOX 98  
JACKSON, MISSISSIPPI 39205-0098

WEBSITE: [www.sdwlaw.com](http://www.sdwlaw.com)

RICHARD T. BENNETT  
JOSEPH E. LOTTERHOS  
MARCUS M. WILSON  
JOHN L. PANNIER  
CHARLES E. E. BARNHART  
OF COUNSEL  
STEPHEN M. SULSER, II  
The Attorneys for the State of Mississippi

October 25, 2001

Senator Patrick J. Leahy,  
Chairman Judiciary Committee  
United State Senate  
224 Dirksen Building  
Washington, DC 20510

Re: Judge Charles W. Pickering, Sr.

Dear Senator Leahy:

I am very pleased to send a letter of recommendation in behalf of Judge Charles W. Pickering, Sr., for your consideration as a judicial candidate for the United States Court of Appeals for the Fifth Circuit.

It has been my great pleasure to know Judge Pickering for over 35 years, and I can readily attest to his character and fitness for this position.

I have also had an opportunity to work very closely with him on a professional basis and have found him to be of the highest integrity.

Over the years, I have observed that he has always demonstrated an unusual degree of sensitivity and understanding toward others. As a United States Federal District Judge for the Southern District of Mississippi since 1990, his judicial character has been beyond reproach while demonstrating a keen sense of right and wrong.

During my term as President of The Mississippi Bar (2000-2001), Judge Pickering proved that he has the ability to work with all types of people and everyone knows you can count on him in times of need.

Although Judge Pickering's many achievements and contributions to the judiciary and legal profession are too numerous to mention in this letter, there is no doubt that he is a man who possesses some of life's greatest qualities - thoughtfulness, humor, modesty, common sense, and a profound knowledge of the law. His personality, temperament and disposition also set him apart as a judicial candidate.

BENNETT LOTTERHOS  
SUISER & WILSON, P.A.  
Senator Patrick J. Leahy  
October 25, 2001  
Page 2

Simply put, Mr. [Name] has been and continues to be a success in both his career profession and in his life, without a doubt, would continue to be a credit to our judiciary.

I am extremely proud to have this very special person as my friend and unconditionally recommend him to you.

Should you need anything further concerning this recommendation, please contact me at your convenience.

Sincerely,



Richard T. Bennett

RTB/ce  
cc: Senator Orrin G. Hatch

**BLACKWELL & WHITE**  
ATTORNEYS AND COUNSELORS AT LAW

1661 Office Bldg 400  
Gulfport, MS 39502-0400  
1618 Twenty Third Avenue  
Gulfport, MS 39501  
ED# 664-0660994

LEONARD A. BLACKWELL II  
GARY E. WHITE  
TRICIA TEDALE

Telephone: 228/864-1494  
Facsimile: 228/866-4494  
E-mail: bw\_blackwell@comcast.net

Real Estate: 228/866-4334  
Faxes: 228/866-0915

E-Mail: bw\_blackwell@comcast.net

October 26, 2001

Hon. Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Judge Charles W. Pickering, Sr.

Dear Senator Leahy:

This letter is to urge a favorable report of the Senate Judiciary Committee and confirmation by the Senate of the nomination of Judge Charles W. Pickering, Sr. to the Fifth Circuit Court of Appeals. I have known Charles Pickering since 1959 and have had the opportunity to observe him closely both as a fellow attorney and since 1990, in the service he has rendered as a United States District Judge. He is an outstanding individual, a person with a good heart, and one who has always exhibited a keen sense of fairness and equity in all his undertakings. Because he cares about every individual with whom he deals, he would add stature to an already distinguished court if his nomination is confirmed.

Judge Pickering was a respected and successful lawyer who primarily represented plaintiffs during the course of his legal career. He has helped countless individuals, rich and poor, black and white, male and female, Republican and Democrat, during his years as a lawyer. This fact was never more evident than upon the occasion of his investiture as a United States District Judge, when people from all walks of life came to pay their respects to this man. To my way of thinking one of the highest accolades for an attorney is to be country lawyer beloved in a community in which one has made his home. This kind of high regard in which he is held is evident in Charles Pickering's community and throughout the areas in Mississippi where his influence has extended.

As a lifelong yellow dog Democrat I can assure you that Charles Pickering is a person who places principles before party politics. Before he was named to the bench he was a staunch Republican, but his decisions as a judge have been based on law, not ideology. He is completely trustworthy. As a person of conscience, he leads efforts toward racial reconciliation in our state. His concern for disadvantaged children, women, and those in poverty has led him to serve in his hometown of Laurel, Mississippi in a group of volunteers dedicated to assist such individuals and families.

Judge Pickering is a scholar of the law and one well experienced in fighting in the trenches for the rights of individuals. Except to give it another means of expression, elevation to the Federal bench has not altered his concern for his fellow man one iota. Because he has served in all three branches of government during his public career, he has unique insight as a Judge. I hate to lose him on the District bench, but the Fifth Circuit will benefit from his humanity and lifelong observation of the Golden Rule.

Several years ago I had the opportunity to serve as president of the Mississippi State Bar Association, which put me in touch with hundreds of lawyers around our State. It happened to be the same year during which Judge Pickering's nomination to the United States District Court and the ensuing confirmation process occurred. Lawyers all over the state expressed support for their fellow attorney being selected for the Federal bench. I never heard one negative comment about Charles Pickering during that time, and by his service on the Court he has continued to hold our admiration and confidence. I hope the Senate will expedite his confirmation.

I appreciate your service to our nation during these trying times. The people of this country are its strength and all of us are united in our prayers and support for you and all other leaders of our country.

With best regards,

Very truly yours,



Leonard A. Blackwell II

LAB/jb

cc: Senator Orrin Hatch



**BILLY McGEE**  
SHERIFF  
FORREST COUNTY MISSISSIPPI

P. O. BOX 747

HATTIESBURG, MISSISSIPPI 39403

October 30, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Subject: Honorable Charles W. Pickering, Sr.

Dear Senator Leahy:

It has been my privilege to serve as the Chief Deputy Sheriff for Forrest County, Mississippi, since the year 1992, and I wish to take this opportunity to comment regarding the nomination of United States District Judge Charles W. Pickering, Sr. to the United States Court of Appeals for the Fifth Circuit.

I have been involved in law enforcement for approximately 23 years and have had the privilege of holding the highest office that an African American has held in law enforcement for the Forrest County Sheriff's Office. I would like to express my opinions regarding the nomination of Judge Pickering. The assistance that Judge Pickering rendered when he was County Prosecuting Attorney of Jones County, Mississippi to the Prosecuting Attorneys in Forrest County, Mississippi during the unprecedented trial of Ku Klux Klan members for the murder of Vernon Dahmer, is no small accomplishment. Judge Pickering demonstrated his dedication to the unbiased and unprejudiced administration of law and his application to not only African Americans, but others as well. That trait continued after his appointment to the United States District Court for the Southern District of Mississippi. I have had the opportunity to observe Judge Pickering during his administration of the United States District Court, which sits in Hattiesburg, Mississippi, and have also had the opportunity to testify on numerous occasions in his Court. He has always demonstrated a policy of not only "fairness" and one of "upholding the law" as it applies to all persons, but he has been particularly careful in preserving the rights of all prisoners, including African Americans who sought to pursue remedies in Judge Pickering's Court.

TELEPHONE A.C. 601-544-7800  
FAX NO. 601-544-8182

Senator Patrick J. Leahy  
Page 2  
October 29, 2001

I can say without reservation, that the elevation of Judge Charles Pickering to the United States Court of Appeals for the Fifth Circuit, will be an asset to that Court and will provide the Fifth Circuit with a new member who will continue to uphold the rights of all citizens or individual, either civilly or criminally. I hope that you will respectfully confirm his nomination as a member of the United States Fifth Circuit Court of Appeals.

Sincerely yours,



Charles Bolton

CB

cc: U. S. Senator Orrin Hatch

2-5-02

Honorable Patrick J. Leahy  
 Chairman, Committee on the Judiciary  
 United States Senate  
 224 Dirksen Office Building  
 Washington, DC 20510

Dear Mr. Chairman:

I previously served as Daniel  
 Swans supervising principal at Dexter  
 High School, when he was approximately  
 15-16 years of age. To my knowledge,  
 Daniel never exhibited racial actions  
 toward his peers prior to his problems  
 stemming from a cross burning. It is my  
 opinion that he has served his time and  
 did receive a more than ample sentence.

Sincerely,

Jace Breeland

Jace Breeland  
 10 Bill Dier Road  
 Tylertown, MS 39667

currently teaching science & math  
 at Salem Attendance Center

*McMAHAN & BRINKLEY, P.A.*

Attorneys and Counselors  
608 WEST FINE STREET  
POST OFFICE BOX 31  
HATTIESBURG, MS 39403-0031

H. ALEX BRINKLEY

*Of Counsel*  
MICHAEL B. McMAHAN

(601) 544-8680  
FAX (601) 544-8748  
Sheila D. Prout, Legal Assistant

January 23, 2002

Senator Patrick Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Building  
Washington, D. C. 20510

In Re: Charles W. Pickering, Sr.

Dear Senator Leahy:

I have practiced before Judge Pickering and in his court for many years. I understand that Judge Pickering has been criticized somewhat for his handling of prisoner's rights cases in his court.

Upon hearing of this criticism, it reminded me of a time not so long ago when Judge Pickering asked me to do a favor for the court by acting as advisory counsel for a prisoner who had filed a civil rights case against a local sheriff's department and a Mississippi county jail.

Although Judge Pickering did not have the authority to appoint paid counsel, he asked me to do this, pro bono, to make absolutely sure that the prisoner's case was properly prosecuted from a factual and procedural standpoint.

This was a prisoner who had been convicted of murder and was serving an extremely long, if not, life sentence and even given the fact that prisoner's rights cases are not extremely popular in this part of the country, Judge Pickering was conscientious enough to want to make sure that this prisoner's rights were fully protected.

Based on my experience with Judge Pickering, I believe the criticism he is receiving regarding his handling of prisoner's rights is not well founded.

Sincerely,



H. ALEX BRINKLEY  
HAB/sdp

cc: Senator Orrin Hatch



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ATTORNEYS AT LAW  
A PROFESSIONAL ASSOCIATION  
[www.brownbuchanan.com](http://www.brownbuchanan.com)

Raymond L. Brown  
228.762.0035, ext. 112  
[rlb@brownbuchanan.com](mailto:rlb@brownbuchanan.com)  
Reply: Pascagoula

**PASCAGOULA OFFICE**  
3112 Clary Street  
Post Office Box 2220  
Pascagoula, Mississippi 39569-2220  
Tel: 228.762.0055  
Fax: 228.762.0320

**BILLOKI OFFICE**  
609 West Street  
Post Office Box 1377  
Biloxi, Mississippi 39318-1377  
Tel: 228.574.2999  
Fax: 228.433.7090

October 25, 2001

Senator Patrick J. Leahy, Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

RE: Nomination of Judge Charles W. Pickering

Dear Senator:

I write in support of Judge Charles W. Pickering's nomination to the Fifth Circuit Court of Appeals.

I have clerked for a Justice of the United States Supreme Court, been President of the Mississippi Bar and am a member of the American College of Trial Lawyers, of which I am past State Chair. My litigation experience in federal court will, in a few months, cover forty years.

Trying cases in federal court throughout south Mississippi, for the most part, I have had occasion to be on Judge Pickering's docket a number of times. Others in my office have also appeared before him.

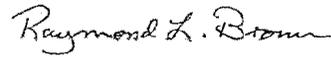
My experiences before Judge Pickering have always been of the highest quality. He is thorough and knowledgeable, always has a good grasp of the matters before him, and cuts right through to the real issues. He has always been courteous and professional.

His intellect is outstanding, and, therefore, his opinions are well-written and clear. As an appellate judge, his written opinions will, I believe, provide clarity and guidance to the bench and bar.

Senator Patrick J. Leahy  
October 25, 2001  
Page Two

Without reservation, I add my recommendation that Judge Charles Pickering's nomination be approved.

Sincerely,



Raymond L. Brown

RLB/tmr  
cc: Senator Orrin Hatch  
RLJMGel Leahy102501.htm

BUSTIN LAW FIRM

109 FAIRFIELD DRIVE, SUITE 109  
HATTESBURG, MISSISSIPPI 39402  
TELEPHONE (601) 268-6551  
FACSIMILE (601) 268-6771

CAROL ANN ESTES BUSTIN  
ATTORNEY AT LAW

January 28, 2002

Senator Patrick Leahy, Chairman  
Committee on the Judiciary  
U.S. Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: *Judge Charles W. Pickering*

Dear Senator Leahy:

I am writing to offer my most enthusiastic support of the nomination of Judge Charles W. Pickering for the U.S. Court of Appeals for the Fifth Circuit. I have had the privilege of practicing before Judge Pickering for nearly eleven years and have always found Judge Pickering to be fair, prepared, and honest. Even in my first months of law practice, Judge Pickering treated me with the same respect and dignity as my more seasoned peers. Judge Pickering has always encouraged me to be an attorney of integrity and intellect.

My experience with Judge Pickering has taken place in both the federal civil and criminal arenas. In civil matters, I have found Judge Pickering to be impartial. I have been most impressed with his ability to move his docket and to work tirelessly with all litigants toward the right resolution of each case. He is always well-versed in the issues presented to him, obviously independently researching pending jurisprudence and giving all parties a fair chance for their day in court.

I have also had experience with Judge Pickering in the criminal area. I have found Judge Pickering to be an excellent and fair criminal jurist. Most recently, I represented an African-American twenty-year-old male brought before the Court for sentencing on a possession with intent to distribute drug charge. My client, a first-offender, did not have a high school degree and admitted to drug use since age 8. Judge Pickering expressed concern for the future of my client and a desire to assist him with improving his life. Judge Pickering granted a reduction in the sentencing guidelines offense level in excess of the reduction recommended by the U.S. Attorney and pre-trial services officer and imposed a sentence within the lowest 10% of the guidelines, thus enabling my client to qualify for several rehabilitative opportunities while incarcerated. From the bench, Judge Pickering praised my client's acceptance of responsibility and substantial assistance to the government and encouraged my client in his future endeavors. I believe my client's sentencing experience with Judge Pickering may have been a positive life-changing experience for the defendant.

I look forward to hearing about continued progress toward the confirmation of Judge Pickering for the Fifth Circuit.

Sincerely,

*Carol Ann Bustin*  
Carol Ann Estes Bustin

CAEB/bb

LAW OFFICES

*Goodman, Chesnoff & Keach*

OSCAR B. GOODMAN, CHARTERED  
DAVID Z. CHESNOFF, CHARTERED  
EUGENE M. KEACH, CHARTERED

AN ASSOCIATION OF PROFESSIONAL CORPORATIONS  
620 SOUTH FOURTH STREET  
LAS VEGAS, NEVADA 89101-6563

TELEPHONE  
(702) 384-8863  
FAX  
(702) 384-1428

October 25, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Dear Senator Leahy:

I have been practicing law for over 20 years and have tried cases in many Federal District Courts.

I had the opportunity to try a case before Judge Charles Pickering, Sr., which involved many complex federal issues. Judge Pickering, Sr., showed astute insight and was fair in his handling of some often very difficult issues. He showed exceptional judicial temperament.

I strongly support and believe Judge Pickering, Sr., would be a first-class addition to the 5<sup>th</sup> Circuit Court of Appeals.

Very truly yours,

GOODMAN, CHESNOFF & KEACH



David Z. Chesnoff, Esq.

cc: Senator Orrin Hatch  
Judge Charles Pickering, Sr.



October 26, 2009

Pickering

U.S. Senate should confirm judge

Despite the flurry of Capitol Hill bi-partisanship in the days immediately following the Sept. 11 attacks, partisan wrangling is now creeping back into the halls of power in the federal government.

Key Democrats in the U.S. Senate -- as they did in the recent confirmation hearings for newly-confirmed U.S. District Judge Mike Mills of Aberdeen -- are delaying the confirmation of current U.S. District Judge Charles Pickering to the 5th U.S. Circuit Court of Appeals in New Orleans. The court hears appeals from Mississippi, Louisiana and Texas.

Senate Democrats seek an additional review of Pickering's record on civil rights issues since the 5th Circuit represents states with high minority populations. Perhaps such review is legitimate. And Democrats appear to be reacting to the delays with former President Clinton's judicial nominees when the Republicans held the majority. That's just politics.

But Mississippians know Pickering as an intelligent, fair and decent man with a strong commitment to civil rights issues and equal protection under the law. We believe he will be a fair, responsible appellate judge.

The Senate should quickly and solidly confirm Pickering's well-deserved nomination to this important post.

Send this article as a postcard



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November 4, 2001

### Pickering has clean record on race issue

Few Mississippians are surprised when 2nd District U.S. Rep. Bennie Thompson aligns himself on national political issues with the Congressional Black Caucus. Where else, pray tell, is Thompson to go in terms of political alignments?

It is also wrong to criticize Thompson for being a loyal member of the Democratic Party both in Mississippi and on the national scene. He is dancing with those who brought him to the dance — something Republicans do as well.

Thompson likewise can't be criticized for holding Bush Administration appointments to the federal judiciary as legislative hostages in the very same manner that Republican congressmen held hostage appointees of the Clinton Administration.

It's not even plausible to knock Thompson for holding the 5th U.S. Circuit Court of Appeals nomination of U.S. District Judge Charles Pickering of Laurel in legislative limbo based on the question of race — for Southern white politicians made a virtual sport of that practice in the 1960s and 1970s.

Neither is it a legitimate point of attack to criticize Thompson as a liberal for opposing the appointment of Pickering as a conservative. That's the way the political cookie crumbles.

What racist record?

But what Thompson can — and should — be criticized for is embracing the congressional Black Caucus party line that Pickering's public record in Mississippi and his judicial decisions while on the federal bench in this state have been in any manner whatsoever those of a racist.

There is no such record. It doesn't exist. Pickering's clean.

The people of Mississippi — black and white — know it. White conservative Republicans, black liberal Democrats and everyone else along the state's political spectrum know it, too.

Respected civil rights attorney Carroll Rhodes of Hazlehurst has publicly praised Pickering as has leading racial reconciliation leader Dolphus Weary of Mission, Mississippi.

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3/27/2002 10:22:52

## Pickering

### • Are Baptists not qualified to serve?

The protracted 5th U.S. Circuit Court of Appeals confirmation proceedings for U.S. District Judge Charles Pickering in the U.S. Senate has centered on two fronts.

There is partisan foot-dragging by Senate Democrats incensed over what they believe were unnecessary delays in the confirmation of Clinton administration judicial nominees by GOP senators.

There also have been vague accusations of racism tied to a law review article on miscegenation penned by the judge while he was in law school. But this week, the political squabble took on a new, more ominous tone.

Opponents from the National Abortion Rights Action League (NARAL) characterized the Laurel judge as an "ultra-conservative political activist" who they believe could not set aside "extreme personal views in issuing judicial decisions." NARAL cites as evidence to support that belief the fact that Pickering was president of the Mississippi Baptist Convention when it approved a resolution calling for a ban on abortion in the early 1980s and his role as chairman of a subcommittee at the 1976 Republican National Convention that created the party's first anti-abortion party platform plank.

NARAL seems to suggest that a Southern Baptist — simply by virtue of his or her personal religious faith — is somehow disqualified from serving on the federal bench. That suggestion is nothing short of religious bigotry.

Pickering's personal religious beliefs aren't relevant to his performance as a judge and in no way should disqualify him from serving. The judge told Senate Judiciary Committee members as much during his testimony and vowed to continue to follow existing federal law on abortion on the 5th Circuit bench — as he has in Mississippi.

Civil rights leaders who actually know Pickering and have witnessed his life's example in this state have consistently praised him as well-qualified and morally fit for service on the 5th Circuit bench. Pickering's opposition comes from special interest groups who don't know him and who haven't to date produced a single judicial opinion from him that supports their accusations of racism or religious activism. If such decisions exist, where are they?

Pickering deserves to be confirmed for this judicial appointment. Continued foot-dragging by Senate Democrats should be seen for what it is — partisan politics. But the tactics to which some of Pickering's opponents are stooping to engage in that partisan battle are deplorable.

### Record Intact

- Despite withering attacks on his personal religious beliefs by special interests groups, U.S. District Judge Charles Pickering's record of fairness, compassion and racial equality remains unscathed.

February 28, 2002

### Pickering

- Record being wrongly besmirched

Fights over judgeships are highly partisan, so Senate confirmation hearings in recent years have become more of a political circus than a serious examination of a nominee's qualifications.

That was true when Republicans controlled the Senate and is true now that Democrats are back at the helm.

It is certainly true in the case of the nomination of Charles Pickering to the 5th U.S. Circuit Court of Appeals.

Pickering, currently a U.S. District judge in Mississippi's Southern District, is being pilloried by liberal Democratic forces that don't want to add another Republican to the 5th Circuit and who see Pickering's nomination as a test case for upcoming votes.

That's the politics.

The man, however, is a different story.

Charles Pickering is a deeply religious man of the highest integrity. His political career prior to the bench is solid when it comes to public service and leadership.

The claims by members of the Black Caucus that he is insensitive to minority and women's rights is simply not borne out in his record. In fact, his political career suffered because of his stand against the Ku Klux Klan in the 1960s in Jones County, where he served as a prosecutor.

If senators want to oppose Pickering because he is a Republican and a conservative, that is their political right.

However, they cannot oppose him based on his record on race in Mississippi.

Pickering is a capable judge and a person of utmost integrity who has carried out his duty to uphold the Constitution. He should be confirmed.

### And, this...

- Thompson's rhetoric appalling

Mississippi 2nd District U.S. Rep. Bennie Thompson joined members of the Congressional Black Caucus Wednesday in opposing Charles Pickering's nomination to the 5th U.S. Circuit Court of Appeals.

As a Democrat, Thompson could be expected to oppose Pickering, a former state GOP chairman

### Integrity

- U.S. District Judge Charles Pickering is a person of integrity who has a long and distinguished record in politics and law.
- He should be confirmed to serve on the 5th Circuit.

backed by Republican U.S. Sen. Trent Lott. How Thompson opposed him is something else altogether.

Thompson crossed the line in using a brand of racial rhetoric that has seldom been heard in Mississippi since the 1960s. Thompson didn't stop at opposing Pickering, but criticized any black Mississippian who might support him as being a "Judas."

Thompson was elected to represent the 2nd District, not as spokesperson for all black people in Mississippi. Who is Thompson to declare what black Mississippians must believe, lest they be accused of betrayal?

There are black Mississippians — Democrats and Republicans — who support Charles Pickering.

For Thompson to say there should be some sort of racial litmus test is offensive. Such racially charged rhetoric has no place in modern Mississippi politics.

### Prisons

- Why such a push for counties?

Already struggling — with a \$15 million deficit this year, down from \$29 million with cuts to the bone — the state Department of Corrections is now being hit with a bill to rob its budget for another \$1 million for county jails.

Senate Appropriations Chairman Jack Gordon, D-Okolona, defends his bill by saying county sheriffs need to be paid what the state owes them, \$20 per inmate per day for housing state prisoners in county jails.

Corrections Commissioner Robert Johnson says he is late on reimbursing counties with the cost-cutting he has already done, but passing the bill will cause him to lay off 80 people, threatening the security of guards and communities where state prisons are located.

Why all this concern by state legislators? Why now, with the state strapped for cash in every state agency?

Perhaps there's a clue in another "surprise" bill this week to give county and statewide elected officials a pay raise.

In the pay raise bill, also authored by Gordon, major beneficiaries would be county supervisors, sheriffs, justice court judges . . . each county's "courthouse crowd."

Hmmm . . . the 2003 budget. Isn't that an election year?

The state needs to pay its bill with counties if it is owed. The state, however, should not be propping up counties with the corrections budget.

 [Send this article as a postcard](#)

CLINE, LTD.  
137 Jeff Byrd Road  
Laurel, Mississippi 39443-6136

Lee W. Cline  
(601) 646-6274

January 25, 2002

The Honorable Patrick J. Leahy, Chairman  
Judiciary Committee  
United States Senate  
Washington, D.C. 20510-4502

Re: Charles W. Pickering, Sr.

Dear Senator Leahy:

As a long time member of the National Association of Criminal Defense Lawyers and considered by some to be a "Yellow-Dog" Democrat, this letter may seem to be a contradiction. My memberships also include the Southern Poverty Law Center, the Georgia Justice Project, the New Orleans Innocence Project and Amnesty International. But this letter is not a contradiction.

Simply, this letter is to express my support for the nomination of my friend, Charles Pickering to the United States Court of Appeals for our Fifth Circuit. It has been my pleasure to know Judge Pickering for over fifteen years, both personally and professionally. This also includes knowing members of his family. To say that Judge Pickering and I agree on every issue would not be correct. To say I have agreed with all of his decisions from the bench, would not be honest.

However, this is not what a judicial office is about. I can say without reservation that Judge Pickering is fair, impartial and keeps the lawyers appearing before him "on the mark". There is no excuse accepted for lack of preparation or professionalism before this judge. As to his personal character and ethics, in my impression, they are above reproach. This may have hurt him somewhat in this process of this nomination, as he will not bend when it comes to the canons required of a judicial official. In short, Judge Pickering does not practice "situational ethics".

Frankly, it is my belief that to be subjected to a one or two issue litmus test for elevation to a major judicial post would invite chaos in our judicial system. It is also my belief that those individuals and groups who promote these litmus tests, (which is their right), have their own agendas and interests that often exclude all other opinions. And, too often these agendas are made without full knowledge of the individuals and facts that are affected. This is not what the law is about.

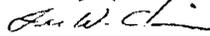
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The Honorable Patrick Leahy  
January 25, 2001  
Page Two

For this reason, I have enclosed two recent items from the *Jackson Clarion-Ledger* for your review. Having personal knowledge and relationships with each of the Mississippi commentators, I know that each person also does not agree with Judge Pickering all of the time. But as to respect for him, and personal knowledge of what Judge Pickering has accomplished over his life, the opinion is unanimous, Charles Pickering will be an outstanding Circuit Judge. This is what is truly important.

In closing I request a speedy hearing and proper confirmation of Charles Pickering. He is an outstanding person, has been an outstanding lawyer and jurist. He has been a true credit to the Laurel community. He will make an outstanding Circuit Judge.

Thank you,



LEE W. CLINE

Enclosures

LAW OFFICES  
OF  
*John Mark Colette*

401 EAST CAPITOL STREET, SUITE 302  
HERITAGE BUILDING  
JACKSON, MISSISSIPPI 39201

Post Office Box 861  
JACKSON, MISSISSIPPI 39205

TELEPHONE (601) 355-6277  
TOLL-FREE 888-679-4277  
FAX (601) 355-6283

January 17, 2002

Honorable Patrick J. Leahy  
Chairman, Committee on Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

RE: Judge Charles W. Pickering, Sr.

Dear Senator Leahy:

I am writing to you on behalf of Judge Pickering whose confirmation hearing will be coming up based upon his recent nomination to the Fifth Circuit Court of Appeals.

For the past sixteen (16) years I have represented numerous people charged with various types of criminal conduct here in Mississippi and have appeared before Judge Pickering, both from a retained status and pursuant to the Criminal Justice Act. These clients came from all types of backgrounds, but, unfortunately, the majority were minorities.

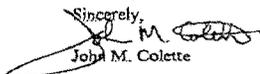
In every case, despite the allegations, Judge Pickering has shown compassion, understanding, professionalism and total fairness. Because Judge Pickering himself actually tried cases before coming to the bench, he does not simply "rubber-stamp" what the government and/or defense wants to do, but, examines closely all aspects of each situation.

From a local perspective, we will lose one of the best U.S. District Court Judges, however, a greater number of citizens will be better served by his appointment to the Appellate Court, where he will be able to address larger issues, and assist more people.

Therefore, I would respectfully urge you and your committee to confirm this highly qualified, professional, compassionate and experienced trial Judge to the Fifth Circuit Court of Appeals.

If I can provide any additional information, or testimony, please let me know.

Sincerely,

  
John M. Colette

JMC/sg



*Michael D. Cooke*  
Attorney At Law

106 Front Street . Post Office Box 625 . Iuka, Mississippi 38852  
Tel: (662) 423-2000 Fax: (662) 423-2052

February 1, 2002

Honorable Patrick J. Leahy  
Chairman, Committee on Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

RE: Confirmation of Honorable Charles W. Pickering, Sr.

Dear Senator Leahy:

I am writing you on behalf of the Honorable Charles W. Pickering, Sr. who has been nominated by the President of the United States for a position on the United States Fifth Circuit Court of Appeals. I am writing in particular regarding the following case: *Britton Mosley v. Mississippi Department of Corrections*, US District Court for the Southern District of Mississippi Cause No. 2:98CV357-P-G. I represented the Plaintiff, Britton Mosley, in that case.

In order to recommend Judge Pickering, I need to advise you of my past association with him. In the early 1970's I served in the Mississippi Legislature as a young lawyer, just out of law school. I was a member of the Mississippi House of Representatives. Judge Pickering was a practicing lawyer in the Laurel area and served in the Mississippi State Senate. He and I knew each other on a casual basis only. We are not good friends and I have had no contact with him since that time, until the trial of the above referenced case.

Very frankly, I was somewhat apprehensive about trying a case before Judge Pickering. I knew his political ideology was Republican and he was very conservative. I have been a "yellow-dog" Democrat all of my life. Notwithstanding our difference in political philosophies, I was pleasantly surprised with the manner, professionalism, and fairness with which Judge Pickering conducted the trial of this lawsuit.

February 1, 2002

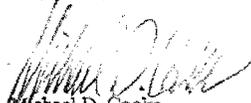
Page 2

My client made numerous allegations against the Mississippi Department of Corrections, but simply was unable to substantiate same with appropriate witnesses. I felt that Judge Pickering allowed the case to go to the jury when, in fact, there was really not enough proof to avoid a judgement as a matter of law. Even though Judge Pickering did allow the case to go to the jury, they found for the Defendant. It was simply a matter of not being able to prove the allegations made by my client. The case was so poor that I did not participate in any appeal, although I prepared the appeal Notice and documents for Mr. Mosley. Whether he has appealed that to the Fifth Circuit Court of Appeals, I do not know. In this limited experience in Judge Pickering's court, I was treated professionally, courteously, fairly and I feel my client was treated the same.

I received a call from the NAACP in Washington. I gave them the same set of facts that I am relating to you. Likewise, you should be aware that Mr. Mosley requested the United States Justice Department, through the Federal Bureau of Investigation to conduct an examination of the facts which gave rise to his civil suit prior to my involvement with him. My understanding is that the Federal Bureau of Investigation found no probable cause for any illegal activities as it related to Mr. Mosley's claims.

I thank you very much for your attention to this letter and I hope that I have helped you partially set the record straight as it relates to the above referenced lawsuit and Judge Pickering's handling of same.

Respectfully yours,



Michael D. Cooke

MDC/dpd

cc: Honorable Charles W. Pickering, Sr.

## LAW OFFICES

W. G. CROTHWAIT, JR.\*  
 RICHARD G. NOBLE  
 \*ALSO ADMITTED IN  
 THE DISTRICT OF  
 COLUMBIA

**CROTHWAIT, TERNEY & NOBLE**  
 A PROFESSIONAL LIMITED LIABILITY COMPANY  
 POST OFFICE BOX 29  
 100 COURT STREET  
 INDIANOLA, MISSISSIPPI 38751-0029  
 October 29, 2001

GORDON L. LYON (1989-1973)  
 CHAMP TERNEY (1939-1998)  
 852/947-2412  
 FAX 852/947-6661  
 ctn@techinfo.com

Honorable Patrick J. Leahy  
 Chairman of Committee on Judiciary  
 United States Senate  
 224 Dirksen Office Building  
 Washington, DC 20510

RE: Honorable Charles W. Pickering  
 United States District Judge  
 Confirmation to United States Fifth Circuit Court of Appeals

Dear Senator Leahy:

As a friend of Charles Pickering for more than 45 years I am pleased to recommend Judge Pickering for confirmation to the Fifth Circuit Court of Appeals.

As a practicing attorney and now a sitting judge he has constantly adhered to the highest principles and traditions of our legal profession and society in general.

Judge Pickering has that special dedication and fundamental responsibility to both the legal profession and the public, and it is manifested through his leadership and service.

I have always been impressed with his quiet dignity and his sense of fairness, ethics, caring and principles that guide his life. In his service to our profession, his church, community and state, no one has ever been too poor, his or her circumstances too humble, to merit Judge Pickering's fidelity and concern.

In addition to his outstanding career as a lawyer, judge, church and civic leader, Charles Pickering has found time to be a husband, a father and a loving and caring grandfather. He represents all those professional, civic and family virtues that we hold out to the public as representative of our profession, as we struggle to restore public respect and esteem for the legal profession.

October 29, 2001  
Page 2

He is most deserving of your confirmation to the United States Fifth Circuit Court of Appeals.

Should you have any questions, please do not hesitate to contact me.

Respectfully yours,



Frank O. Crosthwait, Jr.  
Past President Mississippi Bar  
Past Member of Board of  
Director of American Judicature  
Society  
Life Fellow American Bar Foundation

FOCjr:dc  
Enclosure  
cc: Honorable Orrin Hatch

LAW OFFICES OF  
DANNY E. CUPIT  
POST OFFICE BOX 22079  
304 NORTH CONGRESS STREET  
JACKSON, MISSISSIPPI 39225

TELEPHONE  
(601) 355-2000  
FACSIMILE  
(601) 355-2175

November 13, 2001

The Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: Nomination of the Honorable Charles W. Pickering, Sr.

Dear Mr. Chairman:

I am writing in support of the nomination of Judge Charles Pickering to the United States Court of Appeals for the Fifth Circuit.

First, however, I want to commend your Committee for its thoughtful, deliberate and careful review of nominees to judicial positions. While I am aware that some have unjustly criticized the Committee for unnecessarily delaying judicial nominations, I would hope that you would continue the careful process of reviewing these nominations even though it might take longer than some would like.

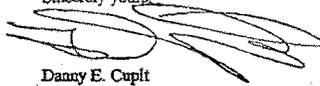
I got to know Charles Pickering in the mid-70's when I co-managed the Carter campaign in Mississippi and thereafter served as Chairman of the state Democratic Party. Judge Pickering at that time was active in the Republican Party. Although I had substantial disagreements with Judge Pickering over his political philosophy, I found him to be a person of high moral character and integrity who was completely honest and straightforward despite our adversarial positions.

After serving my sentence as Chairman of the state Democratic Party, I became actively engaged in a civil litigation practice representing primarily plaintiffs in personal injury litigation. Since his appointment to the bench as United States District Judge for the Southern District of Mississippi, Judge Pickering has won high praise from members of the plaintiff as well as defense Bar for his fairness, evenhandedness and temperament. He is truly one of those individuals whose level of integrity and commitment to the judicial system has compelled him to lay aside his past political views and render fair and impartial justice for all who have appeared before him. I venture to guess that you will not find a single instance of any attorney or litigant who has appeared before Judge Pickering who will say that they were not treated fairly and impartially in his Court.

The Honorable Patrick J. Leahy  
November 13, 2001  
Page 2

Since I have not yet turned in my partisan badge as Judge Pickering has, I have some reticence in voicing support for a nominee of a Republican President. I feel, however, that if I am going to be critical as I have been of some of the judicial nominations from Republican Administrations, I should, in all fairness, be equally outspoken on nominations of those who have demonstrated fairness and equality and respect for the judicial system. Judge Pickering has achieved that position in my view. I would strongly urge your Committee's expeditious review and recommendation to confirm Judge Pickering for the Fifth Circuit.

Sincerely yours,



Danny E. Cupit

DEC:dnl

cc: The Honorable Orrin G. Hatch  
The Honorable Thad Cochran  
KWPZ\FILES\DEC\WIGCER\NLTR

January 24, 2002

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Re: Judge Charles Pickering

Dear Mr. Leahy:

These comments are to assure all who read them of my support for Judge Charles Pickering's nomination. I met the then attorney Pickering in 1968, when our community at large was in the midst of a crisis and needed the best possible guidance and leadership to step forward. He did, and found the way to start the lines of communication between the races, for them to begin talking and working together. His forthrightness, dedication and concern for the community never ever gave rise, in my opinion, to anything that might or would cause you to doubt his dedication.

He encouraged active participation, your opinions and suggestions, etc. Attorney Pickering's influence easily flowed through the city, appropriately making known the problems that needed to be addressed. I was part of that effort.

Finally his credits for advocating the promotion and upward mobility of minority citizens is unquestionable. He will bring great influence to our community.

Laurel Citizen,

Gus DeLoach  


## JOHN ARTHUR EAVES

Law Firm

JOHN ARTHUR EAVES:

JOHN ARTHUR EAVES, JR.;  
WILLIAM BOBBY GILL, III;  
KIRK G. LADNER;  
RICHARD M. MARTIN, JR.;  
JAMES M. PRIEST, JR.;

W. G. "CHET" DILLARD  
OF COUNSEL

JÖRG KRUMMEL;

KENNY MIGNECO;

101 NORTH STATE STREET  
JACKSON, MISSISSIPPI 39201  
Telephone: (601) 352-7961  
Fax: (601) 354-0630  
Tel. From (US) (877) 328-3752  
E-mail: [weaves@jga.net](mailto:weaves@jga.net)  
<http://www.eaveslaw.com>

2216 MAGAZINE STREET  
NEW ORLEANS, LOUISIANA 70130  
Telephone: (504) 581-5297  
Fax: (504) 891-5290  
E-mail: [ceweshw@bellsouth.net](mailto:ceweshw@bellsouth.net)

DISTRICT OF COLUMBIA  
1700 17<sup>TH</sup> STREET NW, SUITE 209  
WASHINGTON, D. C. 20005  
Telephone: (202) 428-0338

1 ADMITTED IN MISSISSIPPI, TEXAS,  
AND DISTRICT OF COLUMBIA  
2 ADMITTED IN MISSISSIPPI, ARKANSAS,  
AND DISTRICT OF COLUMBIA  
3 ADMITTED IN MISSISSIPPI  
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TEXAS, AND DISTRICT OF COLUMBIA  
5 ADMITTED IN MISSISSIPPI AND WYOMING  
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HOUSTON, TEXAS - (713) 651-8336

BURGSSTÄDT, GERMANY  
9517 BURGSSTÄDT  
BRUNN 11  
02-724-28-07  
FAX - 02-724-157-09

MARACAY, ESTADO, ARAGUA, VENEZUELA  
AVENIDA 18 de ABRIL TORRE CINCOPOLITAN  
POBOX 7, RESCITA 78  
58-434-525-32

Senator Patrick Leahy  
Chairman, Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, DC 20510

Senator Orrin Hatch  
Ranking Member, Senate Judiciary Committee  
152 Dirksen Senate Office Building  
Washington, DC 20510

Dear Senators Leahy and Hatch:

Last week, I read with amazement a one-sided story by AP reporter Jason Struziuso ("Bush judicial nominee Pickering accused of false Senate testimony") that implied that Charles Pickering had intentionally given false testimony to the U.S. Senate Judiciary Committee during his 1990 confirmation hearing for a federal district judgeship. Mr. Struziuso further implied that Charles Pickering's 1990 testimony that he had had no contact with the Sovereignty Commission was an effort to cover up his prior role in that now-defunct segregationist commission that primarily investigated civil rights groups in the 1950s and 1960s. While Judge Pickering, a current nominee to the 5<sup>th</sup> Circuit Court of Appeals, could not respond to this one-sided story, I wanted to take this opportunity to tell the other side of the Charles Pickering story.

First, the AP story reported that a Sovereignty Commission document stated that Pickering was in a group of state legislators "'who requested to be advised' about a group organizing pulpwood workers in the state," some of whom hauled wood to the Masonite Corporation's plant in Jones County, Mississippi. What the AP story failed to mention was that in 1972, Jones County was just emerging from a bitter labor dispute at the Masonite plant where union members, who were also members of the KKK, shot into and burned homes in the middle of the night and brutally beat up workers. As the former District Attorney of Jones County,



**JOHN ARTHUR EAVES**

ATTORNEY AT LAW

Mississippi, I knew what Charles Pickering had known in 1972. Indeed, in 1967, I filed a murder charge against reputed Klansman Vander L. "Dubie" Lee, a member of the Woodworkers Union, for a murder at the Masonite plant in Jones County. As a state Senator representing Jones County, Charles Pickering had every reason to be concerned about further union violence involving the Masonite plant in Jones County.

Second, the implication that Charles Pickering attempted to mislead the U.S. Senate Judiciary Committee in 1990 is hogwash. As any long-time resident of Mississippi knows, the mention of the Sovereignty Commission, instantly brings to mind its high-profile investigations in the 1950s and 1960s. Thus, by 1990, Charles Pickering could easily have forgotten a 1972 conversation with a Commission investigator that occurred years after the Commission's heyday and involved no high-profile Commission activity.

Third, the implication that Charles Pickering would try to cover up an 18-year-old conversation with a Commission employee doesn't square with the same Charles Pickering that I have known for forty years. This is the same Charles Pickering who as County Attorney in the 1960s worked tirelessly with FBI agents to investigate and prosecute violent Klansman in Mississippi. The same Charles Pickering who in 1967 put his and his family's lives on the line by personally testifying against Sam Bowers, the Imperial Wizard of the KKK, in the case dealing with the murder of civil rights activist Vernon Dahmer. The same Charles Pickering who in 1977, as a state Senator, voted to shut down the Sovereignty Commission, and fought against efforts to destroy the Commission's records by voting for the only plausible alternative — to preserve the Commission's records and to make them public after a number of years.

While Judge Pickering, in 1990, may have forgotten an 18-year-old conversation, he has never forgotten his duty to protect people of all races in Mississippi. Indeed, when I checked my memory by reviewing the court record on the 1967 case against Vander L. Lee, the reputed Klansman who was a member of the Woodworkers Union at Masonite Corporation, I discovered another signature in addition to mine on the affidavit supporting the murder indictment — "Charles W. Pickering." That's the other side of the story.

Sincerely,


  
W. O. "CHET" DILLARD


## JOHN ARTHUR EAVES

Law Firm

JOHN ARTHUR EAVES:

JOHN ARTHUR EAVES, JR.,  
WILLIAM BOBBY GILL, III,  
KIRK G. LADNER,  
RICHARD M. MARTIN, JR.,  
JAMES M. PRIEST, JR.,

W. O. "CHET" DILLARD  
OF COUNSEL

JÖRG KRUMMEL  
KENNY MIGNECO:

101 NORTH STATE STREET  
JACKSON, MISSISSIPPI 39201  
Telephone: (601) 355-7961  
Fax: (601) 355-0530  
Toll Free: (US) (877) 328-3752  
E-mail: atyjnc@gte.net  
<http://www.eaveslaw.wld.com>

2216 MAGAZINE STREET  
NEW ORLEANS, LOUISIANA 70130  
Telephone: (504) 581-5297  
Fax: (504) 581-5290  
E-mail: [eeveslaw@bellsouth.net](mailto:eeveslaw@bellsouth.net)

DISTRICT OF COLUMBIA  
1700 17<sup>TH</sup> STREET NW, SUITE 209  
WASHINGTON, D. C. 20009  
Telephone: (202) 628-0338

1 ADMITTED IN MISSISSIPPI, TEXAS,  
AND DISTRICT OF COLUMBIA  
2 ADMITTED IN MISSISSIPPI, ARKANSAS,  
AND DISTRICT OF COLUMBIA  
3 ADMITTED IN MISSISSIPPI  
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5 ADMITTED IN MISSISSIPPI AND WYOMING  
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HOUSTON, TEXAS - (713) 431-9995

BÜROSTADT, GERMANY  
09217 BURENSTADT  
WÜHL 11  
03-724-29-87  
FAX - 03-724-1-57-80

MARACAY, ESTADO ARAGUA, VENEZUELA  
AVENIDA 19 de ABRIL TORRE COSMOPOLITAN  
PISO 7, ESPINA 73  
58-434-525-32

January 23, 2002

Honorable Patrick Leahy, Senator  
Chairman, Committee of Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: Charles W. Pickering Appointment  
to U. S. Court of Appeals  
Fifth Circuit Confirmation Hearings

Dear Mr. Chairman Leahy:

It was my honor and pleasure to serve with Judge Charles Pickering in the early 60's civil rights struggles in Jones County, Mississippi as a District Attorney. I was acquainted with him during law school and have been privileged to work with him as his career progressed from County Attorney, State Senator, U. S. District Judge and many other civic and professional services he has rendered for the people of the United States.

During the civil rights struggle, being a native of Jones county, the resident agents of the F.B.I. seemed to work closer with Charles because they had known him for many years before I came to Jones county. Especially during the *Dahmer* case, when Special Agent Roy K. Moore and approximately 50 other agents were in the area, Charles worked as liaison with the federal offices while I worked more with the state officers. He attended the many meetings when the investigation was on-going resulting in the arrest of some 14 individual Klan members.

Charles wrote the speech given on WDAM-TV, Laurel, - Hattiesburg by Mayor Henry Bucklew in an effort to stop the violence and calm our people of all ethnic groups. To my personal knowledge he risked his safety to protect the public and to enforce the law fairly and impartially against the KKK. He was threatened many times and stood firm on many occasions when it was necessary to enforce the law.



**JOHN ARTHUR EAVES**

ATTORNEY AT LAW

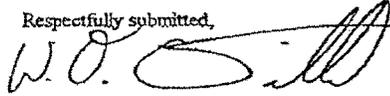
Our Jones County careers were both terminated because of our stand; as we both lost election following our terms as prosecutors. Later, we were both redeemed. My redemption was being appointed Commissioner of Public Safety and receiving a letter of Commendation from J. Edgar Hoover. Charles was appointed and confirmed by your committee as a U. S. District Judge for the Southern District of Mississippi.

If there is any person who has paid his dues for his stand on civil or criminal rights, it's Charles. As prosecutors we put the first blacks and women on juries in Jones County enforcing the decision of our U. S. Supreme Court.

I can personally attest to the fact that he will enforce the United States Constitution as interpreted by our highest court. He is of the highest moral character and the only member of the judiciary that I have met who has received no adverse criticism for his private or public life. Charles has always stood tall for justice when very few people would make a stand at all.

This recommendation comes from an eye witness who fought in the trenches with him. It would be a great loss to our federal judiciary if for any reason he is not confirmed.

Respectfully submitted,



Judge W. O. "Chet" Dillard (Ret.)  
Chancellor, Fifth Chancery Court District  
State of Mississippi

WOD/rcd

cc: Sen. Orin Hatch  
Sen. Thad Cochran  
Sen. Trent Lott  
*The Clarion-Ledger*



**CHARLES PICKERING:  
THE OTHER SIDE OF THE STORY**

by Judge Chet Dillard\*

Yesterday, I read with amazement the one-sided story by AP reporter Jason Struziuso that implied that Charles Pickering had intentionally given false testimony to the U.S. Senate Judiciary Committee during his 1990 confirmation hearing for a federal district judgeship. Mr. Struziuso further implied that Charles Pickering's 1990 testimony that he had had no contact with the Sovereignty Commission was an effort to cover up his prior role in that now-defunct segregationist commission that primarily investigated civil rights groups in the 1950s and 1960s. While Judge Pickering, a current nominee to the 5<sup>th</sup> Circuit Court of Appeals, could not respond to this one-sided story in the press, I can.

First, the AP story reported that a Sovereignty Commission document stated that Pickering was in a group of state legislators who "requested to be advised" about a group organizing pulpwood workers in the state," some of whom hauled wood to the Masonite Corporation's plant in Jones County, Mississippi. What the AP story failed to mention was that in 1972, Jones County was just emerging from a bitter labor dispute at the Masonite plant where union members who were also members of the KKK shot into and burned homes in the middle of the night and brutally beat up workers. As the former District Attorney of Jones County, Mississippi, I knew what Charles Pickering had known in 1972. Indeed, in 1967, I filed a murder charge against reputed Klansman Vander L. "Dubie" Lee, a member of the Woodworkers Union, for a murder at the Masonite plant in Jones County. As a state Senator representing Jones County, Charles Pickering had every reason to be concerned about further union violence involving the Masonite plant in Jones County.

Second, the implication that Charles Pickering attempted to mislead the U.S. Senate Judiciary Committee in 1990 is hogwash. As any long-time

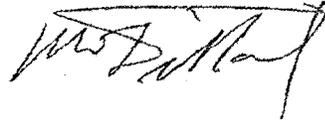
Page 1 of 2

resident of Mississippi knows, the mention of the Sovereignty Commission, instantly brings to mind its high-profile investigations in the 1950s and 1960s. Thus, by 1990, Charles Pickering could easily have forgotten a 1972 conversation with a Commission investigator that occurred years after the Commission's heyday and involved no high-profile Commission activity.

Third, the implication that Charles Pickering would ~~intentionally~~ try to cover up an 18-year-old conversation with a Commission employee doesn't square with the same Charles Pickering that I have known for forty years. This is the same Charles Pickering who as County Attorney in the 1960s worked tirelessly with FBI agents to investigate and prosecute violent Klansman in Mississippi. The same Charles Pickering who in 1967 put his and his family's lives on the line by personally testifying against Sam Bowers, the Imperial Wizard of the KKK, in the case dealing with the murder of civil rights activist Vernon Dahmer. The same Charles Pickering who in 1977, as a state Senator, voted to shut down the Sovereignty Commission, and fought against efforts to destroy the Commission's records by voting for the only plausible alternative -- to preserve the Commission's records and to make them public after a number of years.

While Judge Pickering, in 1990, may have forgotten an 18-year-old conversation, he has never forgotten his duty to protect people of all races in Mississippi. Indeed, when I checked my memory by reviewing the court record on the 1967 case against Vander L. Lee, the reputed Klansman who was a member of the Woodworkers Union at Masonite Corporation, I discovered another signature in addition to mine on the affidavit supporting the murder indictment -- "Charles W. Pickering." That's the other side of the story.

*\*Chas. Dillard is a retired Judge of the Fifth Chancery Court District in Mississippi who served as District Attorney in Jones County during the 1960s.*



Page 2 of 2

**Roger K. Doolittle**

*Attorney at Law*  
460 Briarwood Drive, Suite 500  
Jackson, Mississippi 39206  
Telephone: (601) 957-9777  
Facsimile: (601) 957-9779  
E-mail: [RKDoolittle@aol.com](mailto:RKDoolittle@aol.com)

Member of Faculty in Mississippi & Georgia

Charles O'Neil, Legal Assistant

January 7, 2002

Via Facsimile Only  
Honorable Patrick J. Leahy  
Chairman, Judicial Committee  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

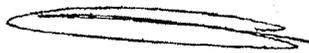
Re: *Honorable Charles W. Pickering, Sr. Nomination to the United States Court of Appeals for the Fifth Circuit*

Dear Senator Leahy:

As an attorney representing labor interests in the State of Mississippi for over 20 years, I write to you to support the nomination of the Honorable Charles W. Pickering, Sr., to the United States Court of Appeals for the Fifth Circuit, a matter which is currently pending before your committee. During the course of my representation of labor unions, several occasions have arisen, in which I have appeared before Judge Pickering and in which he has considered difficult issues regarding labor and employment law. Frankly, while neither my clients nor I have agreed with every single ruling of Judge Pickering, we have always found his decisions to be well-founded in law, fairly and impartially considered, and sensitive to the needs of working men and women.

Therefore, please accept this correspondence as the unequivocal endorsement of Judge Pickering for a seat on the Fifth Circuit Court of Appeals. Should the committee or its staff have any questions whatsoever, please feel free to contact me with respect to those concerns.

Very truly yours,



Roger K. Doolittle

RKD/cc  
cc: Honorable Orrin Hatch, Co-Chairman  
C:\My Files\Roger K. Leahy\jsgf

THE LAW OFFICE OF  
 JAMES K. DUKES  
 224 WEST FINE STREET - R. O. BOX 2093  
 HATTIESBURG, MISSISSIPPI 39403-2093

JAMES K. DUKES  
 JAMES K. DUKES, JR.  
 R. CHRISTOPHER WOOD

TELEPHONE  
 601 544-4123  
 FAX 601 544-0425  
 JKD@law@ms.com

January 24, 2002

Honorable Patrick J. Leahy  
 Chairman, Committee on the Judiciary  
 United States Senate  
 224 Dirksen Office Building  
 Washington, DC 20510

Subject: Charles W. Pickering, Sr. - Nomination to United States 5<sup>th</sup> Circuit  
 Court of Appeals

Dear Senator Leahy:

Forrest County, Mississippi, its County Seat being Hattiesburg, Mississippi, was the county of residence of Vernon Dahmer and family at the time of the malicious and racially motivated fire-bombing and assassination of Mr. Dahmer on January 10, 1966. At the time of Mr. Dahmer's death, I was privileged to be the elected County Prosecuting Attorney of Forrest County, Mississippi and in such capacity, was responsible for the State's prosecuting of any State cases involving Mr. Dahmer's death.

My brother was an FBI agent, active in the Dahmer investigation. Our relationship, along with others, allowed the unusual occurrence of cooperation between local and federal authorities regarding the investigation and prosecution of the Ku Klux Klan.

The ultimate defendants in the Dahmer murder were from Jones County, Mississippi, one namely: Samuel Bowers. Mr. Bowers was the Imperial Wizard of the Klan and the person who orchestrated the Dahmer murder. Charles W. Pickering, a young lawyer like myself at that time, was one of the very few residents of Jones County, who responded to my request for assistance in the prosecution of Sam Bowers and his fellow Klansmen. Charles W. Pickering made himself available upon request, not only as a witness, but actually testified in the State's prosecution regarding the Dahmer murder. His testimony regarding the bad character and reputation of the Klan defendants was invaluable in tilting the Scales of Justice towards the conviction of four (4) individuals for Vernon Dahmer's murder. The courage, determination and willingness of Charles W. Pickering to speak out on behalf of justice was not without a price in racially tormented Mississippi during the ---60's. As it did with myself and others, Charles W. Pickering was subsequently rejected at the polls because of this courageous stand.

Mississippi is my lifetime home, where I have been privileged to practice law for 43 years

Senator Patrick J. Leahy  
January 24, 2002  
Page 2

and have known Judge Pickering personally, professionally and from a community viewpoint. I can, and am, representing to you and your committee (without reservation), that the performance of Judge Pickering as a U. S. District Judge has not only been outstanding and a credit to the judiciary, but representative of his early determination of being on the side of justice and the rule of law without regard to race, creed or color. Judge Pickering has, at all times, conducted the affairs in and out of the courtroom with absolute fairness and equity with litigants, as well as attorneys, with no favoritism because of race, sex, nor social status. His elevation and confirmation to the 5<sup>th</sup> Circuit Court of Appeals will be an asset to the Federal Judiciary and will insure a continuation of a Federal Appeals Court in the 5<sup>th</sup> Circuit that is recognized for upholding constitutional and substantive law, fairly and impartially.

I appreciate the opportunity to correspond with you on behalf of Judge Pickering and am available for any questions or inquiries you or your committee may have in this regard.

With best regards, I am,

Sincerely,



JAMES K. DUKHS

JKD

cc: Honorable Orrin Hatch

**BRYANT, CLARK, DUKES, BLAKESLEE, RAMSAY & HAMMOND, P.L.L.C.**

**LAWYERS**

7225 14th STREET - P. O. BOX 10 - GULFPORT, MISSISSIPPI 39502-0010 - TELEPHONE (228) 855-6101 - FAX (228) 856-9077

ROGER Y. CLARK  
W. RAYMOND HUNTER  
JAMES O. DUKES  
WILLIAM D. BLAKESLEE  
J. PURSUIT RAMSAY  
R. ROBERT HAMMOND, JR.  
GREGORY E. LECHE III  
WILLIAM L. McSPENCER, JR.  
WILLIAM W. WETHERSpoon III

STEPHEN A. ANDERSON  
WILLIAM V. WETHERSpoon III  
KAREN K. SAWYER  
DAVID W. STEWART  
RONALD T. BLANKELL  
RICHARD W. SLAMAN  
PATRICK T. BERGHEIM  
MARY MARGARET ALEXANDER  
MATTHEW B. MILLER III

KIMBERLY F. ROBERTS  
AMANDA CLANNAN WADDELL  
DORINE K. COOPER, II

\* Of Counsel  
\*\* Also admitted to Attorney  
\*\*\* Also Admitted to Georgia  
|| Also Admitted to Louisiana

Hattiesburg Office  
165 MADISON Plaza - P. O. BOX 10667  
HATTIESBURG, MISSISSIPPI 39404-0667  
TELEPHONE (601) 566-9077

FLE BRYANT  
1064 - 1094

October 30, 2001

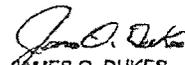
Honorable Patrick Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D. C. 20510

Dear Senator Leahy:

It is a honor and a pleasure for me to write in support of the nomination of Honorable Charles Pickering to the United States Court of Appeals.

As a practicing trial lawyer, a member of the American College of Trial Lawyers, and Past President of the Mississippi Bar, I have had occasion to appear before Judge Pickering on numerous occasions, as well as to work with Judge Pickering on a variety of projects intended to support and enhance the functioning of the judiciary and of the Bar. It has been my experience that Judge Pickering is, without exception, fair and courteous to all attorneys and parties who appear before him. His integrity is unquestioned and the quality of his judicial decisions is exceptional. Judge Pickering will be an outstanding addition to the bench of the Fifth Circuit Court of Appeals, and I recommend him without reservation.

Sincerely,

  
JAMES O. DUKES

JOD/pgm  
cc: Honorable Orrin Hatch

LAW OFFICES

**HOLCOMB DUNBAR***A Professional Association*

722 GOODMAN ROAD EAST, SUITE 1  
 POST OFFICE BOX 190  
 SOUTHWAYEN, MISSISSIPPI 38671  
 662-238-2604  
 TELECOPIER 662-238-2424

1217 JACKSON AVENUE  
 P.O. DRAWER 701  
 OXFORD, MISSISSIPPI 38653

152 DELTA AVENUE  
 POST OFFICE BOX 308  
 CLARKSDALE, MISSISSIPPI 38614  
 662-527-2241  
 TELECOPIER 662-527-4751

662-234-5775

TELECOPIER 662-238-7552

E-MAIL [jackd@holcombdunbar.com](mailto:jackd@holcombdunbar.com)

**JACK F. DUNBAR**  
 Direct Dial 662-238-7513

October 25, 2001

U.S. Senator Patrick Leahy  
 United States Senate  
 Washington, DC 20510

**RE: U.S. District Judge Charles Pickering**

Dear Senator Leahy:

This letter is to submit for your consideration my unqualified endorsement of U.S. District Judge Charles Pickering for confirmation of his appointment by the President to the Court of Appeals for the Fifth Circuit.

I have practiced law in the State of Mississippi for more than 40 years. I am a past president of the Mississippi Bar Association, and a past member of the Board of Governors of the American Bar Association. I am a fellow of the American College of Trial Lawyers and have known Judge Pickering personally and by judicial reputation for many years.

I am a Democrat and would not want you to confirm any person to the federal courts of this nation who I felt was gender or racially biased. I have never known Judge Pickering to be a person or judge that was anything other than fair and impartial in his conduct toward women or minorities.

I do not think anyone questions his judicial qualifications. The American Bar Association has deemed him "well qualified."

For these reasons, I strongly endorse his confirmation to the Court of Appeals for the Fifth Circuit.

Respectfully,



Jack F. Dunbar

cc: U.S. Senator Orrin G. Hatch  
 U.S. Senator Thad Cochran  
 U.S. Senator Trent Lott

City Council  
 ... Rowell ..... West One  
 Deputy L. Denton ..... West Two  
 Cyrene Carroll ..... West Three  
 C. E. "Doc" Bailey ..... West Four  
 Henry E. Naylor ..... West Five



Post Office Box 1288  
 Hattiesburg, Mississippi 39403-1288  
 (601) 543-4301  
 Fax: (601) 245-4608  
 Email: mayor@hattiesburgms.com  
 council@hattiesburgms.com  
 Website: www.hattiesburgms.com

City of Hattiesburg  
 Johnny L. DuFree, Mayor

October 29, 2001

Senator Patrick J. Leahy, Chairman  
 Committee on the Judiciary  
 United States Senate  
 224 Dirksen Office Building  
 Washington, D.C. 20510

Dear Senator Leahy:

This letter is written on behalf of the Honorable Judge Charles Pickering. Judge Pickering has been a personal friend of mine for some time and I truly respect and honor him as a fair and impartial jurist.

It has come to my attention that Judge Pickering has been nominated to sit on the 5<sup>th</sup> U.S. Circuit Court of Appeals. This is an honor for Judge Pickering and south Mississippi and I whole-heartedly endorse his nomination. Judge Pickering has consistently advocated racial reconciliation for as long as I have known him and has testified against such men as convicted Ku Klux Klan member Sam Bowers in 1967, for the firebombing and murder of civil rights leader Mr. Vernon Dahmer.

I would ask that you look favorably upon Judge Pickering's nomination. If I can be of additional assistance please contact me at the above address or phone number. With deepest regard I am:

Sincerely,

Johnny L. DuFree  
 Mayor

Cc: Senator Orrin Hatch

Pyle, Dreher, Mills & Dye, P.A.

ATTORNEYS AT LAW  
800 AVERY BOULEVARD NORTH, SUITE 101  
RIDGEBLAND, MISSISSIPPI 39157

Brad Dye

Telephone:  
(601) 957-2600  
Telecopier:  
(601) 957-3440

February 1, 2002

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Dear Mr. Chairman:

It is a privilege for me as a long time Democrat to endorse the appointment of United States District Judge Charles W. Pickering to the United States Fifth Circuit Court of Appeals. I served the State of Mississippi as an elected Democrat for a number of years. Among those offices was twelve years spent as Lt. Governor. During that time I chaired the Mississippi delegation to the National Democratic Convention in San Francisco, which named former Vice President Walter Mondale as the Democratic nominee for President.

Judge Pickering has an outstanding record of leadership and accomplishment. He has served his community, his state and his nation with distinction. He is well qualified to serve on the United States Court of Appeals. His honesty, impartiality, fairness and knowledge of the law are well known throughout the State of Mississippi. It would be a terrible mistake to fail to advise and consent to his nomination.

Yours most sincerely,



Brad Dye

BD/rhm

Cc: Honorable Orrin Hatch



The City of Laurel  
Mississippi

Post Office Box 647  
Laurel, Mississippi 39441

October 29, 2001

Senator Patrick Leahy  
Chairman, Senate Judicial Committee  
U.S. Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Dear Senator Leahy:

I am an elected official currently serving as a Councilman in the City of Laurel, Mississippi. My fellow Councilmen have also elected me as President of that Council.

I am writing on behalf of my friend, Judge Charles Pickering, whom I have known all of my life. He has always been a very fair and honest individual. I have visited his courtroom to observe hearings. He has always taken time out to counsel with individuals who are in his Court.

I am a past President of the Laurel/Jones County N.A.A.C.P. In that capacity, I had discussions with him on issues of fairness, mandatory sentencing, etc. He has always been very professional and forthright. He has applied the law to the facts and situations before him after carefully considering any extenuating circumstances, disregarding the race or gender of the accused.

I can wholeheartedly recommend him for the position of Judge on the Fifth Circuit Court of Appeals. If I can answer any questions or provide any more detailed information, please call me.

Sincerely,

Thaddeus Edmonson  
Councilman, Ward 7  
City of Laurel, Mississippi

cc: Senator Orrin Hatch

JOHN EDWARDS  
NORTH CAROLINA  
(202) 224-3154

United States Senate  
WASHINGTON, DC 20510-3306

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AND PENSIONS  
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INTELLIGENCE

March 5, 2002

Honorable Patrick J. Leahy  
Chairman  
Senate Committee on the Judiciary  
433 Russell Senate Office Building  
Washington, D.C. 2051-4502

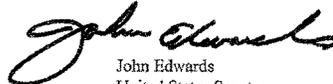
Dear Mr. Chairman:

On February 20, I requested the opinions of three legal ethics experts concerning Judge Pickering's conduct in *United States v. Swan*, Crim. No. 2:94cr3PR (S.D. Miss.). The experts are Stephen Gillers, Vice Dean and Professor of Law at New York University; John Leubsdorf, Professor of Law and Judge Frederick Lacey Scholar at Rutgers University and Associate Reporter for the American Law Institute's *Restatement of the Law Governing Lawyers*; and Steven Lubet, Professor of Law at Northwestern University and co-author of *Judicial Conduct and Ethics* (3d ed. 2000).

I have received responses from the three experts and ask that they be included in the record, together with the letter requesting an opinion that I sent to all the three on February 20, 2002, and the follow-up letters supplying additional information sent by my staff on February 22, 2002.

Thank you for your consideration.

Sincerely,



John Edwards  
United States Senator

cc: Senator Orrin G. Hatch  
Attachments

JOHN EDWARDS  
NORTH CAROLINA  
(202) 224-3134

United States Senate  
WASHINGTON, DC 20510-3306

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AND PENSIONS  
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February 20, 2002

Stephen Gillers  
Vice Dean and Professor of Law  
New York University School of Law

Dear Professor Gillers:

Judge Charles W. Pickering, Sr., United States District Judge for the Southern District of Mississippi, has been nominated to be a judge on the United States Court of Appeals for the Fifth Circuit. I have concerns about Judge Pickering's conduct in a criminal case, *United States v. Swan*, Crim. No. 2:94cr3PR. I would be grateful if you would respond to the following question: Under the circumstances outlined below, were the actions of Judge Pickering consistent with the rules governing judicial conduct and otherwise appropriate?

Daniel Swan and two other individuals—one a juvenile and the other an adult of low intelligence—burned a cross on the lawn of an interracial couple. The juvenile pleaded guilty and agreed to testify regarding the cross-burning. He was sentenced to a term of probation and home confinement. Mr. Swan and the other adult, Mickey Herbert Thomas, were indicted on three counts. One of these counts, under 18 U.S.C. § 844(h)(1), carried a five-year mandatory minimum sentence, to run consecutively with other counts. Mr. Thomas pleaded guilty and was sentenced to a term of probation and home confinement. (*Order of Jan. 4, 1995, pp. 1-3; Indictment, Mar. 8, 1994.*)

Mr. Swan was offered a plea agreement that would have resulted in a sentence of approximately one-and-one-half years imprisonment. Mr. Swan refused that agreement and pleaded not guilty. After a jury trial, on May 24, 1994, Mr. Swan was convicted on the three counts. Through the operation of § 844, he faced a sentence of more than 7 years. For reasons most fully elaborated in his recent letter to Senator Hatch, Judge Pickering believed "this was the worst case of disparate sentencing" he had seen on the bench. (*Letter of Judge Pickering to Senator Hatch, Feb. 12, 2002, pp. 2-3; Letter of Judge Pickering to Senator Leahy, Feb. 6, 2002, p. 1.*)

I am concerned that, in an effort to prevent application of § 844, Judge Pickering made statements and took actions that violated rules and standards of judicial conduct. The following account of Judge Pickering's statements and actions is based on official court documents and on U.S. Department of Justice internal communications that Judge Pickering has "had a chance to carefully review" and has not materially disputed. (*Letter to Sen. Hatch, pp. 1, 1-5.*)

1. More than five months after the time for Mr. Swan to move for a new trial had passed, Judge Pickering suggested a motion for a new trial. Rule 33 of the Federal Rules of Criminal Procedure provides that motions for a new trial may be made only “[o]n a defendant’s motion” and, unless based on newly discovered evidence, “only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.” On November 15, 1994, Judge Pickering summoned counsel into an off-the-record conference. Judge Pickering asked counsel for the government whether they would “agree not to oppose a motion for a new trial on the § 844 charge.” As far as the record reveals, defense counsel had not moved for a new trial, and Judge Pickering had not extended the time for a new trial motion within 7 days after the guilty verdict. (*Memorandum of Brad Berry, USDOJ, to Linda Davis, USDOJ, Nov. 29, 1994, p. 3; Letter to Sen. Hatch, pp. 3-4.*)

2. Prior to the November 15 conference, Judge Pickering had raised the question whether § 844 applied to cross-burning. The government asserted that it did. At the November 15 conference, Judge Pickering said that (1) he thought the government was likely correct about the law, and (2) he might issue an opinion unfavorable to the government unless the government agreed not to oppose a new trial.

Specifically, according to a government lawyer, Judge Pickering said he believed the government was “probably right on the law” that § 844 applied to cross-burnings. After asking “whether the Department would agree not to oppose a motion for a new trial on the 844 charge” in return for a three-year sentence for Swan, Judge Pickering

said that if the Department does not agree to do this, he might well write a nasty opinion from [the government’s] perspective, emphasizing the sentencing disparities and the injustice of applying section 844 in this case. He said that given his strong feelings against applying 844 in this case, he might well leave this task to the Fifth Circuit. After further discussion, [the government lawyer] asked Pickering what would be the basis for the motion for a new trial. Pickering responded: “Any basis you choose.”

The government lawyer stated that he needed instructions from Washington. (*Memorandum, pp. 3, 4; Sentencing Transcript, Aug. 15, 1994, p. 3.*)

3. In December 1994 and again in January 1995, Judge Pickering asked an Assistant United States Attorney whether he had received a response from Washington. During the second inquiry—a phone call to the lawyer at home on January 2, a holiday—the attorney told Judge Pickering that “the position of the Government had not changed”: the government still believed Mr. Swan should be sentenced on his § 844 conviction. (*Order, pp. 1-2; Letter of Jack Lacy, USDOJ, to Linda Davis, USDOJ, Jan. 5, 1995, p. 2; see also Letter to Sen. Hatch, p. 4.*)

After being told the government still sought sentencing of Mr. Swan on the § 844 conviction, on January 4, 1995, Judge Pickering issued an extensive new order. (*Order, p. 1.*) As far as the record reveals, Mr. Swan’s only pending motion at this time was a motion for a continuance.

A. The new order stated: "counsel for the government are specifically directed to take up personally with the Attorney General of the United States this Order in its entirety and to report back to the Court within ten (10) days." (*Order, p. 2.*)

B. The new order stated that if the government lawyers adhered to their position, they were to file two papers within 15 days. The first was a memorandum addressing the court's concerns. The second was a document analyzing all cases relied upon in the government brief that involved cross-burning, setting out the sentences of all defendants in those cases to which the government was a party, and providing a synopsis of all relevant facts relating to the culpability of the defendants in those cases. (*Order, p. 6.*)

C. The new order also stated: "Counsel for the Government, as officers of this Court, shall certify that this Order along with its contents has been personally discussed with the Attorney General." (*Order, p. 6.*)

D. Judge Pickering sealed the new order. He stated: "This Order does not involve any matter that has not previously been testified about in open Court, except as to the sentence of the juvenile. Since this Order does relate indirectly to a matter involving a juvenile this Order shall be sealed ...." On February 4, 2002, Judge Tom Lee unsealed the 1995 order, stating that it contained "information that was presented or discussed in open court, relative to this defendant who is an adult, or in the proceeding against the other defendant who is also an adult." (*Order of Jan. 4, 1995, p. 7; Order of Feb. 4, 2002.*)

4. In a memorandum dated January 5, 1995, a government lawyer reported that the Swan case "has had a history of off-the-record conferences with this judge, in which his displeasure at our insistence on the §844 count has never been far below the surface. He has had conferences on several occasions with" six government attorneys, including the U.S. Attorney. (*Lacy Letter, p. 1.*)

5. Judge Pickering has stated: "shortly after I entered the Order of January 4, I called Assistant Attorney General Frank Hunger, a personal friend, expressing my frustration with the gross disparity in sentence recommended by the government, and with my inability to get a response from Washington." (*Letter to Sen. Leahy, p. 3; see also Letter to Sen. Hatch, pp. 1-2.*)

The Justice Department attorneys eventually stipulated to dismissal of the § 844 count. Judge Pickering sentenced Mr. Swan to 27 months of imprisonment. (*Sentencing Transcript, Jan. 23, 1993, p. 8.*)

For your reference, I am attaching the documents cited above, the *Swan* sentencing transcripts, and the pages of the nominations hearing transcript addressing the Swan case.

Because I may be able to provide additional information shortly, please regard this statement of facts as provisional. If you have any questions or would like to receive further material, please let me know.

Thank you very much.

Yours sincerely,



John Edwards

Attachments

Attachments

1. Swan Indictment
2. Swan sentencing transcripts
3. USDOJ Memorandum from Brad Berry to Linda Davis, Nov. 29, 1994
4. Order of Jan. 4, 1995  
with unsealing Order of Feb. 4, 2002
5. USDOJ Letter from Jack Lacy to Linda Davis, Jan. 5, 1995
6. Excerpts from Nominations Hearing concerning Swan case, Feb. 7, 2002
7. Letter from Judge Pickering to Sen. Leahy, Feb. 6, 2002
8. Letter from Judge Pickering to Sen. Hatch, Feb. 12, 2002

JOHN EDWARDS  
NORTH CAROLINA  
1201 224-2154

United States Senate  
WASHINGTON, DC 20510-3306

COMMITTEES:  
COMMERCE, SCIENCE, AND  
TRANSPORTATION  
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February 22, 2002

Stephen Gillers  
Vice Dean and Professor of Law  
New York University School of Law

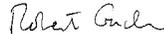
Dear Professor Gillers:

We can now share some of the additional information that Senator Edwards' letter mentioned.

On February 13, 2002, majority and minority staff for the Judiciary Committee interviewed Brad Berry, one of the Justice Department lawyers in *Swan*. Just this morning, the Department of Justice granted permission for Committee members to disclose most of the contents of that interview. On February 19, 2002, Senator Edwards paraphrased page 39, lines 9-16 in questions for Judge Pickering. Today, Senator Edwards supplemented that paraphrase with a direct quotation of page 39, lines 7-23. We have not yet received Judge Pickering's response to these questions. We ask, of course, that you give the interview whatever weight and treatment you think appropriate. The full transcript, with DOJ redactions, is enclosed.

Also enclosed is the trial transcript recently provided by Judge Pickering. If you have any questions, please call me at (202) 224-4923. Thanks very much.

Sincerely,



Robert Gordon  
Counsel

Enclosures

JOHN EDWARDS  
NORTH CAROLINA  
(202) 224-4134

United States Senate  
WASHINGTON, DC 20510-3003

COMMITTEES:  
COMMERCE, SCIENCE, AND  
TRANSPORTATION  
HEALTH, EDUCATION, LABOR,  
AND PENSIONS  
JUDICIARY  
SMALL BUSINESS  
INTELLIGENCE

February 22, 2002

John Leubsdorf  
Professor of Law  
Rutgers University

Dear Professor Leubsdorf:

Per your request, I am enclosing the trial transcript provided by Judge Pickering. The juvenile coconspirator testified in open court and his name appears repeatedly in the transcript, as well as in the open court file. Consistent with a suggestion made by Judge Pickering when he transmitted this transcript, we have redacted the juvenile's name and the names of his family members.

We can also now share the additional information that Senator Edwards' letter mentioned.

On February 13, 2002, majority and minority staff for the Judiciary Committee interviewed Brad Berry, one of the Justice Department lawyers in *Swan*. Just this morning, the Department of Justice granted permission for Committee members to disclose most of the contents of that interview. On February 19, 2002, Senator Edwards paraphrased page 39, lines 9-16 in questions for Judge Pickering. Today, Senator Edwards supplemented that paraphrase with a direct quotation of page 39, lines 7-23. We have not yet received Judge Pickering's response to these questions. We ask, of course, that you give the interview whatever weight and treatment you think appropriate. The full transcript, with DOJ redactions, is enclosed.

If you have any questions, please call me at (202) 224-4923. Thanks very much.

Sincerely,



Robert Gordon  
Counsel

Enclosures

JOHN EDWARDS  
NORTH CAROLINA  
(202) 224-3154

United States Senate  
WASHINGTON, DC 20510-3509

ISSUES:  
COMMERCE, SCIENCE, AND  
TRANSPORTATION  
HEALTH, EDUCATION, LABOR,  
AND PENSIONS  
JUDICIARY  
SMALL BUSINESS  
INTELLIGENCE

February 22, 2002

Steven Lubet  
Professor of Law  
Northwestern University

Dear Professor Lubet:

We can now share the additional information that Senator Edwards' letter mentioned.

On February 13, 2002, majority and minority staff for the Judiciary Committee interviewed Brad Berry, one of the Justice Department lawyers in *Swan*. Just this morning, the Department of Justice granted permission for Committee members to disclose most of the contents of that interview. On February 19, 2002, Senator Edwards paraphrased page 39, lines 9-16 in questions for Judge Pickering. Today, Senator Edwards supplemented that paraphrase with a direct quotation of page 39, lines 7-23. We have not yet received Judge Pickering's response to these questions. We ask, of course, that you give the interview whatever weight and treatment you think appropriate. The full transcript, with DOJ redactions, is enclosed.

Also enclosed is the trial transcript recently provided by Judge Pickering. If you have any questions, please call me at (202) 224-4923. Thanks very much.

Sincerely,



Robert Gordon  
Counsel

Enclosures



**New York University**  
*A private university in the public service*

School of Law  
 Office of the Vice Dean  
 40 Washington Square South, Room 402  
 New York, NY 10012-1099  
 Telephone: (212) 998-6200  
 Fax: (212) 995-4658  
 E-Mail: [stephen.gillers@nyu.edu](mailto:stephen.gillers@nyu.edu)  
 Stephen Gillers, *Vice Dean and Professor of Law*

VIA FACSIMILE AND FEDERAL EXPRESS

February 25, 2002

Honorable John Edwards  
 United States Senate  
 225 Senate Dirksen Building  
 Washington, D.C. 20510  
 Fax # 202-228-1566

Dear Senator Edwards:

I am responding to your letter of February 20, 2002. You ask my opinion about certain conduct of Federal District Judge Charles W. Pickering, Sr., who has been nominated to the United States Circuit Court of Appeals for the Fifth Circuit. Specifically, the first paragraph of your letter poses the following question with regard to this conduct: "Under the circumstances outlined below, were the actions of Judge Pickering consistent with the rules governing judicial conduct and otherwise appropriate?"

I assume familiarity with all of the facts thereafter summarized in your letter and with the materials you have sent me. My opinion addresses only your question in light of the facts contained in the materials you enclosed. I offer no opinion on whether Judge Pickering should be confirmed. Many factors influence a confirmation decision. I am here addressing one set of events in Judge Pickering's career on the federal bench.

Judge Pickering exceeded his powers as the trial judge in the *Swan* case in a way that undermined decisions of the political branches of government – the Executive Branch and Congress. He then sealed the Order that would have fully revealed his actions, limited its distribution to counsel, and ordered those lawyers "to maintain the confidentiality of this Order." As a result, the public has not had access to the record in this case despite the presumption of access to court records.

Judge Pickering has explained the motive for his conduct as an effort to avoid an unfair disparity between the sentences received by two other defendants, who had pled guilty, and the sentence Congress had mandated for Mr. Swan, who was convicted at trial after refusing to accept a plea bargain. But by attempting to correct the perceived disparity in the way he did, Judge Pickering invaded the powers of the lawmaking and law enforcing branches of government.

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February 25, 2002

After Mr. Swan rejected several plea bargain opportunities, he was convicted of all counts in the indictment. The congressionally mandated sentence (under section 844) for his act of burning a cross on the lawn of an interracial couple was five years incarceration. The sentencing guidelines indicated about two more years of incarceration for the remaining counts, to run consecutively. The two other defendants, each of whom had pled guilty to counts of the indictment that did not carry the mandatory sentence, received, in the case of the juvenile, eight months home confinement (Transcript of sentencing hearing held 11/15/94 at p. 13), and in the case of the other defendant, home confinement and a term of probation. (Order of 1/04/95 at pp. 1-3.)

Judge Pickering had two judicial options at this point: First, he had the authority to rule that the mandatory sentence in the context of the facts of the case would be an unconstitutional sentence. The record you sent me hints at this possibility. (Order of 1/04/95 at p. 5.) Second, Judge Pickering could have concluded that Congress did not intend section 844 and its mandatory sentence to apply to cross burnings. The Eighth Circuit had so held, but the Seventh Circuit had reached the opposite conclusion. The Fifth Circuit had not ruled on the question. That freed Judge Pickering to follow the Eighth Circuit. But Judge Pickering himself appears to have concluded at one point that the Seventh Circuit was probably correct. (Order at p. 5.)

I have no view on whether the Seventh Circuit or the Eighth Circuit is correct. I strongly doubt that a five year mandatory sentence for Swan would have been unconstitutional. But my point here is that either decision would have been within Judge Pickering's power as an Article III Judge. If he had ruled in either way, the Government could have appealed and the correctness of the Judge's ruling would have been reviewed by the Fifth Circuit.

Judge Pickering chose neither option. He delayed sentencing for months while taking various steps to pressure the Justice Department to accept a resolution he deemed fair but for which there appears to have been no legal basis. Specifically, Judge Pickering wanted the Government to agree not to oppose a motion for a new trial, following which the defendant would, instead of again going to trial, accept a plea to a non-mandatory count. (Memorandum of 11/29/94 from Brad Berry to Linda Davis at p. 3.)

This is what eventually happened. Judge Pickering's actions led to a resolution that, unlike the two options available to Judge Pickering in his *judicial* capacity, were insulated against the possibility of appeal and reversal. In other words, whereas an exercise of the Judge's constitutional powers would have been subject to appellate review, the resolution Judge Pickering achieved by stepping outside the judicial role was "appeals proof." Judge Pickering, as discussed below, then took steps to keep his actions secret.

Though unreviewable, Judge Pickering's conduct was wrong. Congress mandated a five year mandatory sentence for a section 844 violation (which the Seventh Circuit and apparently Judge Pickering himself believed applied to cross burnings). The Executive Branch, through the

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February 25, 2002

Justice Department, had convicted Mr. Swan of a section 844 violation after Mr. Swan rejected plea bargains that would not include the mandatory charge. At this point, the Court had no choice but to sentence Mr. Swan according to law for the crimes of which he was convicted.

Judge Pickering used the powers of his office to avoid this duty. He asked the Justice Department to agree not to oppose a motion for a new trial although it appears that one could not then be timely made and the defendant had made no motion. Judge Pickering offered no legal basis for granting such a motion other than his discomfort with the sentencing disparities in light of his perceptions of the defendants' relatively culpability. In seeking to achieve his objective, the Judge did the following:

1. According to the November 29, 1994, memorandum of Mr. Berry (at p. 3), a Department lawyer from Washington who participated in Swan's trial, in an off the record chambers discussion with counsel on November 15, 1994, Judge Pickering threatened "to write a nasty opinion from our perspective, emphasizing the sentencing disparities and the injustice of applying section 844 in this case."

2. In the sealed Order to the parties signed January 4, 1995, Judge Pickering wrote that he was "concerned whether or not [the Court] should set aside the guilty verdict and order a new trial" with a different jury instruction. (Order at p. 5.)

3. "Shortly after" issuing his January 4 Order, Judge Pickering had an ex parte communication with a high Justice Department official, Frank Hunger, to whom he expressed his "frustration about the fact that I had instructed the attorneys to get an answer, a response, from the Department of Justice in Washington," to his request that the Department agree to a new trial. (Transcript of 2/07/02 hearing at page 130, line 23; letter to Senator Leahy of 2/06/02 at p. 3.) However, in an ex parte communication with an assistant U.S. Attorney on January 2, 1995, before the Judge's call to Mr. Hunger, the Judge had already received an "answer." He was told "that the position of the Government had not changed." (Order at p. 2.)

4. This brings me to the Judge's January 4 Order, which was the last step in his effort to avoid the imposition of the mandatory sentence required by section 844. The Order expressed annoyance with the Government's lack of a timely response to the Judge's request on November 15 that the Government accede to a new trial motion. Yet, as the Order acknowledged, by the time of the Order, the Judge did have the Government's answer. (Id. at p. 2.) The Order then proceeded to put two kinds of pressure on the Government. It instructed Government lawyers to provide the Court, within 15 days, with a large amount of data about section 844 prosecutions. Specifically, the Judge instructed the Government lawyers to file a memorandum (Id. at p. 6.):

which shall analyze all cases relied upon in the brief of the Government that involved cross burnings and shall specifically set out the respective sentences of all defendants involved in those cases as to which the U.S. Government

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February 25, 2002

was a party and likewise provide to the Court a synopsis of all relevant facts relating to the culpability of the various defendants in those cases along with any information available relating to the racial animosity of the various defendants in those cases.

However, this burden was imposed only if the Government "persists in its position" on a new trial motion. (Id.) The Government was ordered to report on this position within 10 days. The Order required that the trial lawyers take the matter up with the Attorney General of the United States before reporting back to the Court on their new trial position (Id.):

Further, counsel for the Government shall specifically discuss this case and all of the contents of this Order with the Attorney General of the United States so that this Court can be assured that the approach the Government is taking is uniform throughout the country. Counsel for the Government, as officers of this Court, shall certify that this Order along with its contents has been personally discussed with the Attorney General.

5. Finally, Judge Pickering sealed his Order. His explanation for sealing the Order was as follows (Id. at p. 7.):

This Order does not involve any matter that has not previously been testified about in open Court, except as to the sentence of the juvenile. Since this Order does relate indirectly to a matter involving a juvenile, this Order shall be sealed by the Clerk and shall be furnished only to counsel for the parties involved who are under strict orders to maintain the confidentiality of this Order.

The Order was unsealed on February 4, 2002, in response to the request from the Judiciary Committee. The unsealing Order, signed by Judge Tom S. Lee, concluded that it appeared "that the information contained in this Order is information that was presented or discussed in open court, relative to this defendant, who is an adult, or in the proceeding against the other co-defendant who is also an adult. . . ."

The primary beneficiary of the secrecy order appears to be the Judge himself. His order was not exposed to public scrutiny at the time it issued, despite the presumption that court records, especially in criminal cases, are to be public. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (common law right to inspect and copy judicial records); *SEC v. Van Waeyenbergh*, 990 F.2d 845, 848 (5<sup>th</sup> Cir. 1993) (same). See also *Globe News Paper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (constitutional right of public access to criminal trials "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government"). The Judge's actions, which should have been

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February 25, 2002

accessible to the public, have remained secret for seven years and might never have been known were it not for the confirmation hearing.

The Judge's explanation for secrecy is hard to fathom. No juvenile was identified in the Order. True, the sentence the juvenile received was contained in the Order, but it was also placed on the record in open court. (Sentencing hearing of 11/15/94 at p. 13; Order of Judge Lee dated 2/04/02.) Equally important, contrary to what Judge Pickering wrote, the Order *does* "involve" a matter "that has not previously been testified about in open Court." That "matter" is the Judge's own methods of seeking to cause the Justice Department to abandon its position and the Judge's effort to avoid imposing the sentence mandated by Congress. This is certainly a matter of public interest.

The Code of Conduct for U.S. Judges tells federal judges that they "should respect and comply with the law," Canon 2A, and that they "should be faithful to . . . the law," Canon 3A(1). In my opinion, the law on the facts shown me obligated Judge Pickering to effectuate the congressional mandate following Mr. Swan's conviction unless the Judge chose to identify a legal basis for declining to do so. Any such basis would then have been subject to appellate review. Judge Pickering sought to achieve his goal of what he perceived to be a proportionate sentence by employing the several means described above, which succeeded, with no opportunity for appellate review. Then, through sealing and confidentiality orders, Judge Pickering made it unlikely that his actions would ever become fully public.

Sincerely yours,



Stephen Gillers

SG:sg



School of Law-Newark • Center for Law and Justice  
University Heights • 123 Washington Street • Newark • New Jersey 07102-3094 • 973/353-6561

February 25, 2002

Senator John Edwards  
225 Dirksen Office Building  
United States Senate  
Washington, DC 20510-3306

Re: Judge Charles W. Pickering, Sr.

Dear Senator Edwards:

On February 20, 2002, you wrote asking for my opinion whether the actions of Judge Charles W. Pickering, Sr. in the case of *United States v. Swan*, Crim. No. 2:94cr3PR (S.D. Miss) were consistent with the rules governing judicial conduct and otherwise appropriate. On the basis of the documents you and your staff have provided, I conclude that they were not, for reasons stated below. In brief, Judge Pickering initiated post-trial plea bargaining in plain violation of a rule instituted to protect judicial neutrality by forbidding all judicial participation in plea discussions. In the course of his attempt to avoid imposing a criminal sentence prescribed by Congress, the Judge inappropriately intimated that if the Government failed to cooperate he would hand down an opinion adverse to it on another issue; proposed an untimely new trial motion that he lacked jurisdiction to entertain; and sealed an opinion without adequate grounds to do so. He also initiated *ex parte* contacts with Government lawyers, in violation of the Code of Conduct for United States Judges. Whatever Judge Pickering's motives may have been, this was no way for a judge to behave.

Preliminarily, I note that I have been studying and teaching Legal Ethics for twenty-five years. I have taught courses in that field at law schools including those of Columbia, Cornell, and the University of California-Berkeley. I was Associate Reporter for the American Law Institute's Restatement of the Law Governing Lawyers and have published articles in the Harvard, Yale, Stanford, Texas, N.Y.U., Pennsylvania, Minnesota, Cornell, and other law reviews

1. Although federal judges are forbidden to participate in plea discussions, Judge

Pickering initiated and pressed an attempt to negotiate a bargain based on granting the Defendant Swan a new trial, to be followed by the withdrawal of the charge of violation of 18 U.S.C. § 844(h)(1) and the imposition of maximum penalties on the two other charges of which Swan had been convicted. This was a plain violation of Federal Rule of Criminal Procedure 11(e)(1).

That rule directs that "The court shall not participate in any discussion between the parties concerning any such plea agreement." It has been vigorously enforced by the courts, including the Fifth Circuit where Judge Pickering sits. *E.g., United States v. Adams*, 634 F.2d 830 (5<sup>th</sup> Cir. 1981)(appellate court remedies violation even though neither party objected); *United States v. Miles*, 10 F.3d 1135 (5<sup>th</sup> Cir. 1993)(judge who declined to accept plea violated rule by commenting on what arrangement would be acceptable); *United States v. Daigle*, 63 F.3d 346 (5<sup>th</sup> Cir. 1995)(judge wrongly indicated he would probably follow any governmental sentence recommendation); *United States v. Rodriguez*, 197 F.3d 156 (5<sup>th</sup> Cir. 1999)(improper for judge to indicate probable consequences of failure to plead guilty).

Here, the Judge did not simply participate in plea discussions but initiated them. In a private discussion with counsel on November 15, 1994, as reported by Bradford Berry of the Department of Justice, "Pickering then asked whether the Department would agree not to oppose a motion for a new trial on the 844 charge (which trial presumably would never take place), if Swan received the maximum on the other two charges. Pickering expressed a willingness to sentence Swan to 36 months on the other two charges if he could find a way to do it." The Defendant had not sought a new trial. In effect, the Judge was acting as negotiator for the Defendant. He pursued the matter in three telephone calls to Justice Department lawyers and in his Order of January 4, 1995, calling for a governmental response.

In the federal courts (many states disagree) prohibiting judicial participation in plea discussions is an important safeguard for the judge's impartiality. The rule was adopted because, when a judge is involved in plea discussions, a party may feel pressured to accept an agreement and may fear that he will not be fairly tried should he refuse, while it will be hard for the judge to assess objectively any plea ultimately tendered. Fed. R. Crim. P. 11, Advisory Committee Notes (1975). As the Fifth Circuit has said: "the judge's involvement in the negotiations is apt to diminish the judge's impartiality. . . . The judge's role seems more like an advocate for the agreement than a neutral arbiter if he joins in the negotiations." *United States v. Daigle*, 63 F.3d 346, 348 (5<sup>th</sup> Cir. 1995). Judge Pickering departed from his proper role as a federal judge by ignoring the rule that clearly directed him to play no part in plea discussions.

2. Unfortunately, Judge's Pickering's conduct in pursuit of the agreement he sought led him into inappropriate behavior manifesting precisely the dangers against which Rule 11 guards, as well as showing the Judge's unusual commitment to imposing his own view of a desirable sentence. The Defendant Swan had rejected the Government's plea proposal, gone to trial, and been convicted of three offenses including one (violation of 18 U.S.C. § 844(h)(1)) for which Congress had prescribed a five year mandatory sentence, longer than what the Judge considered

appropriate.<sup>1</sup> The Judge was apparently unwilling to find the statute prescribing the sentence inapplicable. Instead he departed from the normal judicial course in order to induce the Government to withdraw, after the Defendant's conviction, the charge in question.

(a) Judge Pickering strongly intimated that, unless the Government changed its position, he would write an opinion finding against it on another issue. In other words, he sought to use his performance of his duty to declare the law as a bargaining chip to obtain withdrawal of a charge.

In his Order of January 4, 1995, the Judge said: "The Court is also concerned as to whether or not it should set aside the guilty verdict and order a new trial in which the jury would be more specifically instructed as to the animus required of the Defendant as reflected in the second *Lee* opinion. (6 F.3d 1297 at 1304 (3<sup>rd</sup> Cir. 1993)). The Court is concerned that failure to do so could result in a fundamental miscarriage of justice under the facts of this particular case." The intimation is clear: unless the Government agreed to drop the 18 U.S.C. § 844(h)(1) charge with its mandatory sentence, the Judge was likely to throw out the underlying conviction for violation of 18 U.S.C. § 241 for defects in his jury instructions. If the charge was indeed defective, and if the Defendant was entitled to set aside his conviction on that ground notwithstanding his failure to seek such relief, Judge Pickering should have acted regardless of the Government's position as to 18 U.S.C. § 844(h)(1). If not, the Judge should not have proposed to do so in order to secure withdrawal of the latter charge. This is just what the *Daigle* court feared when it warned of the consequences of judicial involvement in plea discussions: "The judge's role seems more like an advocate for the agreement than a neutral arbiter . . ." 63 F.3d at 348.

The Judge behaved somewhat similarly in the in chambers discussion of November 15, 1994, where Bradford Berry reports him as saying that "if the Department does not agree to do this [accept a new trial motion on the § 844(h)(1) charge], he might well write a nasty opinion from our perspective, emphasizing the sentencing disparities and the injustice of applying section 844 in this case. He said that, given his strong feelings against applying 844 in this case, he might well leave this task to the Fifth Circuit." Had Judge Pickering concluded that § 844(h)(1) does not apply to cross burring cases, it would of course have been entirely proper for him to write an opinion so holding, leaving it to the Court of Appeals for the Fifth Circuit to reverse him if it disagreed. But the Judge had just said that "he thinks the Department is probably right on the law, but the result in this case would clearly be unjust." The message to counsel was that the Judge's commitment to reducing the sentence was so strong that he might well write an opinion adopting a view he thought was probably wrong on the law.

(b) Judge Pickering twice proposed the allowance of a new trial motion that he had no jurisdiction to hear or allow. Of course, judges make procedural errors. But had one party moved for a new trial, the opposing party would have been able to object, and the Judge could

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<sup>1</sup>Congress has since required a mandatory sentence of ten years.

have appraised the merits impartially. By improperly proposing a new trial motion as part of his contemplated plea bargain, the Judge inhibited the parties from objecting, and removed himself from the neutral position of a judge.

Federal Rule of Criminal Procedure 33 requires a motion for a new trial in a criminal case (except one based on newly discovered evidence) to be made within seven days after the verdict unless the judge, within those seven days, allows further time. That time limit is jurisdictional. The judge cannot waive it. *E.g.*, *United States v. Smith*, 331 U.S. 469 (1947), *United States v. Brown*, 587 F.2d 187 (5<sup>th</sup> Cir. 1979), *United States v. Bramlett*, 116 F.3d 1403 (11<sup>th</sup> Cir. 1997); see also *Carlisle v. United States*, 517 U.S. 416 (1996).

This case was tried in May 1994, and the defendant filed no motion for a new trial. Nevertheless, Bradford Berry reports that on November 15, 1994, Judge Pickering "asked whether the Department would agree not to oppose a motion for a new trial on the 844 charge". And on January 4, 1995, the Judge wrote that "The Court is also concerned as to whether or not it should set aside the guilty verdict and order a new trial in which the jury would be more specifically instructed as to the animus required of the Defendant . . ." Had the Judge not departed from his proper role, surely he would not have proposed an action forbidden as untimely by Rule 33.

(c) Judge Pickering sealed without adequate grounds his Order of January 4, 1995. The result was to conceal from the public the Judge's proposal of a new trial motion, his characterization of the Government's position as "absurd, illogical and ridiculous," his reference to *ex parte* contacts with Government counsel, and his extraordinary order that Government counsel personally discuss the case with the Attorney General and certify having done so to the Court.

The Judge's stated reason for sealing the Order was that, because it stated the sentence of a juvenile involved in the same cross burning, it "relate[d] indirectly to a matter involving a juvenile"(Order, p. 7); but this makes little sense. 18 U.S.C. § 5038 imposes secrecy on "all information and records relating to the proceeding" against a juvenile. The Order, however, was not entered in the juvenile's proceeding but in the case against Swan. In that case, the juvenile had testified in open court and had repeatedly been identified by name. (See Trial Transcript, *United States v. Swan*, pp. 31-76 and elsewhere.) The Judge had already described his sentence in open court (Transcript, November 15, 1994, pp. 4-5, 13, 18).

Two of the prime purposes in making criminal proceedings accessible to the public are to provide a check on arbitrary judicial action, and to reassure the public that justice is being done. *E.g.*, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). There are exceptions to the presumption of publicity, and room to dispute just how far they extend. Nevertheless, for a judge to seal an opinion when the primary consequence of doing so will be to conceal the Judge's own inappropriate initiatives can only add to the seriousness that must be ascribed to those initiatives. That is what happened here.

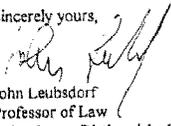
3. On at least three occasions, Judge Pickering communicated *ex parte* with Government counsel about the *Swan* case. Each communication was initiated by the Judge himself. In December 1994, and again on January 2, 1995 the Judge telephoned Jack Lacy of the Justice Department to find out whether Washington had responded to the proposals he had advanced at the November 15, 1994 conference in chambers. When informed by Mr. Lacy that "the position of the Government had not changed" (Order, p. 2), the Judge entered his Order of January 4, 1995, which was sealed but not *ex parte*. Soon after that, Judge Pickering telephoned Frank Hunger in Washington and "reiterated the frustration I had explained in my Order . . . with the disparity in sentences among the defendants recommended by the government, and expressed my frustration with the Department's failure to respond." (Judge Pickering's letter to Senator Hatch, Feb. 12, 2002, p. 1.) There may also have been other *ex parte* communications: a former Justice Department lawyer has stated that "Judge Pickering was commenting on this case, you know, to other Assistants in connection with other cases." (Transcript of Interview of Brad Berry, Esq., Feb. 13, 2002, p. 39.)

A basic principle of judicial ethics is that a judge should not confer about a case with representatives of one party in the absence of those of other parties. Canon 3A(4) of the Code of Conduct for United States Judges states that "A judge should . . . except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. . . . A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters." There is no claim here that the Judge's communications were authorized by law. Nor were they with consent of the parties, which in any event could not have warranted an attempt to "mediate or settle" this criminal case because of Rule 11's prohibition on judicial involvement in plea discussions.

Although Judge Pickering maintains in his letter to Senator Hatch that his communications were not about the merits of the *Swan* case, that position is untenable, at least as to his discussion with Frank Hunger. Nothing could go more to the merits of a criminal prosecution than the length of the sentence. When the Judge expressed his "frustration . . . with the disparity in sentences among the defendants recommended by the government," he was saying that the appropriate sentence should be less than the Government had recommended. That was a communication about the merits. And because that sentence was Congressionally mandated by 18 U.S.C. § 844(h)(1), a statute the Defendant had been convicted of violating, the Judge was saying that he wanted that conviction somehow removed from the case. That also goes to the merits. Moreover, because he had already been informed by Mr. Lacy "that the position of the Government had not changed" (Order, p. 2), even the Judge's expression of "frustration with the Department's failure to respond" (Letter to Senator Hatch, p. 1) concerned, not a failure by the Department to state its position, but rather its failure to change that position in response to the Judge's proposals. So it too was about the merits, or at least about procedures affecting the merits.

All in all, I cannot escape the conclusion that Judge Pickering departed from his proper judicial role of impartiality in the *Swan* case to become an advocate for the sentence he considered proper. Neither Rule 11(e)(1)'s prohibition of judicial participation in plea discussions, nor Rule 33's jurisdictional time limit on new trial motions, nor Canon 3A(4)'s ban on *ex parte* communications, nor 18 U.S.C. § 844(h)(1)'s mandatory five year sentence discouraged his repeated efforts. He was prepared to intimate that the Government's failure to accept his proposed sentencing arrangement would lead to his ruling against it on another issue, to carry his frustration to the highest levels of the Justice Department, and to do his best to keep such behavior secret. And all this appears to have been done entirely on his own initiative, and not in response to any motion or request from the Defendant or any other party. Judge Pickering thus behaved more like an unusually adversarial attorney than like a judge. His actions were inappropriate and violated rules governing judicial conduct.

Sincerely yours,



John Leubsdorf  
Professor of Law  
Judge Lacey Distinguished Scholar

NORTHWESTERN UNIVERSITY  
SCHOOL OF LAW  
357 EAST CHICAGO AVENUE  
CHICAGO, ILLINOIS 60611-3069  
e-mail: slubet@law.northwestern.edu

FROM THE OFFICE OF:  
Steven Lubet  
Professor of Law

(312) 503-6605  
(312) 503-8977 Fax

25 February 2002

Hon. John Edwards  
United States Senate  
225 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Hon. Charles W. Pickering

Dear Senator Edwards:

You have asked me to provide you with my opinion concerning certain conduct of Judge Charles W. Pickering's in the criminal case *United States v. Swan*. Based upon the materials you have provided me, it is my conclusion that Judge Pickering's actions raise serious questions under the CODE OF CONDUCT FOR UNITED STATES JUDGES.

In particular, it appears that Judge Pickering initiated a prohibited *ex parte* communication in violation of Canon 3A(4). Additionally, Judge Pickering's extended efforts to reduce Swan's sentence for cross burning appear to have compromised his impartiality, taking him nearly into the realm of advocacy, thus implicating Canons 2A and 3A as well.

*Ex parte* communications.

Canon 3A(4) of the CODE OF CONDUCT provides that a judge shall "neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." It appears that Judge Pickering clearly violated this provision when he telephoned Assistant Attorney General Frank Hunger to discuss the "gross disparity in sentence recommended by the government" in the *Swan* case. *Letter to Sen. Leahy*, p. 3, *Letter to Sen. Hatch*, pp. 1-2.

This telephone call was definitely an *ex parte* communication, in that it involved fewer than all of the parties legally entitled to participate in discussions of the case. See Shaman, Lubet, and Alfini, *JUDICIAL CONDUCT AND ETHICS* (3d. Edition 2000) p. 159. The conversation with Mr. Hunger went to the merits of the *Swan* case, since it concerned the government's position on the defendant's ultimate sentence. Judge Pickering testified that he addressed "the tremendous amount of disparity in this sentence" and he expressed his "frustration about the disparate treatment." *Hearing transcript*, pp. 126, 130. It also addressed "procedures affecting the merits," in that Judge Pickering was seeking to obtain review by the Attorney General of the decisions previously made by the line prosecutors in the case. *Hearing transcript*, p. 130.

Hon. John Edwards  
25 February 2002  
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As my coauthors and I explain in our treatise, *ex parte* communications are prohibited because they deprive the absent parties of the "right to respond and be heard." Additionally, they "suggest bias or partiality on the part of the judge." JUDICIAL CONDUCT AND ETHICS p. 159. Consequently, "it is obviously unethical for a judge to participate in communications intended to influence the outcome of a case," and discussion need not "go to the ultimate merits" in order to violate the CODE OF CONDUCT. Thus, the *ex parte* discussion of sentencing was a manifest violation of Canon 3A(4).

There is a significant line of cases in which judges have been disciplined for making *ex parte* contacts with prosecutors in attempts "to exert their own influence on prosecutorial decisions," most often in the form of "requests for favorable treatment" for defendants. JUDICIAL CONDUCT AND ETHICS p. 164.

Given the clear nature of the violation, it is particularly disturbing to see Judge Pickering's insistence that his telephone call to Mr. Hunger was not an *ex parte* communication. *Letter to Sen. Hatch, February 12, 2002*, p. 2. Judge Pickering evidently felt strongly about obtaining a reduced sentence for Mr. Swan, so he might understandably attribute the *ex parte* contact to a momentary lapse in judgment. It is considerably more troubling that Judge Pickering attempts to rationalize the conduct, since that suggests that he would endorse similar communications by other judges in the future. Certainly, it would be disruptive of the judicial system if judges were regularly to initiate private conversations with prosecutors concerning "gross disparity" in sentences or similar issues.

#### Impropriety and the appearance of impropriety

Canon 2A provides that a judge "should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." In the same vein, Canon 3A provides that a judge "should be faithful to and maintain professional competence in the law." Judge Pickering's conduct of the *Swan* case raises serious concerns under both provisions, as it appears that he took exceptional steps to circumvent or disregard the law, in many ways becoming an advocate for Mr. Swan more than a judge in the case.

According to the materials, Judge Pickering used his position to exert extraordinary pressure on the prosecutors. Although he agreed that the prosecution was "probably right on the law" concerning the applicable minimum sentence,<sup>1</sup> Judge Pickering reportedly threatened that he would write a "nasty opinion" to the contrary if the prosecution would not agree to accede to a motion for a new trial on the §844 charge against Swan. *Berry memorandum of November 29, 1994*, p. 3.

The requirement that a judge be "faithful" to the law means that he must apply the law as he understands it, even if he does not like the result. Judges make mistakes, of course, and mere error seldom rises to the level of judicial misconduct. Here, however, Judge Pickering apparently agreed

<sup>1</sup>Later, Judge Pickering evidently agreed with the prosecution position that §844(h)(1) was applicable to Swan, stating "[t]his Court agrees with the Seventh Circuit that the language of the statute is unambiguous." *Order of January 4, 1995*, p. 5.

Hon. John Edwards  
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Page 3

that the prosecution's interpretation was correct, but nonetheless threatened to grant a new trial as a means of obtaining the desired reduction in Swan's sentence. Such conduct is not "faithful to the law," since it blatantly ignores the courts's own legal conclusions in favor of the judge's preferred outcome.

This conduct is exacerbated by three additional factors.

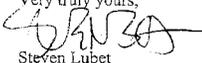
First, the time limit for seeking a new trial had long since expired when Judge Pickering raised the issue with the prosecutors. *Rule 33, FEDERAL RULES OF CRIMINAL PROCEDURE*. Such evident willingness to ignore the time limit does not "respect and comply with the law" and therefore does not "promote[] public confidence in the integrity and impartiality of the judiciary."

Second, it appears that the prospect of a new trial originated solely with Judge Pickering, and not with defense counsel. According to one of the prosecutors, the attorney for Mr. Swan had not even "made any noises about filing a motion for a new trial." *Berry interview transcript*, p. 19. It is also reported that Judge Pickering was cavalier about the basis for the proposed new trial, informing the prosecutors that they could select "[a]ny basis you choose." *Berry memorandum of November 29, 1994*, p. 3. Such conduct does not evince respect for the law.

Finally, it reported that Judge Pickering virtually assumed the role of an advocate on Mr. Swan's behalf by commenting to other assistant United States Attorneys about the case, by "implo[ri]ng" the United States Attorney's Office in Jackson to change its position, and by exerting a "tremendous amount of pressure" on the Government to do the same. *Berry interview transcript*, p. 39. Such conduct by the court can be said to undermine public confidence in the impartiality of the judiciary.

I have based my opinions on the information contained in your letters, with enclosures, of February 20 and 22, 2002. My conclusions concerning Judge Pickering's conduct are additionally based upon my years of study in the field of Judicial Ethics. I am the coauthor of *JUDICIAL CONDUCT AND ETHICS*, and I have written over 20 other articles and monographs on judicial ethics (as well as eight other books and over 40 articles on legal ethics and law practice). I have been retained by or consulted with judicial conduct organizations in Illinois, Wisconsin, Florida, Minnesota, Washington, Pennsylvania, and Nevada. I have lectured or taught on the subject of Judicial Ethics for organizations including the American Judicature Society, the Conference of Chief Justices, the Seventh Circuit Judicial Conference, the National Center for State Courts, the American Bar Association Appellate Judges Seminar, and judicial conferences in Illinois, Florida, Georgia, Wisconsin, and Indiana.

Please let me know if you have any further questions.

Very truly yours,  
  
Steven Lubet

## A Brave Judge's Name Besmirched

By JAMES CHARLES EVERS

In recent days, I have been saddened and appalled to read many of the allegations that have been put forth about Judge Charles Pickering, whose nomination to the U.S. Court of Appeals for the Fifth Circuit will be the subject of a Senate Judiciary Committee hearing today. These allegations are mostly made by groups with a Washington, D.C., address and a political agenda, not by anyone with real knowledge of Mr. Pickering's long and distinguished record on civil rights.

As someone who knows Judge Pickering and is familiar with his commitment on matters of race, I could not sit by and watch these groups' attempts to destroy a good man. Let me tell you about the Charles Pickering many of us in Mississippi have known for well over 30 years.

In 1967, many locally elected prosecutors in Mississippi looked the other way when faced with allegations of violence against African-Americans and those who supported our struggle for equal treatment under the law. Mr. Pickering was a locally elected prosecutor who took the stand that year and testified in a criminal trial against the imperial wizard of the Ku Klux Klan, who was accused of firebombing a civil rights activist. Mr. Pickering later lost his bid for re-election because he dared to defy the Klan, but he gained my respect and the respect of many others as a man who stands up for what is right.

In 1976, while serving as chairman of the state Republican Party, Mr. Pickering hired his first black political staffer. Mr.

Pickering didn't send this person only into the African-American community to look for votes. He felt that the Republican Party's message should be delivered by the same individual to all communities, regardless of skin color. I may not have agreed with the Republican Party's message then or even now, but I certainly admire and agree with Mr. Pickering's inclusive approach to politics.

In the 1980s, Mr. Pickering was in private practice as a lawyer, and became known as a person who took on difficult cases. One such case involved an African-American man accused of robbing at knifepoint a 16-year-old white girl while she operated a rural grocery store. Mr. Pickering believed the man was not guilty, and took on his case. Very few others in Mississippi would have believed the same thing. After two trials, the man was acquitted.

Since he was selected and confirmed to the federal bench in 1990, Judge Pickering has continued to amass a record of working to improve race relations in Mississippi and throughout the U.S. After President Clinton held a town hall meeting on race at the University of Mississippi in 1998, Mr. Pickering and Gov. William Winter led the effort to encourage Chancellor Robert Khayat to establish the Institute of Racial Reconciliation at Ole Miss.

Judge Pickering sat on the executive committee of the institute, whose goal is to

promote understanding and goodwill between people of different races. Mr. Khayat also chose Mr. Pickering to serve on the institute's board of directors, not only because of his role in helping to shape its mission, but also because he has led a life which exemplifies the institute's primary objective—eliminating racism.

As someone who has spent all my adult life fighting for equal treatment of African-Americans, I can tell you with certainty that Charles Pickering has an admirable record on civil rights issues.

He has taken tough stands at tough times in the past, and the treatment he and his record are receiving at the hands of certain interest groups is shameful.

In my view, picking judges should be about finding the right person for the job, someone who respects the Constitution, instead of distorting the record of good people for political purposes. I am afraid that is what is happening to Judge Pickering.

Those in Washington and New York who criticize Judge Pickering are the same people who have always looked down on Mississippi and its people, and have done very little for our state's residents. I urge the Senate to confirm Judge Pickering.

*Mr. Evers, the brother of slain civil rights leader Medgar Evers, manages a radio station in Jackson, Miss.*



Charles Pickering

February 5, 2002

The Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Dear Senator Leahy:

I understand the case of Donnie Ray Fairley et al v. Forrest County, Mississippi, which was before Judge Pickering in 1992 and 1993 has become an issue before your Committee regarding the confirmation of Judge Pickering. I was the lead plaintiff in that case. I felt that Judge Pickering rendered a fair decision in accordance with the law in this case, and because of the same, we did not appeal his decision.

Because of Judge Pickering's fairness in my case, and my personal observation of Judge Pickering's rulings while on the bench in other cases, I feel that he has a commitment to fairness, justice and equal protection for all people who come before him.

Accordingly, I stand in support of Judge Charles Pickering regarding his appointment to the Fifth Circuit Court of Appeals.

Without reservation, I stand in support of Judge Pickering to this appointment and request that the United States Senate ratify his appointment.

If you have any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,

  
DONNIE RAY FAIRLEY

MOUNT CAHOCEL MINISTRIES



October 30, 2001

The Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dickson Office Building  
Washington, DC 20510

Dear Senator Leahy:

This letter comes as a letter of support for Judge Charles Pickering. I have personally observed Judge Pickering's rulings over the years, and I have witnessed his commitment to fairness and equal protection for all people.

I served as president of the Forrest County Branch of the NAACP, a county adjacent to Jones County, where Judge Pickering has lived. I currently serve as a State Coordinator for the Rainbow Coalition under the leadership of Reverend Jesse Jackson. While serving in these positions, I have watched Judge Pickering become a major bridge builder in the State of Mississippi. He has developed platforms that have eased racial tensions. I am aware that he serves as a member of the Board of Directors for the Institute of Racial Reconciliation at the University of Mississippi. This institute has helped all Americans of different races to understand and respect each other. Also, I am aware that in 1967 Judge Pickering testified against the Ku Klux Klan Imperial Wizard, Sam Bowers, in the fire bombing death of community leader, Vernon Dahmer. His stance caused Bowers to claim credit for defeating Judge Pickering's bid for the Senate in 1976, and for the attorney general's position in 1979.

Our country will have missed the mark if we fail to appoint Judge Charles Pickering to the 5<sup>th</sup> Circuit Court of Appeals. I wholeheartedly support Judge Pickering in his judgeship and request the United States Senate to ratify his appointment.

If you need any additional information, please feel free to contact me.



P.O. Box 929 ♦ Hattiesburg, Mississippi 39403 ♦ 601-583-4943 ♦ Kenneth E. Fairley, Senior Pastor

MOUNT CARMEL MINISTRIES



February 5, 2002

The Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirks Office Building  
Washington, DC 20510

Dear Senator Leahy:

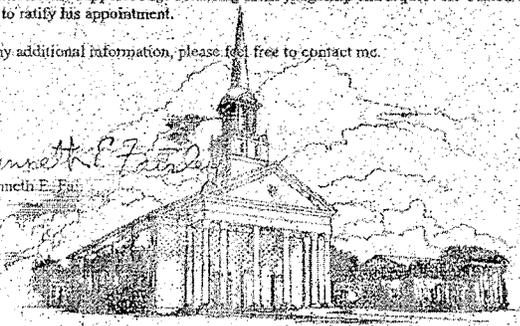
I have previously written a letter on October 30, 2001 in support of Judge Charles W. Pickering's nomination to the Fifth Circuit Court of Appeals. I understand the case of Donnie Ray Fairley et al v. Forrest County, Mississippi, which was handled by Judge Pickering in 1992 and 1993 has become an issue in his confirmation proceeding. Although I was not a named plaintiff, I was serving as the President of the Forrest County Branch of the NAACP and was very instrumental in bringing the suit. I felt the decision was in accordance with law, was fair, and we did not appeal it.

Again, I wholeheartedly support Judge Pickering in his judgeship and request the United States Senate to ratify his appointment.

If you need any additional information, please feel free to contact me.

Sincerely,

*Rev. Kenneth E. Fairley*  
Reverend Kenneth E. Fairley  
Senior Pastor



P.O. Box 929 ♦ Hattiesburg, Mississippi 39403 ♦ 601-583-4943 ♦ Kenneth E. Fairley, Senior Pastor

RUSSELL D. FEINGOLD  
 WISCONSIN  
 569 Room, Senate Office Building  
 Washington, DC 20510  
 (202) 224-3223  
 (202) 224-1189 (TDD)  
 feingold@senate.gov

United States Senate  
 WASHINGTON, DC 20510-4904

COMMITTEE ON THE JUDICIARY  
 COMMITTEE ON FOREIGN RELATIONS  
 COMMITTEE ON THE BUDGET  
 SPECIAL COMMITTEE ON AGING  
 DEMOCRATIC POLICY CENTER

February 22, 2002

Honorable Patrick J. Leahy  
 Chairman  
 Senate Committee on the Judiciary  
 433 Russell Senate Office Building  
 Washington, D.C. 20510-4502

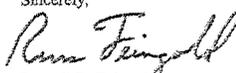
Re: Nomination of Judge Charles W. Pickering, Sr.

Dear Mr. Chairman:

Following our second hearing on the nomination Judge Charles W. Pickering, Sr. to the United States Court of Appeals for the 5<sup>th</sup> Circuit, I requested the opinion of Professor Stephen Gillers of the New York University Law School on the ethical issues raised by Judge Pickering's solicitation of letters of support from attorneys who currently practice in his court.

Attached is my letter to Professor Gillers, and his response. I ask that both documents be included in the record. Thank you for your consideration.

Sincerely,



Russell D. Feingold  
 United States Senator

cc: Senator Orrin G. Hatch

attachment

1640 Appleton Drive  
 Room 137  
 Middleton, WI 53562

517 E. Wisconsin Avenue  
 Room 428  
 Milwaukee, WI 53202  
 (414) 278-2222

401 5th Street  
 Room 410  
 Wausau, WI 54983

425 State Street  
 Room 225  
 La Crosse, WI 54601  
 (608) 782-8288

1649 Main Street  
 Green Bay, WI 54902  
 (920) 455-7608

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RUSSELL D. FEINGOLD  
WISCONSIN  
508 HART SENATE OFFICE BUILDING  
WASHINGTON, DC 20510  
(202) 522-4523  
(202) 224-1280 (FDD)  
feingold.senate.gov

COMMITTEE ON THE JUDICIARY  
COMMITTEE ON FOREIGN RELATIONS  
COMMITTEE ON THE BUDGET  
SPECIAL COMMITTEE ON ASIAN  
DEMOCRATIC POLICY COMMITTEE

United States Senate  
WASHINGTON, DC 20510-4904  
February 12, 2002

VIA FAX

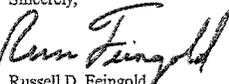
Stephen Gillers  
Vice Dean and Professor of Law  
New York University School of Law  
40 Washington Square South  
New York, NY 10012

Dear Professor Gillers:

I write to request your opinion concerning certain activities undertaken by Judge Charles W. Pickering, Sr. in connection with his nomination to serve on the United States Court of Appeals for the Fifth Circuit. I have attached the transcript of my questioning of Judge Pickering on these activities during a Senate Judiciary Committee hearing on his nomination on February 7, 2002. In particular, I am interested in your analysis of two issues:

1. Judge Pickering's solicitation of letters in support of his nomination from attorneys who regularly appear before him.
2. Judge Pickering's request that such letters be provided to him so that he could forward them to the Justice Department in Washington.

Given your reputation as a leading academic in the area of legal and judicial ethics, your professional opinion on this matter would be greatly appreciated. Thank you for your consideration.

Sincerely,  
  
Russell D. Feingold  
United States Senator

attachment



**New York University**  
*A private university in the public service*

School of Law  
Office of the Vice Dean  
40 Washington Square South, Room 402  
New York, NY 10012-1099  
Telephone: (212) 998-6200  
Fax: (212) 995-4658  
E-Mail: [stephen.gillers@nyu.edu](mailto:stephen.gillers@nyu.edu)  
Stephen Gillers, *Vice Dean and Professor of Law*

VIA FACSIMILE

February 20, 2002

Hon. Russell D. Feingold  
United States Senate  
506 Hart Senate Office Building  
Washington, DC 20610  
Fax # 202-228-0466

Dear Senator Feingold:

I am replying to your inquiry of February 12, 2002. I assume familiarity with Judge Pickering's testimony and will address the two questions you ask. I address only these questions. I take no position on whether Judge Pickering should be confirmed for the Fifth Circuit or the weight, if any, that should be given to my analysis. Obviously, many facts are relevant to a confirmation vote.

It was improper for Judge Pickering to solicit letters in support of his nomination from lawyers who regularly appear before him. It is important to my answer that the Judge asked the lawyers to fax him the letters so that he could send them to the Justice Department for transmittal to the Senate. He did not ask the lawyers to send any letters directly to Washington. Consequently, the Judge would know who submitted letters and what the letters said, as would be obvious to the lawyers.

I will assume initially that none of the lawyers whose letters the judge solicited had current cases pending before the judge. If a solicited lawyer (or litigant) did have a pending matter, the situation is more serious, as discussed further below.

Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. This document, based on the A.B.A. Code of Judicial Conduct, contains the ethical rules that apply to all federal judicial officers below the Supreme Court.

Judge Pickering's conduct creates the appearance of impropriety, in part, because of the power federal judges, and particularly federal trial judges, have over matters that come before

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them. Federal judges enjoy a wide degree of discretion, which means that many of their decisions will be upheld absent an abuse of discretion. This is a highly deferential standard. It means that for many decisions, the district judge is the court of last resort and lawyers know that.

Given this power over their cases, and therefore over the lawyers whose cases come before them, ethics rules for judges forbid them to make certain requests of lawyers and others that "might reasonably be perceived as coercive." Canons 4(C); 5(B)(2). These particular Canons deal with soliciting charitable contributions. They absolutely forbid the judge "personally" to participate in charitable or other non-profit fundraising activities. They also forbid participation in "membership solicitation" that "might reasonably be perceived as coercive." A narrow exception is made for fundraising from other judges "over whom the judge does not exercise supervisory or appellate authority." Canon 4(C).

In these situations, of course, the judge would be soliciting a benefit for an organization, and not, as here, for the judge himself. That difference makes the present case more troubling because a judge would ordinarily have a greater, and certainly a personal, interest in a significant promotion than he or she would have in a contribution to an organization with which the judge is affiliated.

Judge Pickering's solicitation was "coercive" because a lawyer who regularly practices before him was not free to fail to provide a letter endorsing Judge Pickering's promotion. Given the risk to lawyers' (and their firms') clients -- a risk they would readily perceive -- lawyers would feel coerced to comply with the Judge's solicitation of letters and in fact to exaggerate their support for the Judge.

I do not suggest that Judge Pickering would actually retaliate against a non-complying lawyer or his or her clients. Nor should the word "coercive" be understood to describe the Judge's subjective intent. Canon 2 tells judges to "avoid...the appearance of impropriety in all activities." In evaluating Canon 2, we use an objective standard. We do not ask whether Judge Pickering would in fact "punish" a recalcitrant lawyer or what was really on his mind. We should not have to make that inquiry. We focus on the situation itself and how it will appear to the public.

Directly on point is Advisory Opinion 97 (1999), which I attach. It was written by the Committee on Codes of Conduct of the Judicial Conference of the United States (the body of federal judges that interprets the Code of Conduct in response to questions from judges). The Committee was asked whether and when a person being considered for the position of U.S. Magistrate, or for reappointment to that position, must recuse himself or herself under the following circumstances.

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February 20, 2002

Initial appointments as a magistrate judge are made by district judges from a list compiled by a panel of lawyers and others. Identity of the members of the panel is public. Reappointments as a magistrate judge are made following a report of the same kind of panel.

The Committee wrote in Opinion 97 that a person appointed or reappointed as a federal magistrate judge did not have to recuse himself or herself from sitting in a case where a lawyer before the magistrate judge had been on the panel recommending the appointment or reappointment. But the opinion emphasized that the panel "operates under a requirement of strict confidentiality," so that the candidate was "not privy to the individual opinions of the panel members concerning any candidate." If this were not so for a particular panel member, recusal might be required. (The Opinion states: "Of course, in the unlikely event that during the selection process something were to occur between a panel member and the magistrate judge that bears directly on the magistrate judge's ability to be, or to be perceived as being, fair and impartial in any case involving that panel member, then the facts of that particular situation would have to be evaluated by the magistrate judge to determine if recusal is an issue and if notification should be provided to the parties.") In the situation you present, Judge Pickering removed the opportunity for confidentiality by having the lawyers' letters sent directly to him for transmittal to Washington.

The testimony does not clarify whether any of the lawyers or litigants whom Judge Pickering solicited had current matters pending before him. The only reference to this issue is at line 23 on page 81, where you ask whether "present or former litigants, parties in cases that you handled" were asked to write letters. Judge Pickering answered "some." This is ambiguous.

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). As stated below, judges are instructed to avoid unnecessary recusals.

In Opinion 97, the Committee addressed the situation where a lawyer currently appearing before a magistrate judge was *simultaneously* sitting on a panel considering whether to recommend the same judge's reappointment. The Committee concluded that while the issue of the magistrate judge's reappointment was under consideration by a panel, the judge should not sit in any matter in which a lawyer on the panel represented a party. This was true even though the lawyer's own position on the panel was confidential and unknown to the judge. (The Opinion states: "Therefore, in the opinion of the Committee, during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge's

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February 20, 2002

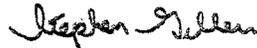
ability to carry out judicial responsibilities with impartiality is impaired in any case involving an attorney or a party who is a member of the panel.") Here, of course, the situation is more serious because Judge Pickering would know what, if anything, a lawyer wrote.

Opinion 97 is consistent with court rulings that have disqualified judges, or reversed judgments, when the judge, personally or through another, was exploring the possibility of a job with a law firm or government law office then appearing before him. See, e.g., *Scott v. U.S.*, 559 A.2d 745 (D.C. 1989)(conviction reversed where judge was negotiating at the time for a job with the Justice Department). *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985)(judge disqualified after headhunter for judge contacted law firms appearing before judge). Recusal has also been required where the judge's contact with a litigant or lawyer in a pending case was not employment-related but was otherwise viewed as favorable to the judge. *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671 (1st Cir. 1984) (recusal required where judge cooperated with a newspaper reporter in a complimentary article about the judge and his wife while newspaper's case was pending before judge).

The Code of Conduct for U.S. Judges requires judges to refrain from activity that could lead to unnecessary recusal. Canon 3 states that the "judicial duties of a judge take precedence over all other activities." Canon 5 instructs judges to "regulate extra-judicial activities to minimize the risk of conflict with judicial duties." Opinion 97 and the cases cited would have given a current litigant who did not write (or whose lawyer did not write) a letter recommending the Judge a strong legal basis to seek to recuse the Judge in the litigant's case. A litigant whose case came before the Judge reasonably soon thereafter, but whose lawyer had not written a letter in response to the Judge's earlier request (as the Judge would be aware), would also have a basis for a recusal motion.

I hope this letter assists your important work.

Sincerely yours,



Stephen Gillers

SG:sg  
Enc.

COMMITTEE ON CODES OF CONDUCT  
ADVISORY OPINION NO. 97Recusal Due to Appointment or Reappointment of a Magistrate Judge.

The Committee has received an inquiry about the ethical obligations of a magistrate judge arising out of the relationship between members of the selection panel and a magistrate judge (1) following the initial appointment process, and (2) during and following the reappointment process.

We begin by briefly reviewing the appointment process. Magistrate judges are appointed and reappointed in accordance with the procedures set forth in 28 U.S.C. § 631 and regulations promulgated by the Judicial Conference of the United States. See Judicial Conference of the United States, Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges, set forth in Administrative Office of the United States Courts, The Selection and Appointment of Magistrate Judges, Appendix H (Oct. 1997, rev. June 1999). The active district judges appoint a selection panel with at least seven members consisting of lawyers and other members of the community. At least two members of the panel must be non-lawyers. The size and composition of panels varies from district to district, but the usual practice is to appoint active federal practitioners and prominent citizens of the community. Frequently United States Attorneys and Federal Defenders, or their designees, also serve on these panels.

When an appointment is being made to a vacant or newly created position, the panel is required to submit a list of five nominees to the court within ninety days of its creation. A majority of the active district judges selects a candidate from the list of five nominees. When a magistrate judge is being considered for reappointment, the panel reports to the court whether or not it recommends reappointment of the incumbent after the public and bar have been given notice and an opportunity to submit comments.

Throughout the appointment process, both the panel and the court are required to keep all information received, including the names of potential nominees and individuals recommended by the panel, in strict confidence.

This inquiry implicates Canons 2 and 3. Canon 2 provides:

A judge should avoid impropriety and the appearance of impropriety in all activities.

A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment.

Advisory Opinion No. 97

Canon 3 provides:

A judge should perform the duties of the office impartially and diligently . . . .

C. Disqualification

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . .

Canon 3C(1) continues with a non-exhaustive list of circumstances under which a judge's impartiality might reasonably be questioned; however, none of these circumstances is applicable to this inquiry.

Canons 2 and 3 are designed not only to ensure against actual partiality but also the appearance of partiality. The controlling consideration is whether reasonable persons would perceive the judge as partial. The Commentary to Canon 2A sets forth an objective test for the appearance of impropriety, and this test is also useful in evaluating the impartiality requirement under Canon 3, namely ". . . whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." Of course, the perception of partiality will vary depending on the facts and circumstances of any particular situation.

Several questions have been posed.

Initial Appointment

1. Should a magistrate judge notify all parties of the fact that a lawyer or party in the case was a member of the panel that originally considered the judge's application?
2. If such notification is required, for what period of time must this notification be given?
3. Is a magistrate judge required to recuse whenever a member of the panel appears as either a lawyer or party to a case?

A candidate who successfully applies for a vacant or newly created position assumes the office of magistrate judge and begins adjudicating cases after the panel has fulfilled its charge by recommending five nominees to the court and the court has made the appointment. While

## Advisory Opinion No. 97

carrying out its responsibilities, the panel is under an obligation to conduct its activities in strict confidence. Therefore, the presumption is that a candidate has no knowledge of what the views or positions of individual panel members are with respect to any candidate. During the selection process, a candidate will undoubtedly be interviewed by members of the panel and may also be contacted by a member of the panel to obtain prior approval before third parties are contacted about the candidate.

In the opinion of the Committee, a magistrate judge following initial appointment is not obligated to notify the parties in a case that either a lawyer or a party in that case was a member of the panel that considered the judge's application since there is no reasonable basis for questioning the magistrate judge's integrity, impartiality, or competence. The selection process is a formalized one established in a way that encourages an objective evaluation of candidates based on merit. It is unlikely that an interpersonal relationship will develop between the candidate and any member of the panel during the selection process. Since the panel operates under a requirement of strict confidentiality, a candidate is not privy to the individual opinions of the panel members concerning any candidate. At best a candidate who is selected can infer that at least a majority of the panel agreed to place the candidate's name on the list of nominees. The candidate assumes the office of magistrate judge after the panel has completed its work.

Under these circumstances, a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would not perceive a magistrate judge's ability to carry out judicial responsibilities with integrity, impartiality and competence to be impaired merely because an attorney or a party who was a member of the panel that considered the judge's application was appearing in a case before that judge. Of course, in the unlikely event that during the selection process something were to occur between a panel member and the magistrate judge that bears directly on the magistrate judge's ability to be, or to be perceived as being, fair and impartial in any case involving that panel member, then the facts of that particular situation would have to be evaluated by the magistrate judge to determine if recusal is an issue and if notification should be provided to the parties.

Reappointment ProcessA. During the Existence of the Panel

1. Should the incumbent recuse from any matter in which an attorney who is a member of the panel represents a party? Should such a recusal apply to all members of the attorney's firm?
2. If recusal is required, for how long is it required?
3. If recusal is not required, then is the incumbent required to notify all parties in a case of the panel member's status on the panel considering the

## Advisory Opinion No. 97

incumbent's reappointment? If so, for what period of time is the incumbent required to advise the parties of this situation?

4. If the United States Attorney or Federal Defender, or their designee, is a member of the panel, must the incumbent recuse in any criminal matters during the reappointment process?

5. Both the nonlawyer and lawyer members of the panel tend to be prominent citizens of the community that have investments and sit on boards of a number of businesses and community organizations. Should the incumbent recuse from any case in which a panel member has an interest? If so, how can the incumbent learn of the panel member's interests, since financial disclosures by panel members are not currently required?

6. May an incumbent advise attorneys and parties that the comment period is open and that they may make comments on the reappointment?

When a court is considering reappointing a magistrate judge, a panel is appointed prior to the expiration of the incumbent's term, in the manner previously described. Public notice is given soliciting comments from the public and the bar. During the process, the incumbent continues to adjudicate cases. After the panel makes its recommendation on reappointment to the court, the court decides whether or not to reappoint. If the court decides not to reappoint the incumbent, the incumbent is notified and the selection procedures prescribed for filling a vacant position are commenced.

An incumbent seeking reappointment obviously has a substantial interest in receiving a favorable recommendation from the panel and is well aware that his or her past service as a magistrate judge is being carefully reviewed and scrutinized. Therefore, in the opinion of the Committee, during the period of time that the panel is evaluating the incumbent and considering what recommendation to make concerning reappointment, a perception would be created in reasonable minds that the magistrate judge's ability to carry out judicial responsibilities with impartiality is impaired in any case involving an attorney or a party who is a member of the panel. Therefore, under Canon 3C(1) the magistrate judge is required to recuse in such a case. However, under Canon 3D, recusal in this situation would be subject to remittal should the magistrate judge in his or her discretion decide to utilize the remittal procedure. See "Notice Concerning Waiver of Judicial Disqualification" printed in the Note following the Commentary to Canon 3.

In the opinion of the Committee, recusal would be required only during that period of time when reappointment is under consideration by the panel and court. Following reappointment, the disqualifying factor is removed and recusal is not necessary unless, as previously noted, something occurred during the selection process between a panel member and the incumbent that directly

## Advisory Opinion No. 97

related to the incumbent's ability to be, or to be perceived as being, fair and impartial in any case involving that panel member.

A situation may also arise in which the incumbent is not reappointed. Due to the strict requirement of confidentiality, the recommendation of the panel presumably will not be known to the incumbent. However, since it is probable that failure to be reappointed is due at least in part to an adverse recommendation of the panel, a magistrate judge in such a situation should continue to recuse, subject to remittal, for the balance of the term of office.

When an attorney is a member of the panel, the magistrate judge need only recuse, subject to remittal, in those cases in which that attorney appears and need not recuse in cases in which other members of that attorney's firm appear. In the opinion of the Committee, the relationship between other members of the firm and the panel is sufficiently indirect and attenuated that a reasonable person, with knowledge of the relevant circumstances set forth above, would not perceive the magistrate judge's ability to carry out judicial responsibilities impartially to be impaired in such cases.

Similarly, where a designee of a United States Attorney or Federal Public Defender is a member of the panel, the magistrate judge must recuse, subject to remittal, only in cases in which those designees appear and not in cases involving other attorneys from those offices. However, in those situations where the United States Attorney or the Federal Public Defender serves on the panel, recusal is necessary, subject to remittal, in all cases (criminal and civil) involving that attorney and that attorney's office due to the direct supervisory role those officials have over the attorneys and the cases in their respective offices.

If the magistrate judge knows that a lawyer or nonlawyer member of a panel, who is neither a lawyer nor a party in a case, has a financial or other personal interest that could be substantially affected by the outcome of a case, then the magistrate judge should recuse, subject to remittal. A reasonable person with knowledge of the relevant circumstances would perceive that the magistrate judge's ability to carry out judicial responsibilities impartially in such cases was impaired. The mere fact that a panel member is on the board of a business or community organization that is a party in a case is not necessarily in and of itself a sufficient basis to require recusal unless, for example, the panel member has a financial or other personal interest that could be substantially affected by the outcome of the case, or will be involved in the case as a witness or as a board member, trustee, or officer with a decision-making role concerning the litigation. Such determinations will necessarily be fact specific in any given case.

In the event that a magistrate judge is aware of or concerned about whether a panel member has a financial or other personal interest or role in a case, the magistrate judge should inform counsel and the parties about the reappointment process and disclose the names of the panel members. Counsel and the parties should be requested to notify the magistrate judge if anybody involved in the case is a member of the panel, and if so, whether to their knowledge that

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individual has a financial or other personal interest in the case that could be substantially affected by its outcome or will participate in any way in the litigation. Once the magistrate judge has the requested information, a fact specific determination concerning recusal can be made. Any recusal would be subject to the remittal procedure if the magistrate judge so chooses.

The magistrate judge may not advise attorneys and parties that the comment period is open and that they can make comments on the reappointment. No matter how well intentioned the magistrate judge might be in providing this information to attorneys and parties, there is a significant risk that they might feel pressured to comment favorably on the magistrate judge who is presiding over their case. Under Canon 2, a judge may not take advantage of the judicial office to promote personal interest. Any such action by a magistrate judge would run a significant risk of creating the appearance of impropriety.

**B. Post Reappointment**

1. After reappointment is the magistrate judge required to recuse or to notify the parties and attorneys in a proceeding that a member of the panel is appearing as counsel or as a party in the proceeding?

In the opinion of the Committee, after reappointment the magistrate judge is not required to recuse or to notify the parties and attorneys in the proceeding that a member of the panel is appearing as counsel or as a party in that proceeding for the same reasons that a magistrate judge is not required to do so after completion of the initial appointment procedure. The only exception to this would be in the unlikely event that during the selection process something were to occur between the panel member and the magistrate judge that bears directly on the magistrate judge's ability to be, or to be perceived as being, fair and impartial in any case involving that panel member. The particular facts of such a situation would have to be evaluated by the magistrate judge to determine if recusal is an issue and if notification should be provided to the parties.

In closing, the Committee notes that 28 U.S.C. § 455(a) contains language substantially similar to that quoted from Canon 3C(1) above. However, the charter of the Committee does not permit it to render opinions interpreting section 455. Magistrate judges may want to review the judicial interpretation of section 455 by various federal circuits in addition to the advice contained in this opinion.

October 13, 1999

**FORTENBERRY LAW FIRM, PLLC**

POST OFFICE BOX 338  
173 EAST Maude Avenue  
MENDENHALL, MISSISSIPPI 39114

RUSTY FORTENBERRY  
SHEILA R. FORTENBERRY

PHONE: 601-847-6622  
FAX: 601-847-6645

January 17, 2002

Hon. Patrick J. Leahy, Chairman  
United States Senate Committee on Judiciary  
224 Dirksen Office Building  
Washington, DC 20510

**RE: NOMINATION OF FEDERAL DISTRICT JUDGE  
CHARLES W. PICKERING, SR. FOR THE  
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT**

Dear Chairman Leahy:

By way of introduction, I am a former District Attorney for Covington, Jasper, Simpson, and Smith counties in central Mississippi. I served in this elected capacity from 1992 until November, 1999. Since that time I have been engaged in the private practice of law and a good portion of my practice is devoted to the area of criminal law.

As a member of the National Association of Criminal Defense Lawyers and a practicing attorney who has appeared before Judge Pickering, I wholeheartedly endorse and support Judge Pickering for his nomination to the Fifth Circuit Court of Appeals. I consider Judge Pickering to be a fair, honest, sincere, extremely competent, and knowledgeable judge. I would be proud and honored for Judge Pickering to serve us on the United States Court of Appeals for the Fifth Circuit. I have no doubt that Judge Pickering will be firm, yet fair, to criminal defendants which appear before him.

Thank you for your time, and should you have any questions, please let me know.

Sincerely,



Dewitt L. Fortenberry, Jr.

OWEN & GALLOWAY  
P.L.L.C.

Attorneys At Law

JOE SAM OWEN  
JSO@owen-galloway.com  
BEN F. GALLOWAY  
BFG@owen-galloway.com  
ROBERT P. MYERS, JR.  
RPM@owen-galloway.com

January 17, 2002

Owen Building  
1414 25th Avenue  
Fort Office Drawer 420  
Gulfport, MS 39502-0420  
Telephone: 228-868-2821  
Fax: 228-864-8421 or 228-468-2818  
e-mail: og@owen-galloway.com  
website: www.owen-galloway.com

BRIAN E. DRENNAN  
BED@owen-galloway.com

Honorable Patrick J. Leahy  
Chairman, Committee on Judiciary  
U. S. Senate  
224 Dirksen Office Building  
Washington, D. C. 20510

Dear Senator Leahy:

I am a member of the National Association of Criminal Defense Lawyers, and I am submitting this letter in support of United States District Judge Charles Pickering for a position on the United States Court of Appeals for the Fifth Circuit.

I have been fortunate to appear before Judge Pickering in many civil and criminal proceedings, and I can state without hesitation that Judge Pickering is abundantly fair to all litigants, their families, and to attorneys who appear in his Court.

I had the opportunity to work with Judge Pickering in his capacity as a private attorney before he assumed the position of United States District Judge. I found him to be straightforward, competent and courteous in his dealings with clients, attorneys, and members of the judiciary. These fine qualities followed Judge Pickering to the bench, and I am certain that if confirmed he will make a fine appellate judge.

I would also advise that in the criminal proceedings in which I have appeared before Judge Pickering he has been more than fair in the sentencing process, and has given defendants and their families every opportunity to address the court.

If you or your staff have any questions, please do not hesitate to contact me.

With best wishes, I remain

Sincerely,

OWEN AND GALLOWAY PLLC

  
Ben F. Galloway

BFG:ej

DEBORAH JONES GAMBRELL & ASSOCIATES  
ATTORNEYS AND COUNSELORS AT LAW  
713 RONE STREET  
HATTIESBURG, MISSISSIPPI 39401  
TELEPHONE (601)583-9401  
TELEFAX (601)583-6119

October 25, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Re: Judge Charles Pickering  
Nominee: Fifth Circuit Court of Appeals

Dear Senator Leahy:

A few days ago I ran into Judge Pickering at lunch and congratulated him on his being selected for an appointment to the Fifth Circuit Court of Appeals. I thereafter learned of opposition to his appointment and felt compelled to write this letter.

As an African American attorney who practices in the federal courts of the Southern District of Mississippi, where Judge Pickering has sat for the past eleven (11) years, I am concerned that he has come under scrutiny. I have appeared before Judge Pickering on numerous occasions during the past eleven (11) years, most often then not, in cases involving violations of civil rights and employment discrimination matters. I have found Judge Pickering not only to be a fair jurist, but one who is concerned with the integrity of the entire judicial process and assures every participant of a "level playing field" and a judge who will apply the law without regard for the sensitive nature of cases of this sort, which may have caused him personal discomfort.

I have personally seen him go overboard in working to bring reconciliation in matters wherein parties, because of lack of understanding of the law or actual ill will, may have committed violations because of lack of knowledge, etc. I have even been appointed by Judge Pickering to represent indigents who have legitimate claims but not the expertise or money to litigate the same, when he could have selected attorneys who might not bring the passion and true concern to bear to insure that the litigants rights are protected. Even when I don't prevail, my clients know that they have had their "day in court" before a judge who is open-minded, fair and just and will follow the law without regard to color, economic status or political persuasion.

I have known Judge Pickering prior to his taking the bench and have seen him advocate the rights of the poor and those disenfranchised by the system. Over the past 11 years, I have seen him bring the same passion for fairness and equity to the federal bench.

Though I personally hate to see him leave the Southern District, I am proud to say that his honesty, integrity and sense of fair play would make him an excellent candidate for the Fifth Circuit Court of Appeals.

Sincerely,  
  
Deborah Jones Casbrell

DJG:s

Cc: Honorable Orrin Hatch  
United States Senate  
Hart Building, SH-104  
2<sup>nd</sup> & C Sts., NE  
Washington, DC 20510

**INGRAM**  
&  
**ASSOCIATES, PLLC**

OFFICE OF EVELYN GANDY

ATTORNEYS AT LAW  
AND  
COUNSELORS

January 9, 2002

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Re: Confirmation of the President's Nomination of Judge Charles Pickering for the United States Court of Appeals, Fifth Circuit

Dear Senator Leahy:

It is a pleasure and privilege for me to write a letter to you and your Committee with reference to my long-time friend, Judge Charles Pickering.

Judge Pickering's home is in Laurel, Jones County, Mississippi and my home is in the adjoining city of Hattiesburg, Forrest County, Mississippi. Judge Pickering and I have been personal and professional associates and friends for more than thirty years. Furthermore, while he is a Republican and I am a Democrat, we have enjoyed a cordial and productive political relationship working for progress for the citizens of Mississippi.

During Senator Pickering's second term as a State Senator, I served as Lieutenant Governor, President and Presiding Officer of the State Senate and have personal knowledge of his service as a member of the State Senate. He was one of the leaders of the Senate at that time, serving with unusual ability, distinction, and dedication to public service. He was also a recognized leader in promoting a spirit of cooperation between Democrats and Republicans to enact progressive legislation to benefit all Mississippians.

As an attorney and elected public official in Mississippi since 1948, I also have personal knowledge of Senator Pickering's career as a lawyer, county attorney, and federal judge of the Southern District of Mississippi. I have always found him to be a person of outstanding ability, trustworthy, dependable and fair. While our positions may have differed from time to time, I have always recognized the sincerity of his position and respected his commitment to a fair and equitable judicial system for all citizens.

May I also mention that Senator Pickering and I share the same religious faith, and he is widely recognized for his commitment to his religious convictions.

211 SOUTH 29<sup>TH</sup> AVENUE (39401)  
PHONE 601.261.1385

PO BOX 15019

HATTIESBURG, MISSISSIPPI 39404-5019  
FAX 601.261.1395

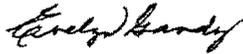
January 9, 2002  
Senator Patrick J. Leahy  
Page 2

We were highly pleased when Judge Pickering was nominated to serve on the United States Court of Appeals, Fifth Circuit, because of our belief that he will serve in this position, as he has in his present position, with unusual ability, distinction and a firm commitment to fairness and justice in our judicial system for all citizens.

Thank you for your consideration of Judge Pickering's nomination and if I can be of further assistance, please call upon me.

Sincerely yours,

INGRAM AND ASSOCIATES



Evelyn Gandy

cc: Senator Orrin Hatch

February 5, 2002

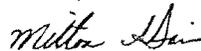
Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Dear Senator Leahy:

My name is Milton Gavin and I am an African American. I am writing this letter on behalf of Judge Charles Pickering, Sr. I have known Judge Pickering for 17 years. He has welcomed me in his home on numerous occasions. His son, Chip, and I developed a friendship in our early teen years. We went to school together and played on the same football team. Even though I came from a family of Christian believers and had great values in working with different races, I learned some stronger values in dealing with relationships with people of different races. I developed a relationship with his son which was more like a brother than a friend. He treated me as a part of his family whenever I was there. We had many meals together and I always felt like one of the family. I worked for the Boys and Girls Club for about four years and during that time Judge Pickering was always a great supporter and expressed interest. Whenever we needed financial support, Judge Pickering was willing to help.

If you have any questions, please feel free to contact me.

Sincerely,



Milton Gavin  
112 Dearborn Street  
Hattiesburg, MS 39401

c: Honorable Orrin Hatch

AULTMAN, TYNER, RUFFIN, & YARBOROUGH, LTD.

A PROFESSIONAL LAW CORPORATION  
 ATTORNEYS-AT-LAW  
 315 HEMPHILL STREET  
 POST OFFICE DRAWER 150  
 HATTIESBURG, MISSISSIPPI 39403-0750

TELEPHONE  
 (601) 583-2671  
 FAX # (601) 583-2677  
 E-MAIL: [ajr@magstate.com](mailto:ajr@magstate.com)

DORRANCE AULTMAN  
 THOMAS W. TYNER  
 LOUISE F. RUFFIN  
 RICHARD F. YARBOROUGH, JR.  
 BEN E. SHEELY  
 CURTIS SMITH  
 DORRANCE AULTMAN, J.R.  
 WILLIAM N. GRAHAM  
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 TROY N. BELL (LA)  
 DAPHNE M. LANCASTER (MS & GA)  
 KYLES MORAN  
 JENNIFER L. WALLEY  
 ROBERT P. Vining (MS & LA)  
 CHRISTOPHER O. MANSSENBURG (MS & LA)  
 DAVID M. EATON

ERNEST R. DUFF  
 OF COUNSEL  
 OTHER OFFICES  
 389 CHURCH STREET  
 POST OFFICE DRAWER 707  
 COLUMBIA, MISSISSIPPI 39429  
 (601) 736-2222  
 FAX # (601) 736-5004  
 1291 24TH AVENUE, SUITE 510  
 POST OFFICE BOX 647  
 GULFPORT, MISSISSIPPI 39502  
 (228) 868-4913  
 FAX # (228) 868-8506  
 THE TEXAGO CENTER  
 401 PONDRAK STREET, SUITE 1900  
 NEW ORLEANS, LOUISIANA 70130  
 (504) 882-9616  
 FAX # (504) 526-6840

October 25, 2001

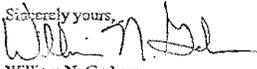
Senator Patrick Leahy  
 433 Russell Senate Office Building  
 United States Senate  
 Washington D.C. 20510

Dear Senator Leahy:

A recent local newspaper article suggests that partisan politics has entered into the judicial nomination procedures for Judge Charles Pickering's nomination to the United States Circuit Court of Appeals for the Fifth Circuit. This is very distressing to me.

I have practiced in Judge Pickering's court since his appointment to the United States District Court bench in the Southern District of Mississippi. While I do not share Judge Pickering's pre-appointment political disposition, I have not found Judge Pickering's personal views to be in an impediment to his performance as a Judge. On the contrary, I find Judge Pickering to have the essential ingredients of an effective judge. He is intelligent and has the analytical capabilities that allow him to obtain a quick assessment of pertinent issues. In addition, he is fair.

In my estimation, it would be a travesty if Judge Pickering is not elevated to the United States Court of Appeals for the Fifth Circuit because of political considerations. If you need additional information, please let me know or contact other lawyers who practice in Judge Pickering's court.

Sincerely yours,  
  
 William N. Graham

WNG/sd

cc: Senator Thad Cochran  
 United States Senate  
 Washington D.C. 20510-2402

**Statement of Hon. Charles E. Grassley, a U.S. Senator from the State of Iowa**

I'd like to welcome Judge Pickering to the Judiciary Committee this afternoon. I just want to make a few comments.

It's important that we have these hearings to make sure that the individuals that are confirmed to the federal bench are not just highly qualified, experienced legal minds. But we want to ensure that they will follow the rule of law—that is, the intent of the Constitution and the statutes ratified and enacted by the people—regardless of what their personal beliefs might be. We need to make sure that these individuals, lifetime appointments, clearly understand their role in the third branch of government, which is to interpret the law rather than create it. So we should ask questions of these nominees to determine that they will do just that.

Now a number of groups have criticized Judge Pickering's record. But I'm not aware that any of these allegations have been substantiated. In fact, Judge Pickering has received a number of letters countering these allegations. There doesn't seem to be a dispute that Judge Pickering has been fine District Court judge. And remember, he's already successfully gone through the Senate review process once before. Unfortunately, I believe that some of these critics have a political agenda. They seem to be requesting us to use their own organizations' agendas as a litmus test as to whether Congress should vote to confirm or reject a judicial nominee. That's just plain wrong.

Whether an individual has been nominated by a Democratic or Republican President, I've consistently applied the same criteria in my decision to vote for or against a nominee: does the individual have the requisite intellect, knowledge, integrity, judicial temperament and philosophy to serve on the federal bench? And most of all, will the nominee follow the law rather than legislate from the bench? I've followed this rule regardless of the judicial nominee's own beliefs. For example, a number of President Clinton's nominees served on associations and organizations, or had actively participated in litigation involving taking positions that I may not have agreed with. I voted to confirm the vast majority of those individuals because I believed that they could do the job, notwithstanding those positions or beliefs. I haven't allowed differences in one's own beliefs to be the litmus test in evaluating whether a judicial nomination should or should not be confirmed. Instead we should be confirmed. Instead we should be looking at the nominee's ability to follow and respect the rule of law. I'll continue to do that in regard to Judge Pickering. I hope my colleagues on this Committee will apply the same objective criteria.

---

Ernest W. Graves  
945 West Drive  
Laurel, MS 39440

November 1, 2001

Senator Patrick Leahy  
Chairman, Senate Judicial Committee  
U.S. Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: Nomination of the Honorable Charles W. Pickering, Sr.  
Court of Appeals for the Fifth Circuit

Dear Senator Leahy:

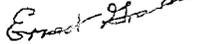
I have been a member of the Mississippi Bar for more than fifty years. I served as the President of that Bar during the 1983-84 fiscal year.

During the years of active practice in Jones County, Mississippi, I was personally acquainted with Judge Pickering as a lawyer, as a prosecuting attorney, as a State Senator, and as a United States District Judge. He is my cousin and we are friends. However, we did find ourselves on opposite sides of cases from time to time.

Over the years of my practice, I had many occasions to observe him. It is my opinion that he will be an outstanding Judge on the Fifth Circuit. He was always a worthy advocate, but handled himself as a true professional with the highest ethical standards. As a District Judge, he has the reputation of giving fair and impartial treatment to all parties before him.

It is my recommendation that your Committee approve his nomination without delay. If I can furnish you with more details, do not hesitate to contact me.

Sincerely,



Ernest W. Graves

cc: Honorable Charles W. Pickering, Sr.  
Senator Orrin Hatch

October 25, 2001

Senator Patrick Leahy  
Chairman of Senate Judiciary Committee  
U. S. Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Dear Senator Leahy:

I am an African-American citizen of Jones County, Mississippi and reside in the Hebron community where Judge Charles Pickering also lives. I have known Charles Pickering throughout his career as a lawyer and a Judge. I have always known him to be a fair and just man whose impartiality is always obvious.

He represented my son David Gray in 1981 in an armed robbery trial. My son was accused of robbing a white teenage girl at knife-point. Judge Pickering believed that my son was entitled to a good defense even though it was not a popular move for him politically. The first trial ended in a mistrial, and the second trial ended with a not-guilty verdict.

I know that Judge Pickering is a strong believer in the constitutional rights of all people. He should be approved for the Judiciary position for which President Bush has nominated him.

Please consider this letter from one who personally knows Charles Pickering.

Sincerely,



Early M. Gray  
P. O. Box 1115  
Taylorsville, MS 39168  
Phone: (601) 729-2184

cc: Senator Orrin Hatch

Charles Harrison

February 5, 2002

Senator Orrin Hatch  
Senate Judiciary Committee  
224 Dirksen Building  
Washington, DC 20510

Dear Senator Hatch:

I was the first African-American hired by the Laurel Police Department in the 1960s. I had personal knowledge that Charles Pickering, the Jones County Attorney at the time, worked against the Klan in Jones County. While Charles Pickering may have forgotten a 1972 contact with a Sovereignty Commission employee when he was before the Senate Judiciary Committee in 1990, he would never have intentionally misled the U.S. Senate Judiciary Committee. In fact, the contact in question is a testament to Charles Pickering's outstanding civil rights record.

According to the newspaper accounts, in 1972 Charles Pickering was in a group of state legislators that asked a Sovereignty Commission employee about a pulpwood union. The pulpwood union would have had dealings with the Masonite plant in Jones County. As an African-American policeman in Jones County, I was aware that during the late 1960s another union at the Masonite plant had been infiltrated by the KKK. In fact, the Klan was running the plant. Klansmen had committed violent acts, including murder, at the Masonite plant. County Attorney Charles Pickering helped investigate the Klan and signed the affidavit to indict Dubie Lee, a Klansman, for the murder at the Masonite plant. Charles Pickering worked with the FBI to investigate and prosecute violent KKK members and even testified against the Imperial Wizard of the KKK, Sam Bowers. He put his, his wife's, and his children's lives on the at risk by doing this.

If any person, would have mentioned union activity that affected Jones County, I would have asked about it too, as would anyone who knew the violent history of unions at the Masonite plant. That would have nothing to with segregation, it would have to do with protecting people, black and white, from violence.

In the end, the Sovereignty Commission allegations only prove the Charles Pickering fought against the Klan and for the people of Jones County. In all my dealings with him, Charles Pickering has distinguished himself as a fine man without any prejudice.

Sincerely,

A handwritten signature in cursive script, appearing to read "Charles Harrison".

Charles Harrison

Sunday, February 3, 2002

## Evidence supports Pickering

Has Charles Pickering, President Bush's nominee for the 5th U.S. Circuit Court of Appeals in New Orleans, shown a "hostile attitude" toward civil rights cases?

The charge, which was leveled Thursday by leaders of the Mississippi branch of the NAACP, would be deeply disturbing if it were true.

We don't believe it is. Why? Because for every piece of "evidence" put forward by Pickering's detractors to thwart his nomination, there is just as much, if not more, evidence - real evidence - to demolish the claim.

Our conclusion: The fuss over Pickering is motivated by efforts to keep a conservative judge from being placed on the 5th Circuit bench. And the "charges" are little more than smoke and mirrors designed to obscure Pickering's impressive record and personal character.

On Thursday, officials with the Mississippi branch of the National Association for the Advancement of Colored People held a press conference in Jackson and outlined some of the reasons the organization opposes Pickering's nomination.

"There's a pattern of a hostile attitude," said L.A. Warren, speaking in reference to Pickering's handling of cases involving discrimination, labor and women's rights issues. The NAACP has forwarded six Pickering decisions to the Senate Judiciary Committee, which has scheduled its second hearing with the nominee for Feb. 7.

Pickering's opponents also contend the nominee gave false testimony about his contact with the Sovereignty Commission during a 1990 confirmation hearing to become a federal judge.

Attacking Pickering on racial and civil rights issues will ultimately prove to be a flawed strategy. There is simply too much evidence - and convincing testimony by those familiar with Pickering's character and record - to the contrary.

The members of the Senate Judiciary Committee would be wise to heed the advice of the Rev. Kenneth Fairley of Mount Carmel Baptist Church in Hattiesburg.

Fairley, an influential leader in our community, has challenged other black leaders such as U.S. Rep. Bennie Thompson to "check with some of the local leadership here and find that some of Judge Pickering's voting record has been very favorable (to the black community)."

According to Chet Dillard, a retired judge and former district attorney in Jones County, Pickering's civil rights record is laudable. In a guest column in the Hattiesburg American ("Former judge defends nominee's character, record," Jan. 30), Dillard praised Pickering for: 1) Testifying against Sam Bowers in the Vernon Dahmer case in 1967; 2) Voting as a state senator to shut down the Sovereignty Commission in 1977; and 3) Fighting efforts to destroy the commission's records.

America's judicial system has entered dangerous territory when political organizations actively

oppose judicial nominees for the simple reason that he/she believes differently than they do.

This unsettling practice forces nominees like Pickering to defend political positions, when in fact judges like Pickering were simply interpreting the law, not trying to advocate and uphold specific political ideologies.

We welcome another hearing for Pickering.

And we believe that the Senate Judiciary Committee - if it hears the full body of evidence - will confirm his nomination to the 5th U.S. Circuit Court of Appeals.

- You may contact Opinion Page Editor Rich Campbell at 584-3128 or by e-mail at [rich@ftpamerican.net](mailto:rich@ftpamerican.net).

*Boyce Holleman*

*SI Professional Association*

*1912 15th Street*

*P.O. Drawer 1030 - Gulfport, MS 39502*

228-863-3142 • 1-888-863-3140 • FAX 228-863-9829 • <http://www.boyceholleman.com>

Monday, October 29, 2001

Honorable Patrick Leahy  
Chairman of Judicial Committee  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Dear Senator Leahy:

I am writing you concerning the pending confirmation of Honorable Charles Pickering to the Fifth Circuit Court of Appeals, which is now under consideration by your committee.

I have been a practicing attorney and member of the Mississippi Bar for over fifty-one years, during which time I have tried cases in all federal and state courts in this area of the country. I also served as President of the Mississippi State Bar Association and have been active in the Mississippi State Bar for over fifty years.

During my years of practice, I have had occasions to know Judge Pickering, both as a practicing attorney and I also, have had the privilege of trying cases in the federal court, over which he presided. I can say without contradiction that he is one of the most able and one of the fairest Judges that has been my privileges to practice before in the courts.

I specifically remember the case of Tim Adams versus Wal-Mart, which was handled by this office in 1993. This case was a personal injury case and the Plaintiff, of the Caucasian race, had an Asian fiancée, who testified in this case. The jury in that case returned a verdict covering only the medical expenses of the seriously injured Plaintiff.

Judge Pickering felt, I am sure, that there had been some prejudice on part of the jury because of the relationship that existed in the Plaintiff's personal life, resulting in failure of the jury to award adequate damages.

*Attorneys and Counselors at Law*

*John Boyce Holleman*  
e-mail: [boyce@boyceholleman.com](mailto:boyce@boyceholleman.com)

*Tim S. Holleman*  
e-mail: [tim@boyceholleman.com](mailto:tim@boyceholleman.com)

*L. Dean Holleman*  
e-mail: [dean@boyceholleman.com](mailto:dean@boyceholleman.com)

*D. Jeffrey White*  
e-mail: [jf@boyceholleman.com](mailto:jf@boyceholleman.com)

Honorable Patrick Leahy  
October 26, 2001  
Page 2

On the Motion for New Trial, Judge Pickering granted a new trial and rescheduled a new trial on the issue of damages only. The result was that a substantial settlement was reached and justice was done.

It is my sincere hope that your committee will confirm Judge Pickering because I think with his intellect, judicial knowledge, legal ability, and character he will make an outstanding Judge on the Fifth Circuit Court of Appeals and the judicial system will be strengthened by his presence.

Thank you for your consideration, I am

Cordially,



Boyce Holleman

JBH/mb  
cc: Senator Oren Hatch

**INGRAM**  
&  
**ASSOCIATES, PLLC**

OFFICE OF CARROLL H. INGRAM

ATTORNEYS AT LAW  
AND  
COUNSELORS

January 9, 2002

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Re: Confirmation of the President's Nomination of Judge Charles  
Pickering for the United States Court of Appeals, Fifth Circuit

Dear Senator Leahy:

In 1972 Charles Pickering and I were sworn in as elected members of the Mississippi Senate. We were both young lawyers, he, a republican, representing Laurel and Jones county Mississippi, and I, a democrat, representing Hattiesburg and Forrest County, Mississippi. We were re-elected to the Senate for a second term, 1976-1980. This letter is written from actual knowledge of Judge Pickering's service in the State Senate. Living in the same vicinity, I also have long-standing knowledge of his family and professional life.

Judge Pickering served in the Mississippi State Senate with distinction and honor. He was one of the most intelligent members of the Senate and his legislative work was excellent. He had an unusual ability to find solutions and common ground in circumstances that appeared impossible. He brought the members of the Senate together on many worthwhile issues.

Question has been raised about the 1977 Mississippi State Senate action abolishing the State Sovereignty Commission. The Senate amended the House Bill, abolishing the State Sovereignty Commission, sealing its records and placing them in the custody of the state archives. For some time prior to 1977, progressive political leaders advocated abolition of the State Sovereignty Commission in order to promote and secure racial harmony and to eliminate this symbol of segregation and racial prejudice. In March of 1977, the senate vote to abolish the State Sovereignty Commission was a vote for the elimination of racial prejudice and a strong progressive statement for racial equality. Charles Pickering voted for this measure and in so doing demonstrated his core conviction of equal and fair treatment. There was significant debate over the issue of sealing the records for 50 years. Sealing the records was better than destroying the records, which would have prevented justice being served. The senate vote for the abolition of the State Sovereignty Commission was a monumental and progressive stand for good race relations.

211 SOUTH 29<sup>TH</sup> AVENUE (94401)  
PHONE (601) 261-1385

PO BOX 15239

HATTIESBURG, MISSISSIPPI 39404-5039  
FAX (601) 261-1393

January 9, 2002  
Senator Leaby  
Page 2

It has been erroneously suggested that Judge Pickering, in some way, advocated an all-white senate. There is no basis for this allegation. No such issue was addressed during his senate service.

In Judge Pickering's life of public service he has consistently maintained his political convictions. He and his family have faithfully lived by their religious beliefs. In all of Judge Pickering's political, professional, and civic actions he has been reasonable and has shown genuine respect for the rights of every person without regard to race, creed or gender. His actions are tempered by compassion, none of which demonstrate a mean spirit nor show malice toward anyone.

As County Attorney, he executed the duties of his office, protecting the rights of all citizens. He faithfully exercised his duties in the face of adversity and danger. In the Mississippi Senate he performed his Constitutional and Legislative duties, respecting the rights of all citizens. His life demonstrates his absolute belief in equality and equal protection under the law.

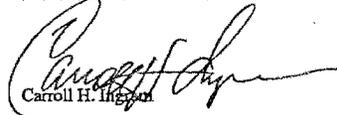
As U.S. District Judge, his competence, his work ethic, and his fairness have never been doubted. We, who practice in his Court, from time to time, may not like some of his decisions or rulings, but no one, privately or publicly, has questioned his fairness, honesty, or integrity. Furthermore, no litigant or lawyer has said that Judge Pickering, in any way, demeaned or mistreated them. His professionalism is unmatched.

Absolutely, he is deserving of the President's nomination and the Senate's confirmation. Personally and professionally, without reservation, I recommend his confirmation. His serving the 5th Circuit will be a tremendous contribution to that Court in the same manner in which he has so faithfully served the state of Mississippi and the U. S. District Court. I make this recommendation as a life-long Democrat, practicing lawyer, and citizen interested in a fair and reasonable Federal Judiciary.

If I may provide any additional information that will be helpful to you or your committee please do not hesitate to call me. Thank you for your dedicated service to the Judiciary, the United States Senate, and to our Country.

Cordially,

INGRAM AND ASSOCIATES

  
Carroll H. Ingram

cc: Senator Orrin Hatch

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 COUNTY ADMINISTRATOR



641 MAIN STREET  
 HATTIESBURG, MS 39401

October 30, 2001

Honorable Patrick J. Leahy  
 Chairman, Committee on the Judiciary  
 United States Senate  
 224 Dirksen Office Building  
 Washington, DC 20510

Dear Senator Leahy:

I am a resident of Forrest County, Mississippi and an African American. I have had the pleasure of serving on the Forrest County Board of Supervisors, which is the governing body of Forrest County, Mississippi. I have lived in this area for many years and am aware of the importance that the Federal Courts play in preserving the rights of not only African Americans, but all citizens of this great country, and I wish to urge your confirmation of Charles W. Pickering, Sr., to the United States Court of Appeals for the Fifth Circuit District. I am very much aware of the qualifications of Judge Pickering and the manner in which he has served as a United States District Judge. I feel that he will be an asset to this community, this state and to the United States, as a member of the Fifth Circuit Court of Appeals. Judge Pickering has demonstrated his devotion to upholding the law of the Constitution of the United States of America and I recommend him without reservation, feeling certain that he will continue to protect the rights of all citizens in his position as a Judge on the Court of Appeals.

Very truly yours,

Oliver Johnson

OJ

cc: U. S. Senator Orrin Hatch

RESOLUTION

A resolution of the Jones County Bar Association recommending the appointment of United States District Judge Charles W. Pickering, Sr., to the United States Court of Appeals for the Fifth Circuit.

WHEREAS, Judge Charles W. Pickering, Sr., was a practicing attorney and member of the Jones County Bar Association for a period of 28 years before his appointment to the United States District Court for the Southern District of Mississippi in 1990; and

WHEREAS, as a practicing attorney and member of the Jones County Bar, Judge Pickering distinguished himself as a loyal and faithful advocate for his clients and exhibited the highest standards of professionalism, ethics, and integrity to both court and fellow counsel; and

WHEREAS, upon his appointment to the United States District Court for the Southern District of Mississippi, he has fulfilled the duties of that position with the utmost regard for the laws of the United States and for the parties and counsel who have appeared before him; and

WHEREAS, in terms of his devotion to family, friends, and service to his fellow man, both in this community and elsewhere, Judge Charles W. Pickering, Sr., has represented the very best of our noble profession; and

WHEREAS, Judge Charles W. Pickering, Sr., as a member of the judiciary, is noted for his fairness and impartiality and is a strong defender of the constitutional rights of all;

NOW, THEREFORE, BE IT UNANIMOUSLY RESOLVED that the Jones County Bar Association recommend the appointment of United States District Judge Charles W. Pickering, Sr., to the position of Appellate Court Judge with the United States Court of Appeals for the Fifth Circuit.

This, the 31<sup>st</sup> day of October, A.D. 2001.

JONES COUNTY BAR ASSOCIATION

By: Billie J. Lusk President

Nora J. Jones  
P. O. Box 1543  
Hattiesburg, MS 39403  
January 25, 2002

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Dear Chairman Leahy:

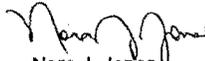
Though it should not matter, I am an African-American female and I had a case before Judge Pickering in the summer of 1994. I had been involved in an accident in Mandeville, Louisiana where I was struck from behind and had a resultant brain injury. I was off work for three years. When we went to court, we went to court in New Orleans and we had an African-American judge. I lost the case in New Orleans before that African-American judge despite five doctors saying that there was no chance for me to lose. When we came to Hattiesburg for a bad faith claim against my disability insurance carrier, I had no faith in the justice system and I certainly expected to lose because my feelings were, if I can lose before an African-American judge, I had no hope before Judge Pickering who is a White judge.

At this point I was so beaten down with so many denials, so many things that happened, I had absolutely no faith in humanity. I came before Judge Pickering with my case. I had a single attorney and the opposing side had three attorneys who came to the court. As it turns out, they had hid evidence and had lied to the judge about the facts of the case and he was able to see through their lies. In the middle of the case he stopped the trial and brought my attorney and me and the opposing counsel to his office. He reprimanded them rather severely and told them in no uncertain terms that he thought that they were concealing evidence and that he did not appreciate them making a mockery of the court, and encouraged them to consider settling the case. He said that my case was probably worth more than the company was willing to pay but I faced several serious legal obstacles. He said that I should consider how much was enough to put my life back together. At the time I was in need of at least \$5,000 so I could get a refresher course which had been deemed a necessary part of my rehabilitation. With the assistance of the Court I was able to put my life back together. I went back and did finish my rehabilitation and I went back to work. I bought a house for myself and my children and I bought a brand new vehicle and I've worked since then.

I feel like Judge Pickering's appointment is a great honor and I think that it is deserved by a great man. I believe in his fairness and his knowledge and his judgment enough that I would be willing to go to Washington and testify on his behalf should that become necessary. I feel that his appointment is a great loss to Mississippi and it will leave an unfillable void, but with his knowledge and dedication to the law and his conviction to making sure that justice is done, I think he would be a tremendous asset to the citizens served by the Fifth Circuit Court of Appeals. I also feel that not only is he an excellent choice but he is the only choice for this appointment. What he did or did not do 30 years ago does not matter to me. What matters to me is his fairness, his integrity, his ability to rule, and his commitment to seeing justice done for all citizens regardless of their race, creed or color.

I consider Judge Pickering to be one of the most compassionate and fair people I have ever met.

Sincerely,



Nora J. Jones

LAW OFFICE OF  
WILLIAM HAROLD JONES  
ATTORNEY AT LAW

---

POST OFFICE BOX 202 / 649 PLY 11 / PCTAL / MISSISSIPPI 39468 / 601-646-8324

October 25, 2001

Hon. Patrick J. Leahy, Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: Charles Pickering  
United States District Court of Appeals Nominee

Dear Senator Leahy:

I have known Charles Pickering for probably 20 years or more. He served as a Senator from a nearby county in the Mississippi Legislature, and I served in the House of Representatives myself for 13 years. I have practiced in his Court on many occasions throughout the last 12 or 13 years and I can only say this is the most fair Judge before whom I have ever appeared. Not only is he fair, he *wants* to be fair to all parties. I have never known of any indifference or prejudice that he has shown against blacks or women and in my own humble opinion, it is regrettable that he has been accused of such.

I presently serve as Chairman of the Forrest County Democratic Executive Committee and although Charles was prior to his judicial service, a Republican, I do not hesitate to signify to any person that he is fair and impartial, and has been so even to myself, a Democrat.

Very sincerely yours,



William H. Jones

WHJ/sp

cc: Senator Orrin Hatch

**ST. JOHN UNITED METHODIST CHURCH**  
P. O. Box 65  
Hattiesburg, MS 39403-0065  
601-583-1243

October 26, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Dear Senator Leahy:

In the year 1987, there were only three black employees out of 105 employees in the Fire Department of the City of Hattiesburg. The NAACP when I was president filed an action in Federal Court where Judge Pickering was the sitting judge. The presentation of the facts by the U.S. Justice Department to the Court was carefully considered by Judge Pickering. At Judge Pickering's urging the City of Hattiesburg agreed to a consent order and, therefore, accomplished what was sought by the NAACP for the African American citizens who had been discriminated against by the City of Hattiesburg in place at the time of trial. The settlement and ruling by Judge Pickering was very fair and has continued to be followed to this day. I believe this action set the standard for fair treatment throughout the State of Mississippi.

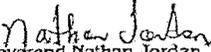
In the year 1998 another action was filed in Judge Pickering's court by the NAACP alleging discrimination in the allocation of funds between the predominantly white affluent community and the eastern part of Hattiesburg, which was predominantly African American. Judge Pickering took the case under advisement and after due consideration advised the City of Hattiesburg that the same facts applied to this cause that were present in the Fire Department case where the facts were in favor of the NAACP who filed the case. Judge Pickering advised the City of Hattiesburg's attorney to work with the NAACP and their lawyer to effect a fair and equal division of the city resources for all citizens. This was accomplished without a trial and 15 years later is still being carefully followed.

Without hesitation, I can truthfully say that Judge Pickering is an extremely fair judge who serves all our citizens, and there has never been

a hint of prejudice against minorities displayed in his court. On the other hand, it seemed to me that he pushed very hard to insure the fair treatment of minorities.

Without a doubt, Judge Pickering should be confirmed as a Judge for the Fifth Circuit Court of Appeals where he will benefit a much wider segment of our citizens.

Sincerely,

  
Reverend Nathan Jordan  
Pastor, St. John United Methodist Church  
Former President, NAACP, serving 3 terms  
unopposed

copy: Senator Orrin Hatch



UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT  
OHIO - MICHIGAN - KENTUCKY - TENNESSEE

CHAMBER OF  
DAMON J. KEITH  
CIRCUIT JUDGE  
U. S. COURTHOUSE  
DETROIT, MICHIGAN 48226

November 8, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D. C. 20510

Dear Senator Leahy:

I write this letter to support the nomination of my friend, Charles W. Pickering, Sr., for a position on the United States Court of Appeals for the Fifth Circuit.

Judge Pickering and I serve together on the Judicial Branch Committee of the Judicial Conference of the United States. I have watched his temperament, his fairness, and his sense of compassion as we discussed several difficult matters concerning the federal judiciary. One of my dear friends, Judge Henry T. Wingate, who serves with Judge Pickering on the Federal District Court for the Southern District of Mississippi and who has known Judge Pickering for more than 16 years, has told me of the outstanding qualifications of Judge Pickering. Judge Wingate also said that as a practicing attorney before him and as a colleague since being appointed to the bench, Charles Pickering's entire life has been committed to equality and fairness and upholding "equal justice under law."

Our Judicial Branch Committee was meeting a few years ago when then-President Clinton nominated Judge Anne C. Williams to be the first African-American judge on the Court of Appeals for the Seventh Circuit. The confirmation was being held up for some political reason, and I talked to Judge Pickering and asked if he would call Senator Trent Lott about pushing the confirmation through. The next day Judge Pickering saw me at breakfast and said, "Damon, Senator Lott has made a commitment to me that he would follow through on this matter." In a few days, Judge Anne Williams was confirmed. She is now the first African-American Judge to sit on the Court of Appeals for the Seventh Circuit.

Page -2-  
November 8, 2001

I am absolutely convinced that Judge Pickering's entire life has been dedicated to the principle spelled out in the Declaration of Independence that says, "... all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness ..."

I recommend Judge Charles W. Pickering, Sr. to you without reservation.

Sincerely,



Damon J. Keith

DJK:med

cc: Senator Orrin Hatch

To: Honorable Patrick Leahy  
Chairman Judiciary Committee  
United States Senate  
Washington, DC 20510-6275

From: James R. King  
2230 Malraux Dr.  
Vienna, VA 22182

Date: December 10, 2001

Subject: Nomination of U.S. District Judge Charles Pickering for a seat on the 5<sup>th</sup> Circuit Court of Appeals

This letter comes as a letter of support for Judge Charles Pickering. While I was aware of Judge Pickering's nomination to the United States Court of Appeals for the Fifth Circuit, I was not aware of the opposition and subsequent questioning of his record on racism and discrimination. I'm a Private Consultant and a native Mississippian. I was in Jackson, MS on business during the week of November 12<sup>th</sup> when I notice an article in the Clarion-Ledger dated Nov. 15<sup>th</sup> (article enclosed).

I have known Judge Pickering for 25 years and can and do state without hesitation that he is a man with great morals and principles and I have found him to be completely void of racism in his approach to dealing with issues of race.

In 1976, Charles Pickering hired me as the first African American Political Operative for the Mississippi Republican Party. I can assure you that there was no pressure on then Chairman Pickering or the State Party at the time to hire an African American. The story I would like to share about Judge Pickering I believe best illustrates his straight forwardness and blindness to approaching situations based only upon race. In 1976 after watching then President Ford lose to President-Elect Carter, I along with several other African Americans decided to meet with the Chairman of the Mississippi Republican Party (Charles Pickering). At the meeting, we laid out for him how badly the Republicans had done in the African American community (Carter received over 96% of the African American vote in MS) and how crucial it was for the Party to hire an African American on it's staff to work in the African American Community. Chairman Pickering listened intently and made notes of the meeting and asked if we could get back together in a week or so. At our second meeting with Chairman Pickering, he stated that we had made some excellent points of the Party's need for outreach and that he was willing to hire an African American, but not for work in the African American Community exclusively. He stated that the person would have to work in all segments of the state rural, urban, African American and White areas of the State.

I became the First African American Political Operative (Fieldman) for the Mississippi Republican Party. During my years of work at the Party, I spent considerable time traveling with Chairman Pickering as well as spending time at his personal residence with

him and his family. I remain close to him today and still consider him to be one of my most reliable Mentors. This story I believe best demonstrates Judge Pickering's approach to dealing with issues of race. The group and myself approached Judge Pickering about only looking at the Party's need from a narrow point of view, he however being Chairman and having an open mind looked at the situation from a broader view. He later explained to me that he felt that in order for the Party to grow it was necessary for both the African American and White community to receive the same message and that would not happen if I were confined to working in the African American community only. My point for telling this story is to say to those who have accused Judge Pickering of being a racist individual, that they really don't know him.

Chairman Pickering could have enhanced his personal standing with the group by allowing us to believe that he agreed with our approach to targeting an African American to the African American Community only, but instead he made the point of reminding us that the Party's message was to be the same to both communities and if the message was the same it could be delivered by the same individual. He also thought it was important for the Party to hire African American to demonstrate its commitment to being an open and inclusive Party. I can unequivocally state from my personal knowledge and twenty-five years of knowing Judge Charles Pickering that he is not a racist and I believe him to be imminently qualified for a seat on the 5<sup>th</sup> Circuit Court of Appeals.

Judge Charles Pickering did not ask me to write this letter on his behalf, but after reading the article in the Clarion-Ledger I felt it imperative on my part to speak out about a Christian, a friend, a mentor and a fine gentleman.

Mr. Chairman, I encourage the Judiciary Committee to Confirm the Appointment of Judge Charles Pickering to 5<sup>th</sup> Circuit Court of Appeals.

c.c. Sen. Orrin G. Hatch

January 26, 2002

Honorable Patrick Leahy  
Chairman Judiciary Committee  
United States Senate  
Washington, D.C. 20510-6275

Dear Senator Leahy:

On December 10, 2001, I wrote to you expressing my support for the nomination of U.S. District Judge Charles Pickering for a seat on the 5<sup>th</sup> Circuit Court of Appeals. In that letter I related to you my friendship and personal knowledge of Judge Pickering over the past twenty-five years which is why I believe him to be eminently qualified to be seated on the 5<sup>th</sup> Circuit.

During my employment with the Mississippi Republican Party, and during Charles W. Pickering's tenure as Chairman (1976-1978), Chairman Pickering and I attended a number of state-wide and regional meetings of the Mississippi Chapter of the National Association for the Advancement of Colored People (NAACP). Chairman Pickering requested to attend these meetings. Dr. Emmitt C. Burns was the State Field Director for Mississippi during that time. Chairman Pickering attended even though there was some in the Mississippi Republican Party who questioned why or what he thought he would accomplish by attending these NAACP meetings, and there were questions from some members of the NAACP as to what he wanted from them. When asked why did he attend, he gave the same answer to both groups, to open up dialog between the two groups. As I stated in my previous letter to you, there was not a lot of political advantage in talking to African Americans about supporting Republican candidates at that time. I accompanied him to most of these meetings and on our return back from them, he and I would talk about how we thought they went. We both agreed that we probably did not gain that much from a political standpoint, but Chairman Pickering always felt upbeat about the opportunity to have had open dialog and the sharing of ideas and concerns. I was always impressed by his ability to find some common ground in which he and the NAACP groups were able to agree that there was room to work together for the betterment of all Mississippians.

I find it ironic that there are Civil Right's groups that oppose him as being someone they believe will try to suppress their civil rights. I find it ironic because over the many years that I have known Judge Pickering, I can earnestly say that I have never known or met anyone that has said that they knew of any such dealings in which he was involved in that denied or suppressed the civil rights of others. Therefore it is in my opinion that those you say such things about Judge Pickering, really do not know him.

Mr. Chairman, again I encourage the Judiciary Committee to confirm this eminently qualified and fine gentleman's appointment to the 5<sup>th</sup> Circuit Court of Appeals.

cc Sen. Orrin G. Hatch

  
James R. King

The International Association of Lions Clubs

(Lions Clubs International)

300 W 22nd Street, Oak Brook, Illinois 60523-8842, USA (630) 571-5466



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DR. TOMMY KING
International Director
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Columbia, Mississippi 39429
USA
Phone: (601) 552-0772, 552-0774
Fax: (601) 552-0409
E-Mail: tking@netdoor.com

November 6, 2001

Senator Patrick Leahy, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Office Building
Washington, D. C. 20510

Dear Chairman Leahy:

The purpose of this letter is to support the nomination of Judge Charles Pickering to the Fifth U. S. Circuit Court of Appeals. Fair and impartial consideration of Judge Pickering will result in his timely confirmation.

I have known Charles Pickering for more than thirty years. He is a gentleman of high moral character and impeccable integrity. In all of his years in public service there has never been a whisper against his character. He has been a leader in his church, community, and profession. He has always been a peacemaker.

In the late sixties Charles Pickering was one of the first men in public life to take a public stand again the Ku Klux Klan and he has consistently stood for racial justice, even when it was not popular to do so.

Please lead your committee to give careful consideration to his background and credentials and confirm him to the position.

Sincerely,
Tommy King
Tommy King

c: Senator Orrin Hatch



**Charles E. Lawrence, Jr.**

ATTORNEY AND COUNSELOR-AT-LAW  
P.O. BOX 1624 • 606 1/2 JOHN STREET • HATTIESBURG, MS 39403-1624 • TELEPHONE (601) 582-4157

October 25, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

RE: Nomination and Confirmation of Federal District Court Judge Charles W. Pickering, Sr.  
to the Fifth Circuit Court of Appeals

Dear Mr. Chairman:

Please be advised that when I learned of Judge Charles Pickering's nomination as a jurist to the Fifth Circuit Court of Appeal I was elated for him and for the people of the State of Mississippi.

My elation for Judge Pickering's nomination arises out of the fact that I have been a practicing attorney in Southeast Mississippi for the past 21 years. I began my career as an attorney with Southeast Mississippi Legal Services within two weeks of graduating from Howard University School of Law in 1979. As an attorney that have spent a great deal of time representing economically disadvantaged clients at legal services and as an attorney in private practice, I have found Judge Pickering to be very fair in administering justice and a jurist that makes every effort to keep the scales of justice balanced.

It comes as a surprise to me to find that there are some possible efforts to delay or derail Judge Pickering's appointment to the Fifth Circuit Court of Appeals. I am fairly certain that the opposition comes from individuals that have never practiced before Judge Pickering or has never had a claim pending in his Court. I believe that anyone that has had the opportunity to speak with Judge Pickering would find him to be a fair and honest individual with high integrity, a good social conscious and a strong belief in family values.

In my opinion Judge Pickering possess all of the qualities that we as Americans should want in a person that is to apply the laws of the land which could have an ultimate impact upon the rights that we enjoy as Americans. I know that he is knowledgeable of the law and fair in his interpretation and application of the law. I also know that as an Appeals Court Judge that he will apply these skills as well as his innate abilities to preserve justice for all Americans regardless of their station in life and without regards to their race, creed, color, sex, or national origin.

I feel that as an African American attorney that have practiced before Judge Pickering and as a person that grew up in south Mississippi I have a duty to speak up on behalf of a person that is deserving of this appoint. If I stand on the sideline without making any effort to provide you and your committee with information from a person that have stood before Judge Pickering and to

Page 2  
Leahy - Letter  
RE: Judge Pickering

Speak up on his behalf, then I would be just as guilty as Peter when he denied Christ with full knowledge of his goodness.

If I can be of further assistance to you or your committee in this matter, please do not hesitate to contact me.

Sincerely,

  
Charles E. Lawrence, Jr.  
celjr.

cc: Orrin Hatch, Senator  
United States Senate  
Hart Building SH-104  
2<sup>nd</sup> & C Sts., NE  
Washington, DC 20510

# LegalTimes

LAW AND LOBBYING IN THE NATION'S CAPITAL

FEBRUARY 4, 2002

## Judge's Record: What Was Left Out

By JONATHAN GRONER

As a young lawyer in Jones County, Miss., in the 1960s, Charles Pickering Sr. helped put Klansmen in jail.

In the early 1990s, when preservationists and black activists clashed over a "colored only" sign in a county court-

5th Circuit, his liberal opponents won't be focusing on these aspects of the nominee's record.

Liberal activists have combed through the decisions that Pickering has written in 11 years as a U.S. district judge in Hattiesburg, Miss., and have concluded that Pickering's con-

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You won't get the full story on Charles Pickering Sr. from liberals' portrayal of his life and record.

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house, Pickering helped craft a compromise that the black community applauded.

And as a federal trial judge, Pickering has tried to keep young African-Americans out of the criminal justice system, convening a group of local civic leaders to try to solve the problem.

When the Senate Judiciary Committee meets Feb. 7 to consider Pickering's nomination to the U.S. Court of Appeals for the

5th Circuit, his liberal opponents "poses a grave danger to our rights and liberties."

But a *Legal Times* analysis of Pickering's important rulings, as well as interviews with community leaders in his home state, offers an alternate view to the liberals' conclusions that Pickering is racially insensitive and indifferent to constitutional rights.

As a potentially explosive showdown approaches, the

See PICKERING, PAGE 8

# Left Out: The Rest of the Story on Bush Nominee

PICKERING, FROM PAGE 1

record indicates that the judge is a more complicated individual than the foe of civil rights that the liberals have depicted in their position papers.

This will be the second go-round on Pickering. A barely noticed Judiciary Committee hearing took place Oct. 18 during the mid-trial scare. Five months after Pickering's nomination, all the time, hundreds of his judge's unpublished rulings were not available, and Democrats reserved the right to call him back.

The campaign against Pickering's nomination has been led by women's rights, civil rights, and abortion rights groups. They have focused on the judge's consistently conservative record on employment discrimination, voting rights, abortion, and criminal law.

According to his opponents, Pickering often "injects his personal opinions" and "bias" into cases he handles. On civil rights, the groups regard him, in the words of Alliance for Justice leader Marcia Kuntz, as "a throwback to the days of the segregated South."

But a look at the 64-year-old Pickering's record shows that although he has often ruled against civil rights claims, the facts of the cases have often tilted strongly against the litigants claiming discrimination.

And although in some voting rights cases he has doubted the correctness of relevant Supreme Court decisions, he has followed the law in making his rulings.



**ON THE RECORD:** Judge Charles Pickering Sr. has drawn fierce opposition from liberals.

One thing is clear: Pickering often voices his personal views on hot-button social issues in his opinions—even when such discussion isn't strictly necessary. These dicta have made him an easy target for liberal opponents.

## BETWEEN RACES

Pickering declines comment through a White House spokesman. Several people—both black and white—who know Pickering say the nominee has worked to achieve racial harmony in a county that for decades was sorely lacking in that quality. He is, conservatives, no question about that," says Susan Vincent, the mayor of Laurel, Miss., a town of 19,000 that is the

county seat of Jones County, where Pickering grew up in the 1940s and 1950s. "He is also a very fair person."

All his life he has been a leader in efforts to achieve equity and human rights, says Vincent, who is white and describes herself as a political moderate. "I think that he is in any way racially biased is unjust."

Says Johnny Magee, a Laurel bookstore owner and city council member who is African-American: "Pickering is not perfect—no one is—but he has courage. He was involved as a county prosecutor in fighting against the Ku Klux Klan and helped put Klansmen behind bars. That was something you just didn't do in Jones County in the 1960s."

Magee says his own stepson came before Pickering to be sentenced on drug charges. The young man "is currently serving time, and he deserves it," says Magee. "But Pickering dealt with him completely fairly."

In fact, Magee says that Pickering, some time after he took the bench in 1990, called together the county's civic leaders to develop anti-school programs "to keep black males from coming into his court on criminal charges."

Thaddeus Edmonson, the president of Laurel's city council and a leader of the black community there, says Pickering "is very sensitive on racial issues and always makes sure that they are safeguarded in his court."

Edmonson, a newspaper owner who was president of the local chapter of the National Association for the Advancement of Colored People in 1995 and 1996, recalls that about a decade ago, African-American citizens were upset about seeing the words "white" and "colored" engraved next to water fountains at the county courthouse in Ellisville, Miss., near Laurel.

Segregation, of course, hadn't existed for a quarter century, but the words were still carved into the courthouse wall. Historians wanted to keep them on the building as a record of bygone times.

Pickering—along with Edmonson and Vincent—served on a biracial commission that decided to retain the dual fountains, but cover the offending words with plaques.

"He understood that those things were offensive and had to be removed," Edmonson says.

Carey Varnado, a Hattiesburg litigator, says that, as a state senator in the 1960s, Pickering testified in court that a Klansman "was known to have a bad reputation in the community. That required a great deal of personal courage for someone with four young children."

"It's unfortunate that some members of my party are making a political football out of this nomination," says Varnado, a white Democrat who thinks liberal groups are deliberately picking a fight with Senate Minority Leader Trent Lott, a Mississippian who is a longtime friend of Pickering's.

#### THE RECORD SPEAKS

The liberal organizations, such as People for the American Way, the Alliance for Justice, and the National Abortion and Reproductive Rights Action League (NARAL), say they are simply reading the record of Pickering's rulings as a district judge.

There is little question, based on Pickering's stances as a legislator, that he is personally anti-abortion, although he has never been called upon to rule on an abortion case. As a Mississippi state senator in the 1970s, Pickering led the effort to approve an anti-abortion plank in the 1976 Republican platform. The nominee testified at his earlier hearing that he would consider it his "duty as an appellate . . . judge to follow" *Roe v. Wade*.

Pickering has testified that he has been reversed or sharply criticized by the 5th Circuit 28 times, although full information is not yet available about all of Pickering's 1,000 unpublished rulings, and it has not been shown that Pickering was reversed more often than other district judges in his circuit.

On the civil rights front, liberals point to several employment discrimination cases that Pickering decided.

In *Foxworth, et al. v. Merchants Co.*, an unpublished opinion from 1996, two blacks who owned a grocery store sued a supplier under the civil rights laws because the supplier stopped extending credit to them. Pickering ruled in favor of the supplier.

The liberal groups highlighted the "harsh" language that Pickering used: "When an adverse action is taken affecting one covered by [civil rights] laws, there is a tendency on the part of the person affected to spontaneously react that discrimination caused the action. All of us have difficulty accepting the fact that we sometimes create our own problems."

What the liberals did not point out is that the supplier canceled the credit terms after

both store owners were arrested and indicted for allegedly threatening to murder a federal official. (They were later acquitted.) Pickering found that these serious criminal charges represented a "valid nondiscriminatory reason" for the supplier's business judgment to cancel the credit arrangement.

The groups also omit from their position paper Pickering's comment in the same case: "America's basic racial problem, if it is to be solved, must be solved by men and women of goodwill, both black and white. There must be understanding and effort on the part of both races and there must be acceptance of responsibility for individual actions."

In *Seeley v. City of Hattiesburg*, a 1998 case, a black firefighter was fired and claimed a civil rights violation. Pickering granted summary judgment against him, finding that he was fired for insubordination and for repeatedly showing up late at work. There was "not one iota" of evidence of racial bias, he ruled.

People for the American Way criticized Pickering for writing in *Seeley* that "the fact that a black employee is terminated does not automatically indicate discrimination. . . . This case has all the hallmarks of a case that is filed simply because an adverse employment decision was made in regard to a protected minority."

Pickering also wrote that "cases such as this case make it more difficult to guarantee that no American is discriminated against because of race or color. If employers are confronted with a frivolous lawsuit every time they discharge a person who is a protected minority, they will become calloused and cynical and less likely to be sensitive to real discrimination."

Elliot Minberg, People for the American Way's legal director, replies, "What we are concerned about is not the results in the cases, but the fact that he goes out of his way to disparage the plaintiffs. When he writes

that this case is an unwanted effect of the anti-discrimination laws, this reflects a hostile attitude and sends a message to future plaintiffs. That's very troubling to us.

"It's insensitivity to civil rights principles, not deliberate racism," says Minberg. "But that is particularly troubling for an appellate judge. There is not a single smoking gun. This is a mosaic."

Minberg also points out that the national and state NAACP have come out against Pickering, as has the Magnolia Bar Association, a predominantly black Mississippi bar group.

In the voting rights area, Pickering's opponents point to his decisions on redistricting and similar issues.

Regarding *Fairley v. Forrest County*, a 1993 ruling, liberals criticize Pickering for including in his opinion a lengthy digression on the history of the one-person/one-vote doctrine in the Supreme Court and for casting doubt on the doctrine, which he said could at times be applied too rigidly.

However, Pickering concluded that as a district judge, he was "bound to follow the precedents established by prior controlling judicial decisions."

The actual holding in the case—which is supported by considerable precedent—was that a Mississippi county did not have to hold special elections to remedy racial deviations in districts used to elect local officials.

Adam Shah, a lawyer at the Alliance for Justice, says that when there is a *per se* violation of the Voting Rights Act, which Pickering found, "the normal remedy is to have special elections, which he refused to order."

The case was not appealed to the 5th Circuit. ■

MINOR & ASSOCIATES

ATTORNEYS AT LAW  
100 MAH STREET  
P. O. DRAWER 1388

BILBO, MISSISSIPPI 39233  
TELEPHONE: (228) 374-5151  
1-800-377-6647  
FAX: (228) 374-6630

PAUL S. MINOR, P.J.\*  
MARK D. LUMPKIN\*  
JAMES R. REEVES, JR.\*\*

\*ALSO LICENSED IN LOUISIANA  
\*\*ALSO LICENSED IN ALABAMA

RUSS JENNINGS  
LEGAL ASSISTANT

January 24, 2002

Senator Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

RE: Hon. Charles W. Pickering, Sr.

Dear Senator Leahy:

Please accept this correspondence in supplementation to my partner Paul S. Minor's correspondence to you dated October 26, 2001, a copy of which is attached hereto, and as an additional endorsement of United States District Court Judge Charles W. Pickering, Sr. for the position of Judge for the United States Court of Appeals for the Fifth Circuit.

In my dealings with Judge Pickering, he has always been fair to all litigants. In one particular case, he granted the plaintiff's Motion for New Trial because he felt that the original trial jury was motivated by racial prejudice. He also granted the new trial, in part, because he felt the jury had improperly construed testimony of a female physician concerning her treatment and care of the female plaintiff as evidence of a lesbian relationship.

Judge Pickering was perceptive enough to make these observations, and sensitive enough to the rights of my client to insure that she would receive justice by a jury who was not motivated by gender bias during a second trial.

Thank you for your consideration. With kindest personal regards, I am

Sincerely,



MARK D. LUMPKIN

MDL/sj  
cc: Senator Orrin Hatch  
Enclosure

Jones County



Board of Supervisors District 5  
126 Central Avenue  
Laurel, Mississippi 39440

Office (601) 649-5275  
Fax (601) 428-3619

Residence (601) 649-4359  
Cell 1-888-3157806

October 25, 2001

The Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Dear Senator Leahy:

I am writing in support of Judge Charles Pickering's appointment to the Fifth Circuit Court of Appeals. I have had the pleasure of knowing Judge Pickering on a personal and professional level for twenty-five (25) years, and I can honestly say that he is very knowledgeable and dedicated to enforcing the law to the greatest extent possible.

Judge Pickering is also a man of good character and high credibility. I feel that his education coupled with his compassion to serve and experience in law enforcement provides the tools needed to be a viable addition to The Fifth Circuit Court of Appeals. As an elected official, I understand the importance of appointing individuals who are competent, fair, committed to achieving results, as well as enforcing the law. Judge Pickering possesses all the named traits and more.

If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

Melvin Mack,  
Jones County Board of Supervisors - Post 5

cc: Honorable Orrin Hatch

JOHNNY E. JOHNSON  
DISTRICT 1

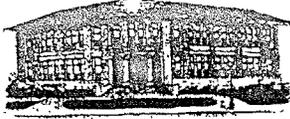
DANNY SPRADELY  
DISTRICT 2

D. L. GIBSON, JR.  
DISTRICT 3

CHARLES A. DIAL  
DISTRICT 4

MELVIN MACK  
DISTRICT 5

WAYNE T. MYRICK  
CLERK



The City of Laurel  
Mississippi

Post Office Box 647  
Laurel, Mississippi 39441  
October 25, 2001

Senator Patrick Leahy  
Chairman, Senate Judicial Committee  
U. S. Senate  
224 Dirksen Office Building  
Washington, D. C. 20510.

Senator Leahy,

My name is Johnny Magee, a Black City Councilman in the city of Laurel, MS. I was elected to the council as a Democrat. This letter is in support of the confirmation of Charles Pickering to the 5th. Circuit Court of Appeals.

I am aware that there is opposition from certain circles concerning his confirmation, including the NAACP and the Congressional Black Caucus. I am not saying that they are wrong and that I am right, we simply see this individual differently.

I would like to speak in favor of the individual that I know as a person. Fortunately, I have never appeared before Judge Pickering in his role as a judge, though if I had, I am certain that I would have been treated fairly. I have though been involved with him in various activities outside the courtroom.

Even though Charles Pickering the judge is required by his position to sentence some individuals to prison for their crimes, Charles Pickering the man, is also required by his humanity to seek ways to prevent as many of those as possible from coming before his bench. For instance, some time ago I was approached about attending a meeting to deal with a supposed school related issue. When I arrived at the meeting, I found that Judge Pickering had put together the meeting along with other persons, Black and White, male and female. The purpose of the gathering, I was to find out was that Judge Pickering had grown tired of seeing young Black men appearing before his bench to be sentenced to prison, and that we needed to do everything possible to prevent this from continuing to happen. We began the group to address the issue of at-risk youths. The group is still operating, and Judge Pickering is still an integral part of it. I have known many of these young men who have been sentenced by Judge Pickering, and I have yet to hear from any of them that he was unfair.



The City of Laurel  
Mississippi

Post Office Box 647  
Laurel, Mississippi 39441

pickering, pg. 2

Judge Pickering has long been involved in this community, and in my opinion one of the best ways to find out about an individual, as to character and other details is to hear from those of us who know him best.

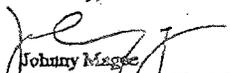
The state of Mississippi has and continues to have its share of challenges as it relates to racial, gender, economic, moral and other issues, but Charles Pickering is in the forefront of bringing about needed changes in all these and other areas.

I have found Mr. Pickering to be open, fair-minded, progressive and one whom I would have every confidence in his assuming the post on the 5th. Circuit Court of Appeals.

As with all of us, we continue to grow and evolve as we live, and it is in my opinion grossly unfair to judge an individual on a written or spoken statement made forty-two years ago, as in the case of the article attributed to Judge Pickering in a 1959 Mississippi Law Journal article. Let us deal with individuals as to whom they have become, and take all the facts into context.

Finally, I would like to express my total support and endorsement for the Honorable Charles Pickering, Sr. to the 5th. Circuit Court of Appeals.

Sincerely,

  
Johnny Magee  
City Councilman, Ward 6

BOARD OF SUPERVISORS  
 DAVID ALLEN  
 DISTRICT 3  
 CHARLES MARSHALL  
 DISTRICT 2, VICE PRESIDENT  
 LYNN CARLISLE  
 DISTRICT 1, PRESIDENT  
 JOHNNY DwyERRE  
 DISTRICT 4  
 RILEY HUDSON  
 DISTRICT 5  
 JEFFREY T. ROLLIMON  
 ATTORNEY  
 BETTY CARLISLE  
 COUNTY ADMINISTRATOR



641 MAIN STREET  
 HATTIESBURG, MS 39401

October 30, 2001

Honorable Patjck J. Leahy  
 Chairman, Committee on the Judiciary  
 United States Senate  
 224 Dirksen Office Building  
 Washington, DC 20510

Dear Senator Leahy:

I wish to take this opportunity to comment regarding the qualifications of Honorable Charles W. Pickering, Sr., United States District Court Judge, regarding his nomination to the United States Court of Appeals for the Fifth Circuit District.

I am an African American resident of Forrest County, Mississippi and it has been my pleasure to serve on the Forrest County Board of Supervisors, which is the county governing body for Forrest County. I feel that it is my responsibility (as a member of the Board of Supervisors) to be aware of the qualifications of persons, who are aspiring to public office. I am particularly interested in those to whom appointments are made regarding the Federal Judiciary, in so much as it was through the Federal Judiciary that African Americans have been protected as it relates to their constitutional rights.

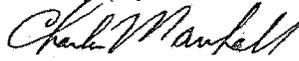
I am very familiar in the manner which Judge Pickering has conducted himself while serving as the United States District Judge, as well as his background, which qualified him for that position. At the time when the Ku Klux Klan perpetrated the murder of Vernon Dahmer in Forrest County, MS, Judge Pickering was the County Prosecuting Attorney of Jones County, MS, the neighboring county to Forrest County. Judge Pickering, as County Attorney of Jones County, made himself and residents of Jones County available as witnesses on behalf of the State of Mississippi when the authorities in Forrest County prosecuted the murder of Vernon Dahmer. It was the courageous willingness of people like Judge Pickering, who contributed to these convictions at a time when convictions for the murder of African Americans was difficult. Since assuming his position as U. S. District Judge, he has conducted himself in an outstanding manner and demonstrated his dedication, not only to the law and the preservation of the law, but to

Honorable Patrick J. Leahy  
October 29, 2001  
Page Two

administering the affairs of his Court without prejudice or discrimination to any person because of sex, race or otherwise.

I recommend to your committee that you respectfully confirm the nomination of Charles W. Pickering, Sr. to the United States District Court of Appeals for the Fifth Circuit District. In you so confirming the nomination of Mr. Pickering, you can be assured that you will be placing a man on the Court who will protect the rights of all citizens regardless of sex, race, creed or color.

Respectfully,



Charles Marshall

CM

cc: U. S. Senator Orrin Hatch

JOLLY W. MATTHEWS  
307 West Pine Street  
Hattiesburg, MS 39401

Telephone: (601) 545-2211

Facsimile: (601) 884-9136

October 26, 2001

Honorable Patrick J. Leahy  
United States Senator  
Chairman, Committee on Judiciary  
240 Dirksen Office Building  
Washington, D.C. 20510

Dear Senator Leahy:

I am writing on behalf of Charles W. Pickering, United States District Judge, who has been nominated by President Bush to the Fifth U. S. Circuit Court of Appeals.

I have known Judge Pickering for approximately 25 years. Judge Pickering resides in Jones County, Mississippi and was Chairman of the State Republican party from 1976 to 1978. At that time, I served as Chairman of the Forrest County Democratic Executive Committee. Forrest and Jones Counties are neighbors and are often in economic competition. He and I had a rivalry during that period of time, but that rivalry remained political and also remained on a high plain. Judge Pickering and I had similar law practices, primarily representation of plaintiffs in personal injury and individual matters. In his law practice as well as his other dealings with me, I have always found him to be a person of the highest integrity. I know him to be fair and impartial in the treatment of all individuals. Certainly he was fair in the treatment of his clients who came from all walks of life, but were primarily working class citizens, including all races and both genders.

My experience with him in the courtroom has been the same even-handed and fair treatment that I have always received from him when we were both practicing attorneys. I consider him to be a judge of high integrity who treats all persons equally.

I sincerely believe he would be a tremendous addition to the United States Fifth Circuit Court of Appeals and I know he would do an excellent job on the appellate bench. I know he has a practical understanding of the law and will make an excellent appeals judge. He practiced law for many years and has been a District Court Judge now for a long period of time. This experience will benefit him greatly. It is too often that we are faced with judges that have neither practiced law nor understand the practical aspects of practicing law and lose sight of what our courts should be. Our courts should be a level playing field and our judges should understand this fact. Judge Pickering, with his judicial temperament and fairness, in my

Honorable Patrick J. Leahy  
United States Senator  
October 26, 2001  
Page 2

opinion, would not only be a good addition to the Court of Appeals, but would improve the Court of Appeals by being one of its Judges.

If you should like to talk with me personally about Judge Pickering's qualifications, I certainly would be happy to discuss them with you or any members of your staff.

Very truly yours,



JOLLY W. MATTHEWS

JWM:dae  
cc: Honorable Orin Hatch  
United States Senator

MISSISSIPPI CHAPTER-AMERICAN BOARD OF TRIAL ADVOCATES

The Mississippi Chapter of the American Board of Trial Advocates had its yearly meeting in Jackson, Mississippi on Saturday February 2, 2002.

There were thirty-nine members of the Mississippi Chapter present when the Motion was made and seconded, recommending JUDGE CHARLES PICKERING, to be elevated to Judgeship with the *Fifth Circuit Court of Appeals* in New Orleans, Louisiana.

The membership of the Mississippi Chapter of the American Board of Trial Advocates unanimously feel that JUDGE CHARLES PICKERING, is eminently qualified, judicial prepared and has the proper judicial temperament to serve on the *Fifth Circuit Court of Appeals*.

There was a unanimous vote to make the recommendations to the appropriate authorities in Washington, D.C.

THIS THE <sup>4th</sup>~~7th~~ day of February, 2002.

  
JOHN L. MAXEY, II President Mississippi  
Chapter of American Board of Trial Advocates

MELVIN & MELVIN  
Attorneys And Counselors At Law  
Post Office Box 142  
424 Sawmill Road  
Laurel, MS 39440  
Telephone No.: (601) 426-6306  
Facsimile No.: (601) 649-7571

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BellSouth Corporation  
Legal Department  
1135 Peachtree Street, N.E.  
Suite 1700  
Atlanta, GA 30309-3010  
mark.mcintosh@bellsouth.com

Mark F. McIntosh  
Senior Litigation Counsel  
404 243 3392  
Fax 404 243 5664

January 28, 2002

Hon. Patrick Leahy  
433 Russell Senate Office Building  
United States Senate  
Washington, DC 20510

Re: The Nomination of Judge Charles Pickering

Dear Senator Leahy:

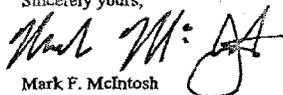
I am writing in support of the nomination of Judge Pickering to serve on the Fifth Circuit Court of Appeals. My comments are wholly unsolicited. My writing is prompted merely by having read news accounts regarding his nomination.

Prior to relocating to Atlanta in 1996, I practiced in the State of Mississippi. I have continued to handle litigation in Mississippi since relocating to Atlanta. I have appeared before Judge Pickering in a variety of litigation. While his decisions have not always been favorable to my clients, I have always found him to be fair, impartial, informed, and possessed of a judicial temperament. I have appeared before him both in court and in chambers. To my observation, he has always treated persons with respect and dignity. I believe he has also respected the rule of law and recognizes the appropriate role of the federal judiciary is to interpret the law and not to make it. (Unfortunately, I can not say the same for many of his peers.)

It has been my privilege to appear in the Federal Courts of numerous states. I am admitted to the bar of the Fifth Circuit Court of Appeals and am a member of the Bar Association of the Fifth Federal Circuit. In my estimation, Judge Pickering is a fine person, a fine judge, and eminently qualified to serve on the Fifth Circuit Court of Appeals.

Thank you for your consideration of my thoughts on the matter. I appreciate your continuing service on behalf of our nation during a difficult time in her history.

Sincerely yours,



Mark F. McIntosh

MFM/rit

430890v1

*McMAHAN & BRINKLEY, P.A.*

Attorneys and Counselors  
608 West Pine Street  
P. O. Box 31  
Hillsburg, NE 68022-0031

H. GUYTON BRINKLEY

MICHAEL B. McMAHAN  
Of Counsel

(501) 714-6180

(501) 714-5748

Shelia D. Prout, Legal Assistant

October 25, 2001

Senator Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

In Re: Judge Charles W. Pickering, Sr.

Dear Senator Leahy:

I am a small town lawyer who has spent the past 25 years practicing law with my wife and one or two other lawyers. Our practice has always consisted of representing ordinary hard-working folks who have either been cheated by some insurance company or have suffered some type of significant injury due to someone else's negligence. In other words, I have always been a personal injury lawyer and a lawyer who specialized in suing insurance companies for punitive damages when they were caught cheating their own insureds. The majority of my clients have been African Americans.

For the past 11 years, most of my cases have been in Judge Pickering's Court. In every case before him, Judge Pickering has treated my clients with the utmost respect and has always treated them fairly. He has always seemed genuinely concerned about my clients as human beings, and not just as litigants in his courtroom. Judge Pickering always seemed to take the approach that he wanted, first of all, to figure out what's the right thing to do under the facts of the case, and then determine if the law will allow him to do it. He has been very pro-consumer in the many cases I have had in front of him against insurance companies. Because of some of his rulings in these cases, insurance companies who targeted African Americans have changed their practices to treat their insureds more fairly.

During my practice, I have often dealt with defense lawyers from large firms who just represent corporations and insurance companies. Judge Pickering has never shown any favoritism to them, in even the slightest degree.

Senator Leahy  
 October 25, 2001  
 Page 2

One of the things that has most impressed me about Judge Pickering through the years is his insistence that both sides know all the facts in a case so that the case could be fully evaluated. He demanded that attorneys and their clients be completely candid with each other and with the opposition. He never allowed defendants to be evasive or to try to hide facts or documents in a case. Judge Pickering believes that if both sides know all the facts of a case, there is a greater likelihood that the case can be resolved satisfactorily to everyone.

Judge Pickering brought a wealth of common sense and experience to the courtroom. His life's experiences were often very beneficial to his understanding of the facts. Whether we were discussing driving 18-wheelers, working on oil rigs, driving school buses, farming, or cutting pulpwood, Judge Pickering had some experience doing it in his past, and this was often very helpful to my clients.

Judge Pickering is a Judge that everyone in this area wants to try their cases in front of, whether representing the plaintiff or the defendant. He always treats both sides fairly, and because of this, many lawyers in this area choose to have bench trials in front of Judge Pickering rather than jury trials. In representing a severely injured African-American young man with a checkered past, I chose to waive a jury and try my case in front of Judge Pickering in a bench trial, because I felt he would be more fair to my client than a jury would be.

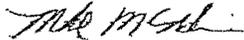
In private conversations with Judge Pickering last year, he told me that racial reconciliation is one of the most important issues facing the country, and he has been active in improving race relations here in Mississippi.

I honestly do not understand why the Black Caucus opposes Judge Pickering's nomination. They certainly have not talked with the African American attorneys that I have worked with on cases in front of Judge Pickering, because these respected and successful African American attorneys are supporters of Judge Pickering's nomination to the Fifth Circuit.

It is no secret that the Fifth Circuit is a very conservative Court and not particularly friendly to plaintiffs. Although I hate to lose him as a trial judge, it is my hope that Judge Pickering can bring some humanity and a more caring attitude for the ordinary working person than has been exhibited in recent years. I truly believe that Judge Pickering will be a moderating voice on the Fifth Circuit. I do not believe that you will find any lawyer, black or white, who has regularly practiced with Judge Pickering who would disagree with anything in my letter.

I do not know if you or your staff have time to talk with individual lawyers concerning Judge Pickering's nomination, but if you do, I would be glad to discuss this with you more.

Sincerely,



MICHAEL B. McMAHAN  
 MBM/cdm

McMAHAN & BRINKLEY, P.A.

Attorney and Counselors  
608 WEST PINE STREET  
POST OFFICE BOX 31  
HATTIESBURG, MS 39403-0031

H. ALEX BRINKLEY

Of Counsel  
MICHAEL B. McMAHAN

(601) 544-6660  
FAX (601) 544-8743  
Shelia D. Prout, Legal Assistant

January 23, 2002

Senator Patrick Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Building  
Washington, D. C. 20510

In Re: Charles W. Pickering, Sr.

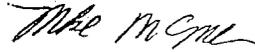
Dear Senator Leahy:

For several years, I represented the Forrest County Sheriff's Office in cases where it had been sued by prisoners. I'm not a defense lawyer by any stretch of the imagination, but I did agree to represent the sheriff's office in prisoner's rights cases, because our local sheriff wanted an attorney who had no interest in dragging out litigation and would evaluate the complaints of the prisoners and make recommendations to the sheriff if I thought the prisoners had legitimate grievances. In other words, our sheriff wanted to do things right.

In representing the sheriff, I was often before Judge Pickering and United States Magistrate Guirola. In the cases before Judge Pickering, he went to great lengths to make sure that the prisoner had a fair day in court and that his claims were adequately presented. Judge Pickering would assist the prisoner in his questioning and make sure that the prisoner covered the areas on which his complaint was based. In other words, Judge Pickering bent over backwards to help the prisoner. At all times, Judge Pickering treated the prisoners with respect and dignity. Judge Guirola did likewise, and he told me that Judge Pickering had told him that in cases where the prisoners were not represented that Judge Guirola should go to great lengths to make sure that the prisoner had a fair day in court. This was especially true in jury trials.

I write this letter because I think that some of the people who are criticizing Judge Pickering simply haven't ever been before him and may be under some misunderstanding as to his view on prisoner rights cases.

Sincerely,



MICHAEL B. McMAHAN  
MBM/sdp  
cc: Senator Orrin Hatch

McTEER & ASSOCIATES  
A PROFESSIONAL ASSOCIATION  
ATTORNEYS AT LAW

CHARLES VICTOR McTEER  
WALTER G. CLIBBERN  
LARRY E. FINEY  
KENNETH RICHMOND  
TIMOTHY PATRICK McTEER  
WALTER BLAIR McTEER

UNION PLANTERS BANK PLAZA, SUITE 400  
540 MAIN STREET  
POM OHLER BOX 1834  
GREENVILLE, MISSISSIPPI 38702-0835  
TELEPHONE (662) 345-2100  
(662) 344-4433  
FACSIMILE (662) 344-0847

October 30, 2001

JACKSON OFFICE  
ARMSTRONG PLAZA, SUITE 400  
270 EAST CAPITOL STREET  
POM OHLER BOX 2568  
JACKSON, MISSISSIPPI 39201-0268  
TELEPHONE (601) 438-4900  
(601) 438-4836  
FACSIMILE (601) 438-4900  
SUITE 214  
GALLATINVILLE, MISSISSIPPI 39238

Senator Patrick Leahy  
Chairman, United States Senate Judiciary Committee  
224 Dirksen Building  
Washington, D.C. 20510

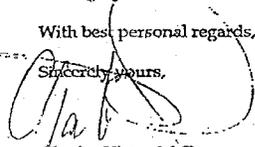
RE: Confirmation of Honorable Charles Pickering to the United States Court  
of Appeals for the Fifth Circuit

Dear Senator Leahy:

I am writing to support confirmation of Honorable Charles Pickering as a Circuit Judge for the United States Court of Appeals for the Fifth Circuit. I have known Judge Pickering as a colleague and friend for some years and believe him to be an individual of the highest judicial caliber. As a long time civil rights practitioner in the State of Mississippi, I strongly recommend Judge Pickering to this high position.

With best personal regards, I am,

Sincerely yours,



Charles Victor McTeer  
Attorney-at-Law

cc: Senator Orrin Hatch

Cvm/ltccross/Leahy, Patrick 1030-01

**MEADOWS RILEY  
LAW FIRM**

1720 23RD AVENUE • P.O. DRAWER 550 • GULFPORT, MISSISSIPPI 39502  
TELEPHONE: (228) 864-4511 • TELECOPIER: (228) 868-2178

JOSEPH R. MEADOWS  
jmeadows@data-sync.com  
DONNIE D. RILEY  
driley@data-sync.com

October 26, 2001

JERRY D. RILEY  
jriley@data-sync.com  
KAREN J. YOUNG  
kyoung@data-sync.com

Honorable Patrick J. Leahy  
Chairman Committee on Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

RE: **Nomination of United States District  
Judge Charles Pickering to the Fifth  
Circuit Court of Appeals**

Dear Senator Leahy:

I have read, with great dismay, some of the outrageous charges recently made by special interest groups opposed to the confirmation of United States District Judge Charles Pickering to the Fifth Circuit Court of Appeals.

My comments, with regard to Judge Pickering's nomination, are based upon my personal knowledge and experience.

When I served as President of the Mississippi Bar Association, I was able to personally observe his support of the Bar Association, and in particular, his commitment to the members maintaining the highest ethical standards.

As a practicing attorney for the last thirty-seven years, I have had an opportunity to observe his outstanding legal abilities both in and out of the courtroom. I have had the unusual experience of appearing in his courtroom as an attorney on various matters, as well as a witness in a very difficult and complex criminal case. In both settings, Judge Pickering conducted himself in the finest traditions of our distinguished Federal Judiciary.

My father was a Baptist minister and this gave me the opportunity to observe his work and dedication to his church. Judge Pickering served as President of the Mississippi Baptist Convention, which is a high honor for anyone, and most especially for an attorney.

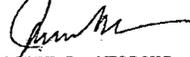
Honorable Patrick J. Leahy  
October 26, 2001  
Page Two

Finally, and perhaps the most important of all his fine attributes, he is totally dedicated to his family.

It is without qualification or reservation that I commend Judge Pickering to the Senate Committee on the Judiciary, with a request that his nomination to the Fifth Circuit Court of Appeals be confirmed.

Thank you for your consideration in this matter.

Cordially yours,



JOSEPH R. MEADOWS

JRM/ka

cc: Honorable Orrin Hatch

**MELVIN & MELVIN**  
ATTORNEYS AND COUNSELORS AT LAW  
524 SAWMILL ROAD, P. O. BOX 152  
LAUREL, MISSISSIPPI  
39441-0142

LEONARD B. MELVIN, SR.  
1896-1972  
LEONARD B. MELVIN, JR.

TELEPHONE (601)426-6306  
FAX (601)649-7571

October 25, 2001

Honorable Patrick J. Leahy  
Chairman of the Commission on Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

RE: Honorable Charles Pickering

Dear Senator Leahy:

I write this letter asking that Judge Charles Pickering be elevated to the position of United States Judge on the Fifth Circuit Court of Appeals in New Orleans.

I have known Judge Pickering for more than 45 years. I knew him when he was at the University of Mississippi getting his law degree and when he returned to Laurel, Mississippi and was in partnership with Carrol Gartin, who later became Lt. Governor and with Judge James Hester who later became Circuit Judge. He served as President of the Mississippi Baptist Association here in Mississippi.

I served as President of the Mississippi of State Bar in 1981 and 1982. I feel that I can speak for the majority of the lawyers of this state that have had contact with, cases before, and meetings with Judge Pickering. With that in mind, I can say that there is no better person fitted for the job to be elevated to the Fifth Circuit Court of Appeals in New Orleans. I do this with no reservations.

Charles Pickering is one of the finest individuals that I have ever had to opportunity to know. He is honest, sincere, fair and you always know where he stands.

In addition to this, I had the opportunity to be in the same church with him, to share the same views that he has with reference to Christianity and to Christians. He also happens to be my Sunday school teacher. I can share with you the fact that he is one of the finest Bible scholars that I have ever known.

Page 2  
RE: Honorable Charles Pickering  
October 25, 2001

I have had the opportunity to appear before him for the plaintiff as well as the defendant. I always walked away knowing and feeling in my heart that justice had been done even though I might be on the losing end.

I do not question his decisions because he calls it like it is and he does the things that are important for our State and Country.

His family is held in the utmost respect and each and everyone of them have made an important contribution to society both locally as well as nationally.

In his Court decisions, Judge Pickering rules on them as the law and evidence justifies.

I would appreciate your consideration.

With kindest personal regards, I am

Sincerely,

MELVIN & MELVIN



Richard B. Melvin, Jr.

LBM:ross  
cc: Senator Orrin Hatch



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Thursday, February 07, 2002



**EDITORIALS**

**U.S. Senate should confirm Judge Pickering**

Feb. 3, 2002

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Judge Charles Pickering is an honorable member of the federal judiciary and, as a distinguished man of integrity and reasoned judgment, is ideally suited for a seat on the 5th U.S. Circuit Court of Appeals in New Orleans. Judge Pickering was nominated to the appeals court by President Bush but his nomination remains lodged in the U.S. Senate while opposition groups attempt to gather enough steam to derail it.

On Thursday, Judge Pickering will have a second hearing before the Senate Judiciary Committee, which held the first hearing on his nomination in October. Suffice it to say the Senate has had access to the details of Judge Pickering's life and legal decisions since it confirmed him as a federal judge. His credentials were impeccable then and remain so today.

The Senate should immediately confirm the nomination of this qualified, experienced judge to a seat on the Court of Appeals.

**BUTLER, SNOW  
O'MARA, STEVENS  
& CANNADA, PLLC**

ATTORNEYS AT LAW

ROBERT A. MILLER  
(601) 949-4575

November 7, 2001

**VIA FACSIMILE**

Honorable Patrick J. Leahy  
Chairman  
United States Senate Judiciary Committee  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: District Judge Charles W. Pickering, Sr.

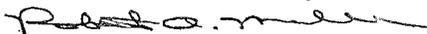
Dear Senator Leahy:

Please accept my letter in support of Judge Pickering's nomination to the United States Court of Appeals for the Fifth Circuit. I am serving my fourth year as chairman of my law firm's Litigation Department. Our firm is fortunate to be the largest in the state. I am also presently Chairman of the Litigation/General Practice Section of the Mississippi Bar, the largest section of our state's bar. I have had cases in Judge Pickering's court and other lawyers in my firm have had numerous cases handled by Judge Pickering.

Judge Pickering is an extremely fair and conscientious judge with a keen mind and consistently courteous judicial temperament. Judge Pickering would be an outstanding appellate judge. I would appreciate your full support of Judge Pickering's nomination.

Sincerely,

BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC



Robert A. Miller

RAM/ddm

cc: Honorable Orrin G. Hatch (via facsimile)  
Mark W. Garriga, Esq. (via e-mail)

2001/11/07 10:00 AM Jackson, MS 39201

Post Office Box 22567  
Jackson, Mississippi 39225-2567

AMSCOTT PLAZA  
17TH FLOOR  
210 EAST CAPITOL STREET  
JACKSON, MISSISSIPPI 39201

TELEPHONE: (601) 948-5711  
FACSIMILE: (601) 949-4555

E-Mail: [bobbymiller@butlersnow.com](mailto:bobbymiller@butlersnow.com)  
[www.butlersnow.com](http://www.butlersnow.com)

## MINOR &amp; ASSOCIATES

ATTORNEYS AT LAW

160 MAIN STREET

P. O. DRAWER 1508

MOBILE, MISSISSIPPI 39533

TELEPHONE: (228) 374-5151

1-800-377-6647

FAX: (228) 374-6680

PAUL S. MINOR, F.A.T.  
MARK D. LUMPKIN  
JAMES R. REEVES, JR., \*\*  
JENNIFER P. BURKESRUSS JENNINGS  
LEGAL ASSISTANT\*ALSO LICENSED IN LOUISIANA  
\*\*ALSO LICENSED IN ALABAMA

October 26, 2001

Senator Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: Hon. Charles W. Pickering, Sr.

Dear Senator Leahy:

I write to endorse and extend my highest recommendation on behalf of Federal District Court Judge Charles W. Pickering, Sr., with regard to his nomination to the Fifth Circuit Court of Appeals.

In order to address the merits of Judge Pickering's qualifications for this most coveted position, I feel it is appropriate to provide you with a brief synopsis of my professional background. First, I am a plaintiffs' trial lawyer who has represented injured victims and consumers throughout this state for 27 years. I was elected president of the Mississippi Trial Lawyers Association in 1992 and, in 1996, was elected to the Board of Governors of the Association of Trial Lawyers of America on which I currently serve. I have also been selected to membership in numerous prominent plaintiffs' legal organizations, such as the Inner Circle of Advocates of which my friend and your fellow Judiciary Committee member Senator John Edwards is a member.

From this frame of reference, I respectfully submit the following comments on behalf of Judge Pickering. Since taking the bench as a District Court Judge, I have had numerous cases assigned to him and accordingly have had the first-hand experience to evaluate his judicial conduct and temperament. In this regard, I can say without equivocation that in every instance he has treated me and my clients with the utmost respect and dignity. Most importantly, in every appearance before him, whether it be in chambers, for a settlement conference, or in the courtroom to argue a motion or try a case, Judge Pickering has been fair. In addition, he has a unique quality that I cannot say about many judges, and that is a steel-trap mind that very quickly cuts to the bottom line issues in a case. As such, he requires the lawyers on both sides to fully and fairly present the merits of their positions without fluff and after quickly analyzing the facts, he separates the wheat from the chaff and makes a recommendation regarding resolution. Judge Pickering is not hesitant in quickly telling a defense attorney and/or a Senator

Leahy  
 October 26, 2001  
 Page Two

recalcitrant insurance adjuster that their position is weak, the plaintiff is going to prevail, and they ought to settle without wasting the Court's time and the litigants' money. Likewise, if my position is shaky, he will quickly let me know it. However, in each instance, his recommendations for settlement are not overbearing, and if the matter cannot be resolved, he will permit the case to go to the jury without unnecessary judicial influence.

His unique approach permits an injured victim who is without funds to pay desperately needed medical and living expenses and to recover a fair and reasonable settlement early in the litigation process. When I step back and analyze the cases that I have had before Judge Pickering, I can honestly say my clients were better served by this very straightforward and practical approach to litigation.

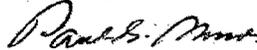
While Judge Pickering expresses great deference to the Seventh Amendment, if he truly believes a jury may have been motivated by bias or extraneous factors, he will not hesitate to re-evaluate and modify the result. In one case in which my firm was involved, an Afro-American female received from an all white jury a questionably low verdict in light of the injuries sustained. Judge Pickering granted our motion for new trial feeling that racial bias motivated the jury, and on retrial we recovered a larger award for the client. I need to stress this is not simply an anecdotal example of Judge Pickering's judicial temperament and philosophy, but serves as pervasive testimony to his underlying respect for the Constitution and all mankind.

Finally, Judge Pickering's background as a trial lawyer from a rural area who represented numerous injured victims further qualifies him, in my judgment, to serve on the Fifth Circuit, a Court of Appeals that is very much underweighted with lawyers who have plaintiffs' personal injury experience. The Judge's life experiences, as a David who has had to take on Goliath, will broaden the philosophical bent of an otherwise very conservative business-oriented Court.

For the foregoing reasons, I personally cannot think of a better choice than Judge Charles W. Pickering, Sr., to be confirmed as the newest member from Mississippi to the Fifth Circuit Court of Appeals.

Thank you for giving me the opportunity to express my feelings on behalf of Judge Pickering.

Most sincerely yours,

  
 PAUL S. MINOR

cc: Senator Joseph R. Biden  
 Senator John Edwards




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 Mississippi Chapter of the Federal Bar Association
 

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October 26, 2001

VIA FACSIMILE AND U.S. MAIL

The Honorable Patrick Leahy  
 Chairman of the Judiciary Committee  
 United States Senate  
 433 Russell Senate Office Building  
 Washington, DC 20510

The Honorable Orrin Hatch  
 Ranking Minority Member, Judiciary Committee  
 United States Senate  
 104 Hart Senator Office Building  
 Washington, DC 20510

Dear Senator Leahy and Senator Hatch:

As practicing and government attorneys in Jackson, Mississippi, we write to express our wholehearted support for the nomination of United States District Judge Charles W. Pickering, Sr., to the United States Court of Appeals for the Fifth Circuit. As officers of the Mississippi Chapter of the Federal Bar Association, we think it is fair to say that Judge Pickering is widely viewed by our chapter's membership as a thoroughly competent, fair, and well-regarded jurist. As you may be aware, the Federal Bar Association is composed of litigators, including many government attorneys, who practice chiefly in federal court. We thus know the federal bench in Mississippi. Without hesitation, we can recommend Judge Pickering as a judge who presides firmly and impartially, with a careful eye toward equal justice under the law for all those who appear in his court.

During Judge Pickering's tenure, he has ably presided over some of the most sensitive and difficult matters tried in any federal court in Mississippi. His wealth of experience would be a credit to the Fifth Circuit as well.

From our experience, and from the experience of many in our organization and in the active bar generally, Judge Pickering has always been fair, thorough, and thoughtful with regard to every matter before him. Moreover, his life experience reveals a kindness, compassion, and a keen sense of justice not just for courtroom parties, but for the greater community of Mississippi as well. Judge Pickering is, and has for decades been, a true public servant. He is both we

October 26, 2001  
Page 2

qualified and well-suited to serve on the Fifth Circuit Court of Appeals. Accordingly, we urge you to move his nomination forward without further delay.

Sincerely,



Terry L. Rushing  
President

Cory T. Wilson  
President-Elect

Mark D. Fijman  
Treasurer

Mississippi Chapter  
Federal Bar Association

CTW/llk

cc: The Honorable Trent Lott  
The Honorable Thad Cochran



THE MISSISSIPPI  
TRIAL LAWYERS ASSOCIATION  
P. O. BOX 1992, JACKSON, MS 39206 601/948-8631

SHANE F. LANGSTON  
President

October 30, 2001

Honorable Patrick Leahy  
United States Senator, State of Vermont  
Chairman, Senate Judiciary Committee  
433 Russell Senate Office Building  
Washington, D.C. 20510

Re: Honorable Charles W. Pickering, Sr., United States District  
Court Judge / Nominee to United States Court of Appeals, Fifth  
Circuit

Dear Senator Leahy:

The Mississippi Trial Lawyers Association ("MTLA") endorses the confirmation of the Honorable Charles W. Pickering, Sr. as United States Appellate Court Judge for the Fifth Circuit. We encourage your committee to act expeditiously on this nomination.

Your committee, of course, is well informed of Judge Pickering's high character and distinguished career. As President of the Mississippi Trial Lawyers Association I would like to offer some insight from the perspective of my colleagues and my constituency.

Judge Pickering is held in the highest esteem among the members of the Mississippi Bar. His reputation for fairness is shared across the legal spectrum; from the criminal defense lawyer to the prosecutor; from the civil defense lawyer to the plaintiff's lawyer. We practice before him daily. We know that he applies the law fairly and equally without regard to economic status, party affiliation, race, sex or religion.

Today, I was quite disturbed to read in our local newspaper a published resolution of the Mississippi State Conference of the NAACP encouraging

Honorable Patrick Leahy  
United States Senator, State of Vermont  
Chairman, Senate Judiciary Committee  
October 30, 2001  
Page Two

opposition to Judge Pickering's nomination. The resolution suggested that Judge Pickering had a history of hostility toward plaintiffs in cases involving claims of racial discrimination and civil rights violations. Such a conclusion is not supported by Judge Pickering's rulings and comes as a shock to the members of my association.

Many members of MTLA are African-Americans. We represent tens of thousands of African-Americans. We prosecute more race discrimination cases and claims of civil rights violations than any other legal association in the State of Mississippi. Members of our association and I represented the State Conference of the NAACP in a historic challenge to the Mississippi "State Flag" regarding its divisive Confederate battle symbol. Our organization would never support a judicial candidate with a record of hostility or unfairness toward litigants claiming civil rights violations.

With great respect for the NAACP and the civil rights advancements it has championed the MTLA strongly disagrees with its conclusions regarding Judge Pickering. Judge Pickering is fair, impartial and a legal scholar. We encourage his expeditious confirmation to the Fifth Circuit Court of Appeals.

Sincerely,



Sharie F. Langston  
President, Mississippi Trial Lawyers Association

cc: Honorable Thad Cochran  
Honorable Trent Lott  
Honorable John Edwards  
Leo V. Boyle, President, American Trial Lawyers Association  
Executive Committee, Mississippi Trial Lawyers Association  
Dennis C. Sweet, III, Esq.

**MONTAGUE, PITTMAN & VARNADO**  
 A PROFESSIONAL ASSOCIATION  
 ATTORNEYS AND COUNSELORS AT LAW

Frank D. Montague, Jr.  
 James C. Pittman, Jr.  
 F. Douglas Montague, III  
 Garay R. Varnado, Esq.  
 Jerome W. Glendon, Jr.  
 Paul B. Cannon

826 Main Street  
 Post Office Drawer 1976  
 Hattiesburg, Mississippi 39402-1976  
 Telephone 601/644-4234  
 Facsimile 601/644-4278

www.mpflew.com

Raghuvaran A. Gray, Jr. (1918-1978)

\*Also admitted to Louisiana  
 \*\*Also admitted to Arkansas

Writer's e-mail: pf1@mpflew.com

October 26, 2001

Senator J. Patrick Leahy  
 Chairman, Committee on the Judiciary  
 United States Senate  
 224 Dirksen Office Building  
 Washington, D.C. 20510

Re: **Nomination of Honorable Charles W. Pickering, Jr. to  
 United States Court of Appeals for the Fifth Circuit**

Dear Senator Leahy:

I write to express shock and disappointment over reports that the above nomination is in dispute.

Respectfully listed below, and in modesty, are indications of my professional background as a basis for the assessment of Judge Pickering which follows:

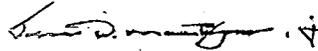
President, Mississippi Bar  
 President, Mississippi Defense Lawyers Association  
 Chairman, Mississippi Bar Foundation  
 Chairman, Mississippi Institute for Continuing Legal Education  
 Life Member, American Bar Endowment  
 Two 4-year terms on the American Bar Association Standing Committee on  
 Professional Discipline representing five southeastern states and Chairing the United  
 States Supreme Court Disciplinary Rules Revision Committee.

As a lawyer of more than fifty years experience, I have been privileged to practice in a variety of cases before Judge Pickering and respectfully urge that his commitment to fairness, courtesy and impartiality as well as high judicial acumen, place him among the zenith of trial judges. Gifted with a fine legal mind, he is deliberative and has a "quick study" ability to grasp issues including those not perceived by the advocates before him. He is intuitive, creative and committed to the highest demands of our justice system and the judicial integrity on which it is based.

For example, in a voter redistricting case in which I represented a south Mississippi county, Judge Pickering meticulously followed existing law in requiring a racially balanced plan.

It will be a privilege to provide any further information or assessment which your committee may require.

Sincerely and respectfully,



Frank D. Montague, Jr.

FDMjr/ph  
 cc: Senator Orrin Hatch

GIBBES GRAVES MULLINS HORTMAN HARLOW MARTINDALE & BASSI, PLLC  
 ATTORNEYS AT LAW  
 414 WEST OAK STREET  
 LAUREL, MISSISSIPPI 39440

WILLIAM S. MULLINS, III  
 NORMAN GENE HORTMAN, JR.  
 JENNIFER M. HARLOW  
 DAVID L. MARTINDALE  
 DEIDRA J. BASSI  
 BRETT W. ROBINSON  
 LEWIS S. BARRY

MAILING ADDRESS:

POST OFFICE DRAWER 1499  
 LAUREL, MISSISSIPPI 39441-1499

TEL (601) 869-8611  
 FAX (601) 846-8028

\* ALSO ADMITTED IN TEXAS

January 24, 2002

Honorable Patrick J. Leahy  
 Chairman, Committee on the Judiciary  
 United States Senate  
 224 Dirksen Office Building  
 Washington, DC 20510

Re: Nomination of the Honorable Charles W. Pickering, Sr.  
 Court of Appeals for the Fifth Circuit

Dear Senator Leahy and Committee Members:

I consider it a privilege to recommend that you confirm Judge Pickering's nomination to the United States Court of Appeals for the Fifth Circuit.

I received my license and started the practice of law in Jones County, Mississippi, in June of 1962. Judge Pickering started his practice here a few months before me. I have known him for forty years. He has always conducted himself with the highest degree of professionalism and integrity. He has always taken a stand for what is right and for law and order. Let me give you an example.

In April of 1967, this law firm served as counsel for Masonite Corporation. The officers of the local union, affiliated with the Woodworkers of America, started a wildcat strike that shut down Masonite. During the next few months the workers that were out on strike, including all of the officers of the local union, were terminated and replaced by Masonite. For several months, there were many acts of violence and lawlessness, including at least one death. It was later judicially determined that most of the officers and many of the union members were out on an illegal strike and their termination was justified. At the time, Judge Pickering was the prosecuting attorney for Jones County, Mississippi. He took a stand against the lawlessness and prosecuted those that were arrested. There were rumors that the local union had been taken over by sympathizers or members of the Ku Klux Klan. During the course of all of this, the International Brotherhood of the Woodworkers of America (AFL/CIO) placed the local union in receivership, removed and replaced its officers, and operated the local union for a period of time. While this seemed to help some, it was the stance of Judge Pickering and a few other local law enforcement officers that guided this County through that very difficult time.

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
January 24, 2002  
Page 2

Since Judge Pickering has been District Judge, he has enjoyed the reputation of being fair and impartial to all parties and enforcing the law. It is my hope that you will confirm Judge Pickering's nomination soon. If I can give you further information, please do not hesitate to call me.

Sincerely,



William S. Mullins, III

WSM/mic

cc: Honorable Orrin Hatch  
Vice-Chairman, Committee on the Judiciary

Honorable Charles W. Pickering, Sr. (Via Facsimile 601-544-7369)

City Council

M. Rowell.....Ward One  
Leonard L. Denerd.....Ward Two  
Carter Carroll.....Ward Three  
C. B. "Red" Bailey.....Ward Four  
Henry E. Naylor.....Ward Five



Post Office Box 1898  
Hattiesburg, Mississippi 39403-1898

City of Hattiesburg

Johanny L. DuFree, Mayor

October 29, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Dear Senator Leahy:

Please accept this letter from me expressing my full support for Judge Charles Pickering to be confirmed as the Fifth Circuit Court of Appeals.

As an executive board member for 12 years with the Forrest County Branch of the NAACP and now serving on the Hattiesburg City Council, I have witnessed Judge Pickering demonstrate fairness, honesty and certainly integrity through out the court.

Also, while it should not matter, Judge Pickering has received much praise from local and state African Americans leaders who can attest to his commitment to being fair toward all citizens.

I think Judge Pickering is a model citizen and he continues to make Mississippi proud. The least I can do as a fellow Mississippian is to try and give a little back to someone who has given much.

Needless to say, it will serve Mississippi and the Fifth Circuit Court of Appeals well should Judge Pickering be confirmed.

I'm available to speak in more details and or specifics about Judge Pickering's attributes if necessary.

Sincerely,

Henry E. Naylor, Hattiesburg City Councilman  
PH: (601) 584-6160 \* FAX (601) 545-9958 \* Email: hnaylor444@aol.com

copy: Senator Orrin Hatch

Northeast Mississippi Daily Journal/Tupelo

*editorial*

Monday, Jan. 28, 2002

## Pickering's plight

### Liberal groups unfairly attack 5th Circuit nominee

The federal judiciary is unelected and tenured for life, but it's not shaped without some connection to the popular will.

Presidents nominate federal judges. The U.S. Senate confirms them. As a general rule, presidents - working in tandem with the senators in the states where vacancies occur - nominate judges who share their broad judicial/political philosophy. Conservative presidents nominate conservative judges, liberal presidents liberal judges, and centrist presidents centrist judges.

Through most of history, the Senate exercised its constitutional prerogative of vetoing a federal judge nomination only if the nominee were considered unqualified or in some way an ethically questionable choice. In recent times, however, ideology has played a stronger role, and judges are more often opposed on philosophical grounds than before.

It's one thing to oppose a nominee on a fair reading of his record and character. It's another entirely for opponents to distort a nominee's record and bring his character into question.

That's what has happened with President Bush's nomination of U.S. District Judge Charles Pickering of Laurel to the 5th Circuit Court of Appeals. The American Bar Association has rated Pickering "highly qualified," its top rating for a judicial nominee. South Mississippi civil rights leaders who have known Pickering since the 1960s support him. Yet national spokespersons for the Leadership Conference on Civil Rights, the NAACP, People for the American Way and the National Abortion and Reproductive Rights Action League have all denounced Pickering in shrill tones. One called him the "worst nominee" Bush has considered.

These attacks should be seen for what they are: desperate attempts to smear a good man and his record based solely on judicial and political philosophy, not qualifications for the job or personal integrity. These groups simply don't want another conservative on the 5th Circuit, which considers cases from Mississippi, Louisiana and Texas.

They have reached back three decades in trying to tar Pickering as anti-civil rights, and haven't succeeded. They've even gone as far as recklessly suggesting Pickering lied under oath in his 1990 confirmation hearings as a federal district judge. They have accurately represented his record as a legislator and state Republican party chairman as anti-abortion, but this hardly should be a disqualifying position.

Pickering's reputation for fairness and integrity is strong and enduring in Mississippi. His civil rights record includes vigorous prosecution of Ku Klux Klansmen in the 1960s when that could literally be

life-risking. The Rev. Nathan Jordan of Hattiesburg, a former local NAACP official, said that in Pickering's tenure on the federal bench "there has never been a hint of prejudice against minorities displayed in his court."

Pickering simply isn't the racist, anti-civil rights, deceptive demagogue the opposition groups are attempting unsuccessfully to portray in their frustration that a conservative president and a conservative senator, Trent Lott, picked a conservative judge.

That's not sufficient reason for the Senate to block Pickering's nomination, and it certainly doesn't excuse the personal attacks and distortions of the record of an honorable Mississippian. We believe Pickering is a capable, fair and impartial judge and should be confirmed.

OWEN & GALLOWAY  
P.L.L.C.

Attorneys At Law

JOE SAM OWEN  
JSO@owen-galloway.com

BEN F. GALLOWAY  
BFG@owen-galloway.com

ROBERT P. MYERS, JR.  
RPM@owen-galloway.com

BRIAN E. DRENNAN  
BED@owen-galloway.com

Owen Building  
1414 25th Avenue  
Post Office Drawer 420  
Gulfport, MS 39502-0420  
Telephone: 228-968-2821  
Fax: 228-968-4221 or 228-968-2813  
e-mail: oeg@dylscape.com  
website: www.owen-galloway.com

January 17, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: Judge Charles Pickering

Dear Senator Leahy:

I am currently an active practitioner in Gulfport, Mississippi. I graduated from the University of Mississippi School of Law in August of 1972.

In August of this year, I will complete my 30<sup>th</sup> year of practice. During those thirty years, I have had the privilege of serving as an Assistant District Attorney and as a special prosecutor in certain murder/capital murder cases. In recent years, I have been active as a criminal defense practitioner.

I am currently a member of the National Association of Criminal Defense Lawyers and I have had the distinct privilege of practicing in the Federal and State Courts.

I have appeared before Judge Charles Pickering in civil and criminal matters. In the context of civil cases, I have appeared before him representing both the Plaintiff and the Defendant. In the criminal scenario, I have appeared before Judge Pickering and I have observed him as a presiding Judge in other criminal cases in which I was not directly involved.

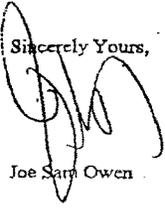
Judge Pickering is an asset to the Judiciary. In every instance in which I appeared before him, either in the civil or criminal context, I experienced fairness, effectiveness and sound judicial temperament. I firmly believe that he is a fair and compassionate jurist and I had no problem, at any time, advising a criminal Defendant that he/she would receive a fair and impartial disposition at the hands of Judge Pickering. I believe Judge Pickering is in the mainstream.

I truly believe that he would be an asset to the Fifth Circuit and I hope that the Judiciary Committee will seriously consider the recommendations and the input of those lawyers that have had the opportunity to observe Judge Pickering as a United States District Court Judge.

As a member of a criminal defense bar, I would personally commend Judge Pickering to the Fifth Circuit Court of Appeals without reservation or timidity.

With kind personal regards, I remain;

Sincerely Yours,



Joe Sam Owen

JSO.pjp

2018 Queensburg Avenue  
Laurel, Mississippi 39440  
October 29, 2001

Senator Patrick J. Leahy, Chair  
Committee on Judiciary  
United States Senate  
224 Dirksen Building  
Washington, D. C. 20510

Dear Senator Leahy:

It is rare that I write letters of recommendation and/or commendation. However, I am elated to write this one on behalf of the Honorable Judge Charles Pickering.

I have known Judge Pickering since 1987. At that time, I was employed with the Laurel School District as Director of Elementary Schools and Title I Programs. A few years later, I was promoted to the position of assistant superintendent. Eventually, I became superintendent of the Laurel School District and retired from that position in July of last year.

During those years, I had the unique opportunity to better know Judge Pickering in his present position. As an African - American, I have found him to be very fair and honest with all (inside and outside his court). He is a very wise and prudent individual. I am not aware of any negative publicity surrounding his integrity and judgeship through the years.

He has continued to be active in community affairs as well. When time permitted, he has been available to help celebrate the accomplishments and achievements of deserving citizens within his district. To him, all people are very important regardless of their socioeconomic status. In addition to his community involvement, Judge Pickering is an active church participant. In times like these, we need leaders of his caliber.

It is my sincere belief that Judge Pickering will certainly bring honesty, integrity and loyalty to the position for which he is being considered. I strongly recommend that you consider him for such an honorable and important position.

Sincerely,



Dr. Eugene D. Owens

cc: Senator Orrin Hatch

ED(WIN) PITTMAN, JR.  
ATTORNEY AT LAW  
P. O. Box 16291  
Hattiesburg, MS 39404-6291

115 Thornhill Drive, Suite D  
Hattiesburg, MS 39402  
E-Mail: [epitsty@aol.com](mailto:epitsty@aol.com)

Office: (601) 271-2713  
Fax: (601) 271-2133  
Cell: (601) 606-1676

January 25, 2002

Hon. Patrick Leahy  
Chairman of Committee on Judiciary  
United States Senate  
224 Durksen Office Building  
Washington, DC 20510

Dear Senator Leahy:

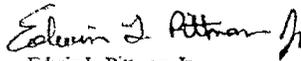
As a part-time municipal judge and a practicing attorney in Hattiesburg, Mississippi, I have had the opportunity to appear before Judge Pickering on several occasions. When in his courtroom, I, as well as my clients, receive courteous and fair treatment. There is one case in particular that I believe highlights Judge Pickering's fairness regardless of race or status of the defendant.

I represented William S. Moody in criminal case number 2:93cr23PG-006. Mr. Moody is a 32 year old black male who pled guilty to possession with intent to distribute cocaine in the latter part of 2000. This crime occurred in 1992. In this eight year period, Mr. Moody was unaware of any charges against him and had moved with his family to New York City. In the years between 1992 and 2000, Mr. Moody showed himself to be a good father and provider for his family. The way he lived his life demonstrated that he had, in fact, changed and became a good and productive member of society.

When Judge Pickering was made aware of the marked change in Mr. Moody's life, he made a heartland exception and went outside the sentencing guidelines, which allowed Mr. Moody to go home to his family and allowed Mr. Moody to be monitored for a year. At the end of this year, we appeared in front of Judge Pickering once more. It was shown that William Moody had thrived due to the Judge's compassionate decision. I believe that I speak for my client, Mr. Moody, when I state that Judge Pickering is a fair and compassionate man, which translates into being an excellent judge.

I believe that Judge Pickering is a wonderful choice to be confirmed as a judge for the Fifth Circuit Court of Appeals.

Sincerely,

  
Edwin L. Pittman, Jr.



CHRIS POSEY, INC.



2518 Highway 16, North • LAUREL, MS 39440  
Telephone: (601) 649-4800  
1-800-524-8033



October 29, 2001

Honorable Patrick J. Leahy  
Chairman, Committee Of The Judiciary  
U.S. Senate  
224 Dirksen Office Building  
Washington D.C. 20510

Dear Senator Leahy:

I am writing you this October Sunday morning from South Mississippi to ask you to approve Judge Charles Pickering for his recent appointment by President Bush. I know your important job must be really hard; i.e. to approve somebody for a position and not really know him personally. I have known him and his wonderful family for over twenty years. His children attended the public high school with my twins, Chris and Parker. When myself and other civic minded citizens started a Boys and Girls Club in Laurel, he was always supportive with not only contributions but also, his presence at fund raisers as well as The Steak and Burger benefits at Christmas time.

A Couple of years after our Boys and Girls Club closed down due to funding shortages, Judge Pickering "collared" me at a wedding party. This was about a year and a half ago. He said, "Chris, we've got to get something going in Laurel for our black kids-I am tired of sending them to prison!" His statement was so heartfelt, so caring for these "at risk" children that he inspired me to begin anew with an effort to coordinate and organize our different resources in our city to attempt to meet all of the needs for our "at risk" children. Myself and a group of Laurel business leaders, educators and citizen groups have been meeting and brainstorming ideas to determine the best approach to our problems.

Judge Pickering has been at these meeting whenever possible, at times, even in ill health. He has encouraged me, yes, inspired me to work hard for these "at risk" children. If it hadn't been for his kind heart, I probably would not have acted. I know you know, Sir, the adage- "Bad things happen when good men do nothing." Charles is a good man. He has a good heart. I know your schedule is busy, but if you need to talk to me, or question me in any way about Judge Charles Pickering, please feel free to call me at 601-649-4800.

Sincerely,

Chris Posey

cc: Orrin Hatch

THOMAS E. ROYALS, PLLC

Attorney at Law  
110 North Congress Street, Suite 500  
Jackson, Mississippi 39201

Telephone: (601) 948-7777  
Facsimile: (601) 948-7780  
Email: royalslaw@aol.com

Mailing Address:  
Post Office Box 22909  
Jackson, Mississippi 39225-2909

October 29, 2001

Honorable Patrick J. Leahy  
Chairman  
Committee on Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D. C. 20510

Re: Judge Charles W. Pickering, Sr.

Dear Senator Leahy:

I write this letter in support of United States District Court Judge Charles W. Pickering, Sr., with reference to his nomination to the Fifth Circuit Court of Appeals.

Though I am a Democrat, I strongly support Judge Pickering's nomination to the Fifth Circuit Court of Appeals. I've handled many matters in his Court, some of them complicated, controversial, and with major issues.

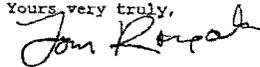
In addition to that, I have appeared before Judge Pickering on plea issues, sentencing issues, and motion practice. I have also been in his Courtroom and witnessed his sentencing of many different types of people. This includes black, white, Mexican-American, male and female. Both in my observation of Judge Pickering in Court and in my own cases, I can say with great enthusiasm that he is one of the fairest and most capable judges I have ever seen. I have commented to several other lawyers and judges that I never feel nervous in his Court because I know he will follow the law and do what is right and will not be swayed by politics, passion, prejudice, religion, nor his own preferences. He will follow the law and in matters where he has discretion, he will exercise that in a very wise, practical, and judicious manner.

I have never even suspected that Judge Pickering would show favoritism toward anyone for any of the above mentioned reasons nor that he would be biased against anyone for any reason, including, but not limited to, race, sex, political, or religious preferences.

Not only can I make this recommendation enthusiastically, I think I can say that this letter reflects the opinion of most of the lawyers who practice before Judge Pickering.

I appreciate your attention to these matters and am glad to get the chance to have input in the selection process by writing this letter of recommendation for the very able and honorable Judge Charles W. Pickering, Sr.

Yours very truly,



Thomas E. Royals

TER:jmb

cc: Honorable Orrin G. Hatch  
Ranking Member  
Committee on Judiciary  
224 Dirksen Office Building  
Washington, D.C. 20510

October 25, 2001

209 Pinewood Drive  
Battlesburg, ME 04022

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Dear Senator Leahy,

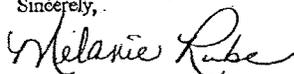
I am writing to urge you to confirm Judge Charles Pickering as a Fifth Circuit Court of Appeals Judge. I have had the privilege of working in Judge Pickering's courtroom for the past two years as a Deputy United States Marshal.

Judge Pickering brings honor and compassion to the bench. His courtroom is truly a center of justice and fairness for men and women of every race and religion. As a Deputy U.S. Marshal, I have been present for most of his courtroom sessions. I am always impressed by Judge Pickering's rulings and opinions. He puts his heart and soul into preparing each case.

I am overwhelmed at the compassion that Judge Pickering shows each and every defendant. He truly cares for the welfare of these defendants and their families. I believe it grieves him to see mothers and fathers separated from their loved ones. As a man of great conviction, I know that Judge Pickering would make a positive impact on the Fifth Circuit.

As a Deputy U.S. Marshal, I am proud to serve under a man who personifies justice. As a citizen of the United States, I am glad to know that in times like these, we have Judge Charles Pickering in the position to maintain dignity and responsibility in our courtroom. As a woman, I am pleased at the thought that we will have Judge Pickering looking out for the rights of women and children from the bench of the Fifth Circuit Court of Appeals.

Sincerely,



Melanie Rube

cc. Senator Orrin Hatch

SCANLON, SESSUMS, PARKER & DALLAS

A Professional Limited Liability Company

Attorneys at Law

1650 MIRROR LAKE PLAZA  
2829 LAKELAND DRIVE  
JACKSON, MISSISSIPPI 39208

TELEPHONE 601.933.2040  
FACSIMILE 601.933.2050  
INTERNET www.smpd.com

Pat H. Scanlon  
Direct No. 601-933-2041  
E-Mail: pscanlon@smpd.com

October 25, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: *Honorable Charles W. Pickering*  
Nominee for Fifth Circuit Court of Appeals

Dear Senator Leahy:

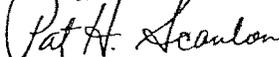
I write to support the nomination of the Honorable Charles W. Pickering to serve as a Judge of the United States Court of Appeals for the Fifth Circuit. I recommend Judge Pickering, without qualification, to the members of the Committee on the Judiciary.

I have known Judge Pickering since college and have observed with pleasure his accomplishments since that time. I have had the opportunity to appear as an attorney in cases handled by Judge Pickering. From my personal observation, I know that Judge Pickering decides the cases before him based on the evidence and the law, without regard to race, gender, color, or national origin.

I have been an active member of the bar for a number of years, including having the privilege of serving as the president of the Mississippi Bar. In all those years of contacts with other bar members, I have never heard any attorney or party state that Judge Pickering's rulings were in any way prejudiced.

In my opinion Judge Pickering's work on the United States District Court bench has given him valuable experience he can use as a member of the Court of Appeals. I believe that Judge Pickering would be an excellent Fifth Circuit Judge and a credit to the federal judiciary.

Sincerely,



Pat H. Scanlon

PHS/dlw

cc: Senator Orin Hatch

SCOTT J. SCHWARTZ, P.A.  
ATTORNEY AT LAW  
POST OFFICE BOX 15116  
229 WEST PINE STREET  
HATTIESBURG, MISSISSIPPI 39404

OFFICE PHONE (601) 545-2322  
FAX (601) 544-8146

February 1, 2002

Senator Patrick J. Leahy  
Chairman Committee on Judiciary  
U.S. Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Re: Judge Charles W. Pickering, Jr.

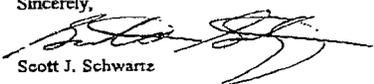
Dear Senator Leahy:

I am writing to you regarding your committee's review of Judge Charles W. Pickering, Jr., for a position on the Fifth Circuit Court of Appeals. I have represented criminal defendants and civil litigants before Judge Pickering for the past five (5) years. I can honestly state that there is not a more qualified jurist that I have ever appeared before. Judge Pickering has always ruled fairly on the issues presented in my cases, even though often times those rulings have not been in my favor. The recent criticism which Judge Pickering has received has not been deserved and does not accurately depict the Judge whom I have appeared before on so many occasions.

Recently I represented a young African-American gentleman who was charged in a crack cocaine operation within the Southern District of Mississippi. Based on the assistance provided by my client, the government moved for a downward departure in his sentence. Judge Pickering followed that recommendation and reduced my clients' sentence by some ten (10) years. Judge Pickering has always given careful consideration to the sentences he has imposed in the cases which I have handled. I have personally observed Judge Pickering take a true interest in trying to make criminal defendants turn their lives around to become productive citizens.

I have felt honored to practice before Judge Pickering and I feel that he is qualified for appointment to the Fifth Circuit Court of Appeals. Should you or any committee member have any questions, regarding my other experiences with Judge Pickering please do not hesitate to contact my office. I thank you for your consideration of my letter and I look forward to the confirmation of Judge Pickering.

Sincerely,

  
Scott J. Schwartz

## *Mt. Olive Baptist Church*

1313 Country Club Road      Hattiesburg, MS 39401  
Telephone (601) 582-3475      Fax (601) 582-0149  
E-Mail - Mt Olive Baptist@aol.com

*Reverend Arthur L. Siggers, Pastor*



*"The Light On The Hill"*

October 31, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate ...  
224 Dirksen Office Building  
Washington, DC 20510

Subject: Honorable Charles W. Pickering, Sr.

Dear Senator Leahy:

I am Arthur L. Siggers pastor of the Mt. Olive Baptist Church of 1313 Country Club Road in Hattiesburg, Mississippi; where I have been privileged to serve for the past 18 years.

Our fellowship is predominately African American with a membership of 1200. We are, furthermore, located in the Southern District of the Mississippi Federal Court Jurisdiction's area served by Judge Charles W. Pickering, Sr.

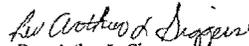
I have been involved in ministry in Southern Mississippi for over 21 years and have found Judge Pickering to have been open, honest, and fair to all the residents of his district and would like to voice my overwhelming support for his nomination and appointment to the United States Court of Appeals for the Fifth Circuit.

The assistance that Judge Pickering rendered when he was County Prosecuting Attorney of Jones County, Mississippi during the unprecedented trial of Ku Klux Klan members for the murder of Vernon Dahmer, is no small accomplishment. Judge Pickering demonstrated his dedication to the unbiased and unprejudiced administration of law and his application to not only African Americans, but others as well. That trait continued after his appointment to the United States District Court for the Southern District of Mississippi. I have had the opportunity to observe Judge Pickering during his administration of the United States District Court, which sits in Hattiesburg, Mississippi. He has always demonstrated a policy of not only "fairness" and one of "upholding the law" as it applies to all persons, but he has been particularly careful in preserving the rights of all prisoners, including African Americans who sought to pursue remedies in Judge Pickering's Court.

Senator Patrick J. Leahy 2

I can say without reservation, that the elevation of Judge Charles Pickering to the United States Court of Appeals for the Fifth Circuit, will be an asset to that Court and will provide the Fifth Circuit with a new member who will continue to uphold the rights of all citizens or individual, either civilly or criminally. I hope that you will respectfully confirm his nomination as a member of the United States Fifth Circuit Court of Appeals.

Sincerely,

  
Rev. Arthur L. Siggers  
Pastor

ALS/mc

cc: U.S. Senator Orrin Hatch

*SOUTH CENTRAL MISSISSIPPI BAR ASSOCIATION*

614 MAIN STREET  
POST OFFICE BOX 590  
HATTIESBURG, MISSISSIPPI 39403-0590

James Kearney Travis, III, President

Michael S. Adelman, Vice-President

William N. Graham, Treasurer

Joseph H. Montgomery, Secretary

James G. Thornston, Member at Large

Deborah Jones Gambrell, Past-President

---

October 29, 2001

Senator Patrick Leahy  
Chairman of the Committee on the  
Judiciary, U. S. Senate  
224 Dirksen Office Building  
Washington, DC 20510

Dear Senator Leahy:

Re: Nomination of Charles W. Pickering, Sr. to United States Court of Appeals for the Fifth Circuit

On behalf of the South Central Mississippi Bar Association I am enclosing herewith a Resolution adopted by the South Central Mississippi Bar Association supporting and endorsing the candidacy of United States District Judge Charles W. Pickering, Sr. for the United States Court of Appeals for the Fifth Circuit. The South Central Mississippi Bar Association includes the City of Hattiesburg and Forrest, Lamar, and Perry Counties, three (3) of the Counties served by the Hattiesburg Division of the United States District Court for the Southern District of Mississippi. Judge Pickering has been outstanding in the performance of his duties and responsibilities as a member of the judiciary of the United States, and is very much admired by the members of the South Central Mississippi Bar Association, including its minority members, for his fairness, impartiality, and consistency to all litigants in the administration of Justice. Judge Pickering is well qualified for the

Senator Patrick Leahy  
October 29, 2001  
Page Two

Position to which he has been nominated, and the South Central Mississippi Bar Association without reservation supports, commends, and endorses the candidacy of Judge Pickering for the United States Court of Appeals for the Fifth Circuit.

Sincerely,

South Central Mississippi Bar Association

By:   
James Kearney Trevis, III, President

ds

Enclosure

cc: Senator Orrin Hatch

**RESOLUTION OF THE  
SOUTH CENTRAL MISSISSIPPI BAR ASSOCIATION**

WHEREAS, Charles W. Pickering, Sr., District Judge for the United States District Court for the Southern District of Mississippi, has been accorded the honor of being nominated as a candidate for the United States Court of Appeals for the Fifth Circuit; and

WHEREAS, the South Central Mississippi Bar Association, which includes the City of Hattiesburg and Forrest, Lamar, and Perry Counties, three (3) of the Counties served by the Hattiesburg Division of the United States District Court for the Southern District of Mississippi, desires to officially endorse the candidacy of Charles W. Pickering, Sr. for the United States Court of Appeals for the Fifth Circuit; and

WHEREAS, Judge Pickering, since his admission to the Bar in 1961, has gained a wealth of experience in the legal profession in private practice and as a Prosecuting Attorney, a County Attorney, a Municipal Judge, a Mississippi State Senator, and as a United States District Judge for the Southern District of Mississippi for the last eleven (11) years; and

WHEREAS, throughout his distinguished career Judge Pickering has at all times exhibited the leadership, professionalism, civility, and personal courtesy to which all members of the legal community should aspire; and

WHEREAS, Judge Pickering has an exemplary record of commitment to public service, having served as Chairman of the Jones County Chapter of the American National Red Cross, Chairman of the Jones County Heart Fund, Chairman of the Jones County Drug Education Council, Co-Chairman of the United Givers Fund, and as the First Chairman of the Economic Development Authority of Jones County; and

WHEREAS, Judge Pickering has been outstanding in the performance of his duties and responsibilities as a member of the Judiciary of the United States, and his term as a District Judge for the United States District Court for the Southern District of Mississippi has been marked by the highest standard of judicial excellence and integrity; and

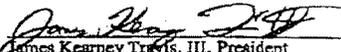
WHEREAS, Judge Pickering is very much admired by the members of the South Central Mississippi Bar Association, including its minority members, for his fairness, impartiality, and consistency to all litigants in the administration of justice, and his commitment to civil rights has been evidenced by his testimony in the 1960's against a former Ku Klux Klan Imperial Wizard and by the sponsorship of Petitions condemning the Klan, and by his role as a founding Board Member of the University of Mississippi's Institute for Racial Reconciliation; and

WHEREAS, the members of the South Central Mississippi Bar Association are firmly of the opinion that Judge Pickering is well-qualified for the position to which he has been nominated and that he would make an outstanding Judge on the United States Court of Appeals for the Fifth Circuit;

NOW THEREFORE, Be it Resolved that the South Central Mississippi Bar Association, by its Executive Committee, after having carefully considered the professional and personal qualifications and attributes of Judge Charles W. Pickering, Sr., does hereby unanimously and unequivocally support, commend, and endorse the candidacy of Judge Charles W. Pickering, Sr. for the United States Court of Appeals for the Fifth Circuit in his continued effort to serve the people of the United States.

Unanimously adopted by the Executive Committee of the South Central Mississippi Bar Association on this the 29<sup>th</sup> day of October, A.D., 2001.

South Central Mississippi Bar Association

By:   
James Kearney Travis, III, President



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**THE TIMES** *wire*

News    Home -> Editorial & Opinion -> Content    Wednesday 26 November, 2001

NEWS SEARCH

SEARCH

#### Editorials

### Judge Pickering gaining support

November 26, 2001

**Federal District Judge Charles Pickering of Laurel, awaiting U.S. Senate confirmation of his appointment to the Fifth Circuit Court of Appeals, has gained support for his nomination from a number of black business and civic leaders across the state.**

A highly qualified and highly ethical nominee, Judge Pickering's nomination by President Bush has been held up in the Senate by Democrats whose opposition to Pickering is primarily because he is a nominee of a Republican president.

One letter of support for Judge Pickering, written to U.S. Senate Judiciary Chairman Patrick Leahy, D-Vt, is from black U.S. District Judge Henry T. Wingate of Jackson. Judge Wingate is a former NAACP leader and a highly respected member of the federal judiciary.

Judge Wingate called Pickering "a fair judge who will be a fair judge on the United States Court of Appeals for the Fifth Circuit."

While Pickering was nominated to the Fifth Circuit by President Bush in May, a hearing on the nomination by the Democrat controlled Judiciary Committee was not held until a month ago, and Democrat members of the committee delayed approval even longer by asking Pickering for dozens of copies of unpublished opinions on women's, labor, and civil rights cases. In addition, some members of the committee even dug up a meaningless paper the Judge had written as a law student some 40 years ago.

Mississippians should express their disappointment in Democrat Congressman Benny Thompson's opposition to Pickering's appointment and his very visible effort to thwart confirmation.

Thompson's opposition is purely political and should be denounced by all Mississippians.

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Simply stated, Judge Pickering is an experienced and ethical judge, a man of integrity and honor, the kind of judge we need on the bench, both federal and state.

Hopefully, the support of Judge Wingate and other black leaders will more than offset the efforts of Thompson and his followers.

Judge Pickering should be confirmed without further delay and promoted from the District Courts to the Circuit Court of Appeals.

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### Reader Opinions

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ATTORNEYS AT LAW  
100 COURTHOUSE SQUARE  
POST OFFICE BOX 1216  
OXFORD, MISSISSIPPI 38666  
FACSIMILE (662) 234-7098  
TELEPHONE (662) 234-7070

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L. "MARK" PERCY

October 29, 2001

Honorable Patrick Leahy,  
United States Senator  
Chairman of the Judiciary Committee  
United States Senate  
433 Russell Senate Office Building  
Washington, D.C. 20510

RE: *Honorable Charles Pickering, United States District Judge, Southern District of Mississippi*

Dear Chairman Leahy:

Although I have been a lifelong Democrat - my son is a Democratic State Senator in Mississippi - as a former president of the Mississippi Bar in 1992 - 1993, I believe that our judiciary should consist of the best available lawyers. Although partisan in my politics, I have tried to be professional in making any recommendations about a Judicial nominee.

I have known Judge Pickering for a number of years. I knew him as a lawyer who had a reputation for ability and integrity. His reputation as Judge in the Southern District of Mississippi is as a lawyer's judge. In the terms of legal scholarship, integrity, experience or general capabilities as a judge, the President could not have nominated anyone more qualified than Judge Charles Pickering.

I have a reservation about Judge Pickering's appointment to the Court of Appeals for the Fifth Circuit - Mississippi will lose a truly outstanding District judge

I have followed the judiciary appointments, both state and federal, very closely. My main complaint is that so few judges appointed to appellate courts, as well as trial courts, have very little trial experience. Judge Pickering is the exception. I have no idea how many trials he had as a lawyer, but I know they were numerous.

I should mention that, although I do often represent people who have been sued, I am probably better known as a "plaintiff lawyer." I do not like putting titles on people; however, I do think the committee should know most "plaintiff lawyers" I know greatly admire Judge Pickering as a trial judge.

This letter of recommendation is as strong as I could make it for any judicial nominee. If it fails as an endorsement of Judge Pickering, it is because of my failure to articulate how strongly I feel that his nomination would enhance the quality of the United States Court of Appeals for the Fifth Circuit.

Cordially,

Grady F. Tollison, Jr.

GFT/bm



THE MISSISSIPPI BAR

OFFICE OF THE PRESIDENT  
W.C. "Cham" Trotter, III  
President

Post Office Box 138  
Belzoni, Mississippi 39018-0138  
Telephone: (662) 247-1462  
Fax: (662) 247-3333  
e-mail: law@capital1.com

October 30, 2001

The Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Re: Nomination of Honorable Charles Pickering for  
Fifth Circuit Court of Appeals

Dear Senator Leahy:

I wanted to take this opportunity to write to you in support of the nomination of District Judge Charles Pickering to be a member of the Fifth Circuit Court of Appeals. I have known Judge Pickering since 1971, and I have never heard anything but the highest praise for his ability, scholarship and judicial temperament.

Judge Pickering has served with the highest distinction as a District Judge and has earned the respect of the Bench and Bar here in Mississippi. Our State has been led in the last few years by individuals working tirelessly to overcome forty year old stereotypes that have attached to our State. Judge Pickering has been in the forefront of these efforts and would continue to do so as a member of the Court of Appeals.

As President of The Mississippi Bar, I urge the Judiciary Committee to act favorably upon his nomination.

On a personal side, I enjoyed meeting you last May at the White House when President Bush announced his first eleven Court of Appeals appointments. I was there for the American Bar Association Day in Washington, and I enjoyed meeting you and other Committee members at the reception following. Perhaps we will have an opportunity to meet and visit again next May when the ABA returns.

With best regards, I am

Sincerely yours,

W. C. Trotter, III

WCT,III:eks  
cc Senator Orrin G. Hatch

WALLER & WALLER  
ATTORNEYS AT LAW  
POST OFFICE BOX 4  
220 SOUTH PRESIDENT STREET (39201)  
JACKSON, MISSISSIPPI 39205-0004

BILL WALLER  
BOB WALLER  
DARLENE D. BALLARD

TELEPHONE 601-354-5252  
FACSIMILE 601-354-2681  
EMAIL: [wll@wfirm@aol.com](mailto:wll@wfirm@aol.com)

January 14, 2002

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington D.C. 20510

Re: Judge Charles W. Pickering, Sr. Appointee: Fifth Circuit,  
United States Circuit Court of Appeals

Dear Senator Leahy:

Please accept my recommendation for the confirmation of the appointment of Judge Pickering to the Fifth Circuit and I make this recommendation based upon thirty (30) years of personal acquaintance and close association.

While serving as Governor of Mississippi, 1972-76, Judge Pickering served in the Mississippi Senate and I had numerous contacts with him regarding his fairness and objectivity in dealing with persons of all genders and races. Subsequently, I had numerous contacts with him in an attorney-Judge relationship, which gave me an opportunity to again observe his fair and unbiased attitude toward people and legal issues.

I commend him to you as a totally fair, unbiased and a Judge with impeccable judicious temperament. He will be fair to all parties on all issues in his Court.

Thank you for your consideration of this matter and we look forward to the confirmation of Judge Pickering.

Very sincerely yours,



William L. Waller, Sr.

January 30, 2002

Senator Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Dear Senator Leahy:

I am very disturbed by what I know to be unwarranted attacks leveled at Judge Charles W. Pickering, Sr., by groups who oppose his nomination to the United States Court of Appeals for the Fifth Circuit. From the comments being made it is apparent that his opponents do not know Judge Pickering and have no understanding of what kind of person he is. Those of us who have known him for many years, not just as a lawyer and judge but also as father, grandfather and community and church leader, have a very different opinion about his nomination and strongly support his confirmation.

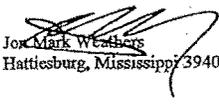
I have been a trial lawyer for almost thirty years. Although I happen to be white, I have represented African-Americans in civil actions, both as plaintiffs and as defendants, in Judge Pickering's court. He has always treated my clients fairly, courteously and with dignity. Based upon my experience, the color of one's skin, whether litigant or lawyer, makes absolutely no difference in how he is treated. Likewise, race plays no part in any ruling, decision or in the ultimate outcome of the litigation.

Through the years Judge Pickering has exhibited many qualities which should assist your committee in making the right decision. His character, morals, and ethics are beyond reproach. He has been and continues to be fair, honest, ethical, compassionate, and thoughtful as he carries out his duties as a district judge. Although he is courteous and helpful to attorneys who appear in his court, he requires them to be prepared and to represent zealously the interests of their clients. He has a strong work ethic. He actively manages his cases and encourages settlement at the earliest stages of litigation. Should parties be unable to settle, he makes every effort to schedule trials at the earliest opportunity while affording every consideration to the schedule's and availability of the parties, the attorneys, and their witnesses. He believes that justice delayed is justice denied.

In summation, Judge Pickering is a people's judge, and it really doesn't matter to him if a person who comes before him is male or female, black or white, rich or poor, or a member of any other group capable of being categorized. I personally believe that's the way it should be if you are going to have the distinction and privilege of being called Judge.

Do the right thing. Confirm Judge Pickering's nomination.

Sincerely yours,

  
Jox Mark Weathers  
Hattiesburg, Mississippi 39402



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TONY A. SCOTT  
224 Dirksen Office Building  
Washington, D.C. 20510  
Phone: (202) 779-3679  
Fax: (202) 779-3679  
E-Mail: [action@abota.org](mailto:action@abota.org)  
Website: <http://www.abota.org>

Reply to: P. O. Box 22567  
Jackson, MS 39225  
Tel: 601.985.4516  
Fax: 601.985.4590  
[tony@abota.org](mailto:tony@abota.org)

Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D. C. 20510

Re: Nomination of Judge Charles W. Pickering, Sr.  
To the United States Court of Appeals, 5<sup>th</sup> Circuit

Dear Senator Leahy:

I urge you and your colleagues of the Committee on the Judiciary to promptly give favorable consideration to the nomination by President Bush of Judge Charles W. Pickering, Sr. to the United States Court of Appeals, 5<sup>th</sup> Circuit. I write to you as an individual member of The Mississippi Bar and of the American Board of Trial Advocates, but not to present the view of either organization.

I proudly write as a practicing trial lawyer, who happens to have had the good fortune to have been elected President of the American Board of Trial Advocates which is a "by-invitation" organization of 5,500 civil trial lawyers throughout the United States that are about evenly balanced between plaintiff and defense lawyers. We have tried a minimum of twenty (20) civil jury trial to a conclusion as lead counsel. Therefore ABOTA members feel we have a unique perspective from which to evaluate the abilities of others who claim to be trial lawyers, as well as the qualifications and judicial demeanor of those who preside.

I can say without hesitation that Judge Pickering is exceptionally well qualified in the eyes of this lawyer who has been trying - and appealing - cases of all sorts for almost thirty-eight (38) years. Frankly I do not know how many years I have known Judge Pickering, but I am personally familiar with his character and his abilities.

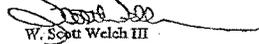
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Honorable Patrick J. Leahy  
October 25, 2001  
Page 2

I have dealt with him often as adversary counsel, appeared before him as a trial judge, dealt with him when I was President of the Mississippi Bar and have known him as a person - a good person! President Bush chose well when he nominated Judge Charles Pickering for this position, and I urge you and your colleagues to approve the nomination of this district court judge who will bring to the appellate bench a necessary appreciation of the battles in the trial trenches, who will fairly apply "the law" to all whose cases come before him and who brings impeccable character and integrity to the bench.

Thank you for allowing me to intrude into your busy schedule and for your anticipated favorable consideration of the letter and of Judge Pickering's nomination. Please feel free to have a member of the Committee staff contact me if I can be of further assistance.

Very truly yours,



W. Scott Welch III

WSW/jp  
::ODMA\GHO\DMA\Jackson\5564991

cc: Honorable Orrin Hatch, United States Senate

LAW OFFICES  
**SAMUEL H. WILKINS**  
ATTORNEY AND COUNSELOR AT LAW

155 TOMBICHER STREET  
JACKSON, MISSISSIPPI 39204  
FAX (601) 354-8773

REPLY TO  
POST OFFICE BOX 806  
JACKSON, MISSISSIPPI 39209  
PHONE (601) 354-8778

COPY

January 18, 2002

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

RE: Honorable Charles W. Pickering, Sr.

Dear Senator Leahy:

Please accept this as my wholehearted endorsement of Honorable Charles W. Pickering, Sr., for a Judgeship on the United States Court of Appeals for the Fifth Circuit.

I first met Judge Pickering in 1956. He was President of the student body at Jones County Junior College, Ellisville, Mississippi, at a time when I was attending the school on a basketball scholarship. Our friendship has continued from that time to the present.

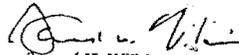
We attended the Law School together at the University of Mississippi. Judge Pickering continued to demonstrate the strong leadership and academic qualities that I had first observed several years earlier in Junior College.

Our paths did not cross on a regular basis during the early years of our respective practices. However, the Mississippi Bar is a relatively small, close-knit organization and I did know that he was an effective and ethical lawyer held in high esteem by the lawyers and judges in his area.

Since his appointment as a District Court Judge I have appeared in Judge Pickering's Court on a regular basis. The playing field is always level and you do not have the sense that the Judge is a part of the prosecutorial process, as is, unfortunately, sometimes the case. Be it the Government, a criminal defendant, a plaintiff or a civil defendant, courteous and fair treatment is judiciously dispensed, regardless of race, gender, age or station in life.

Judge Pickering has the intelligence, the judgment, and the integrity expected of our Appellate Judges. It is without reservation that I recommend him for the job.

With kindest regards,

  
Samuel H. Wilkins

STENNETT, WILKINSON & PEDEN  
A PROFESSIONAL ASSOCIATION  
 ATTORNEYS AND COUNSELORS AT LAW

GENE A. WILKINSON  
 Direct (601) 982-3330  
 Extension 226

MAILING ADDRESS:  
 POST OFFICE BOX 1238  
 JACKSON, MISSISSIPPI 39206-1308  
 DELIVERY ADDRESS:  
 1117 CRANE RIDGE DRIVE, SUITE 200  
 JACKSON, MISSISSIPPI 39216-4602  
 TELEPHONE (601) 982-3330  
 TELEFAX (601) 982-3311  
 E-MAIL: [speden@stclaw.com](mailto:speden@stclaw.com)

January 30, 2002

The Honorable Patrick J. Leahy, Chairman  
 Committee on the Judiciary  
 United States Senate  
 224 Dirksen Senate Office Building  
 Washington, D. C. 20510

Re: Nomination of Charles W. Pickering, Sr., to United  
 States Court of Appeals for the Fifth Circuit

Dear Senator Leahy:

I am writing this letter in support of the nomination of United States District Judge Charles W. Pickering, Sr., of the Southern District of Mississippi, to serve on the United States Court of Appeals for the Fifth Circuit.

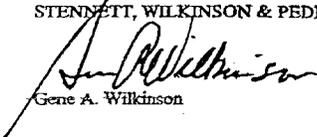
I am a practicing attorney in the City of Jackson, Mississippi, and I have been a member of the Mississippi Bar since 1958. My law firm and I have long been active in Democratic Party affairs. I might mention that this firm served as counsel to the campaign of the late United States Senator John C. Stennis, Democrat of Mississippi, during his final election to the United States Senate. This Democratic Party background in no way lessens my support for Judge Pickering, a Republican.

I have known Judge Pickering for many years as he has served the people of Mississippi and of the United States in various capacities. He is a person of high moral character. As a United States District Judge, he has won the respect of lawyers and of parties who have come before him for his courtesy, professionalism, legal acumen, fairness, judicial demeanor, and devotion to the law.

Judge Pickering is highly respected in Mississippi. I believe that he would be a distinguished appointee to the United States Court of Appeals for the Fifth Circuit, and I respectfully urge his confirmation by you and other members of the United States Senate.

Respectfully yours,

STENNETT, WILKINSON & PEDEN

  
 Gene A. Wilkinson

GAW:br  
 cc The Honorable Orrin Hatch



Forrest, Lamar, Merlen, Pearl River and Perry Counties  
P. O. Box 1584 - HATTIESBURG, MISSISSIPPI 39403-1584  
601-546-0022 - FAX 601-543-6023

JOHNNY L. WILLIAMS  
CHANCELLOR, PLACE THREE

Honorable Patrick Leahy  
Chairman Senate Judiciary Committee  
United States Senate  
224 Dirksen Office Building  
Washington, DC 20510

Re: The Appointment of Charles Pickering

Dear Sir:

I write in support of the appointment of United States Judge Charles W. Pickering, III to the Fifth Circuit Court of Appeals. Charles Pickering is an able, outstanding and fair minded judge. I could not conceive that he would exhibit gender bias toward women inside or outside a court of law.

As an African American I have personal knowledge and experience of his efforts to heal the wounds of racial prejudice, and to resolve conflicts between the races in our state. As someone who experiences racial prejudice, both open and subtle, I can only say that my admiration for Judge Pickering is immense.

I sincerely appreciate all the efforts made by you and your committee in order to insure fairness in our federal judiciary. I urge you and your fellow committee members to recognize diverse opinions of persons, such as myself, who function and work at ground level in our local communities.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in cursive script that reads "Johnny L. Williams".

Johnny L. Williams



*The*  
**University of Mississippi**  
Oxford • Jackson • Tupelo • Southaven

Center for the Study of Southern Culture  
Post Office Box 1848  
University, MS 38677-1848  
(662) 915-5993  
Fax: (662) 915-5814  
E-mail: [csoc@olemiss.edu](mailto:csoc@olemiss.edu)  
URL: <http://www.olemiss.edu/depts/south>

January 29, 2002

The Honorable Senator Patrick Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
2224 Dirksen Office Building  
Washington, DC 20510

Dear Senator Leahy:

I am pleased to write in support of Judge Charles Pickering's nomination for a judicial appointment. I have known Judge Pickering for about three years, and I have worked closely with him on the Advisory Board for the Institute for Racial Reconciliation at the University of Mississippi.

The University established the Institute to take a leadership role in promoting racial reconciliation in Mississippi communities and, in the process, to establish models for ways to achieve this ideal elsewhere as well. It is an ambitious undertaking, and Judge Pickering has shown steadfast devotion to the ideals of the Institute and to finding practical ways to make it work. I have served as chair of the Institute's Advisory Board since its founding, and I have found Judge Pickering to be a source of sound insight and good judgment as issues have arisen on how to push forward the Institute's work. His commitment exceeds virtually else's on the Board, seen in his attendance at meetings, his advanced preparation, and his thoughtfulness about the necessity for our society to devote itself to racial reconciliation.

I know Judge Pickering to be a man of principle, committed to achieving racial equality and a just society. He is without prejudice, a Southerner who knows the cost of racial injustice in the past and the urgency of racial reconciliation.

Sincerely,

Charles Reagan Wilson  
Director and Professor of History

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI

245 EAST CAPITOL STREET  
SUITE 109  
JACKSON, MISSISSIPPI 39201

CHAMBERS OF  
HENRY T. WINGATE  
UNITED STATES DISTRICT JUDGE

October 25, 2001

Honorable Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Office Building  
Washington, D.C. 20510

Dear Senator Leahy:

I write this letter on behalf of Judge Charles Pickering, United States District Judge for the Southern District of Mississippi who presently is undergoing confirmation by the United States Senate for a position on the United States Court of Appeals for the Fifth Circuit.

I am a United States District Judge for the Southern District of Mississippi. Appointed in 1985, I was the first African-American appointed to the bench in Mississippi's history. Before my elevation to the bench, I received many honors and recognitions from various organizations, including the National Association for the Advancement of Colored People ("NAACP") for my community involvement and work. Also, prior to my elevation to the bench, I served on the NAACP Board for the Jackson, Mississippi, Branch of the NAACP.

I have known Judge Pickering for over 16 years. I met him when he was practicing before me as a lawyer. He was always gracious, prepared and professional. He was also very cordial and respectful.

Later, Judge Pickering was appointed to the bench to serve, along with me, the Southern District of Mississippi. The quality of our friendship increased. More than just colleagues, we spent quality time together discussing not only our juridical concerns but also the plight of our country relative to the race issue.

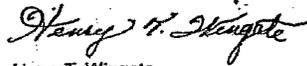
Honorable Patrick J. Leahy  
Page 2  
October 25, 2001

I have found Judge Pickering genuinely committed to making a difference on this matter. Prior to his interest in an appointment to the Fifth Circuit, Judge Pickering discussed these matters with me. Prior to his interest in an appointment to the Fifth Circuit, Judge Pickering would ask me my opinion on the best mechanism for involvement. Prior to his interest in an appointment to the Fifth Circuit, Judge Pickering joined the Institute for Racial Reconciliation at the University of Mississippi, whose aim is to combat racism and promote racial harmony. And, prior to his interest in an appointment to the Fifth Circuit, Judge Pickering had agreed to join me on a lecture circuit around the State to encourage racial togetherness.

Since I am highly visible in the Southern District of Mississippi, constantly involved in various community projects, and since I know most of the members of the Hattiesburg, Mississippi, Bar (I handled this area of the Southern District of Mississippi prior to Judge Pickering's appointment), I should like to think that attorneys aggrieved over Judge Pickering's rulings on racial grounds would have mentioned that allegation to me. I have not heard any such criticisms.

Judge Pickering is a committed Christian who recognizes that racism is incompatible with God's law, who recognizes that racism is destructive and contrary to the lofty principles of our beloved Constitution. Judge Pickering has been a fair United States District Judge, and I am convinced that he will be a fair judge on the United States Court of Appeals for the Fifth Circuit.

Respectfully,



Henry T. Wingate

HTW:scm

cc: Senator Orrin Hatch

Watkins Ludlam Winter & Stennis, P.A.  
ATTORNEYS AT LAW

North State Street (39202)  
Post Office Box 427  
Jackson, Mississippi 39205-0427  
Fax (601) 949-4804  
www.watkinsludlam.com

Gulfport, Mississippi  
Jackson, Mississippi  
Olive Branch, Mississippi

William F. Winter  
Shareholder  
Resident in Jackson  
Direct Dial (601) 949-4800  
Main (601) 949-4900  
www.wf@watkinsludlam.com

October 25, 2001

The Honorable Patrick J. Leahy  
Chairman, Judiciary Committee  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Mr. Chairman:

Please permit me to express to you my support for the confirmation of the Honorable Charles Pickering of Mississippi for a position on the Fifth Circuit Court of Appeals.

As a former Democratic Governor of Mississippi and as a long-time colleague of Judge Pickering in the legal profession and in the public service, I can vouch for him as one of our state's most respected leaders.

While he and I have not always been in agreement on certain public issues, I know that he is a man of reason and sound judgment. He is certainly no right-wing ideologue. He will bring a fair, open and perceptive mind to the consideration of all issues before the court.

I have been particularly impressed with his commitment to racial justice and equity. He and I have worked together for a number of years in the advancement of racial reconciliation, and we serve together on the board of the Institute for Racial Reconciliation at the University of Mississippi. He has been one of this state's most dedicated and effective voices for breaking down racial barriers.

Judge Pickering has demonstrated in every position of leadership which he has held a firm commitment to the maintenance of a just society. I believe that he will reflect those values as a member of the Fifth Circuit Court of Appeals, and I commend him to you as one who in my opinion will be a worthy addition to that body.

Sincerely,

  
William F. Winter

WFW/gn

cc: Senator Orrin G. Hatch

