Why the Senate Judiciary Committee Was Right to Reject the Confirmation of Charles W. Pickering, Sr. to the United States Court of Appeals for the Fifth Circuit

People For the American Way

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Ralph G. Neas
President

2000 M Street NW ♦ Suite 400 ♦ Washington, DC 20036
Telephone 202.467.4999 ♦ Fax 202.293.2672 ♦ E-mail pfaw@pfaw.org ♦ Web site http://www.pfaw.org

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On March 14, 2002, the Senate Judiciary Committee rejected President Bush's nomination of Mississippi federal district court judge Charles W. Pickering, Sr., championed by Senator Trent Lott, to the United States Court of Appeals for the Fifth Circuit. The Committee's decision to reject Pickering's lifetime elevation to the powerful Court of Appeals followed an exhaustive examination of Pickering's record, scrutiny that produced disturbing conclusions. Pickering's record, both before and since he became a judge, demonstrates insensitivity and hostility toward key legal principles protecting the civil and constitutional rights of minorities, women, and all Americans. As a judge, Pickering in a number of instances has allowed his own beliefs to trump his responsibility to follow the law. And his decisions as a judge have been reversed on a number of occasions by conservative appellate court judges for disregarding controlling precedent on constitutional rights and for improperly denying people access to the courts.

Pickering's confirmation hearings served to strengthen the case against elevating him to the Court of Appeals. Not only did his testimony fail to answer the serious concerns that had been raised about his record, but it also raised additional concerns. In particular, the Committee's February 2002 hearing revealed that Judge Pickering had gone to extraordinary lengths and engaged in unethical conduct, according to several legal ethics experts, in order to achieve a more lenient sentence for a defendant convicted in a cross-burning case. Also, Judge Pickering's efforts to explain the discrepancy between his earlier testimony that he had never had "any contact" with the infamous Mississippi Sovereignty Commission, and the documented fact that he had, raised questions about his credibility. And Judge Pickering's solicitation of letters in support of his confirmation from lawyers who may appear before him and his request that they send such letters to him raised additional ethical concerns.

Numerous state and national organizations opposed Pickering's confirmation, including every chapter of the NAACP in his home state, the national NAACP, the Magnolia Bar Association (Mississippi's African American bar group), and a wide coalition of other civil

rights and public interest organizations, including People For the American Way. Many newspaper editorials also urged the Judiciary Committee not to confirm Pickering. For all of the reasons discussed below and previously addressed by us and by others opposed to Pickering's confirmation, the Judiciary Committee unquestionably made the right decision not to give him a lifetime seat on the Court of Appeals.

Despite President Bush's frequent claim that he is a "uniter, not a divider," he has re-nominated Judge Pickering to the Fifth Circuit. He has done this despite the troubling information that has come to light about Judge Pickering's record and his conduct. He has done this despite the fact that, to our knowledge, no federal judicial nominee who has been rejected in one Congress has ever been re-nominated by the President to the same position. Perhaps most disturbing, President Bush has re-nominated Judge Pickering despite the fresh wounds that remain from Trent Lott's recent reopening of the scars of this country's segregated past. This is all the more disturbing given Pickering's present day insensitivity and hostility toward key civil rights principles and protections.

Without repeating all of the many arguments against Judge Pickering's confirmation, this report summarizes the most significant reasons why the Judiciary Committee was right to reject Judge Pickering's confirmation and why it should do so again. It is drawn from the more comprehensive reports that we issued last year and that are listed in the Appendix along with other resources concerning Judge Pickering. As those materials and this report confirm, and as the *Los Angeles Times* has recently stated, Judge Pickering "now has been nominated two times too many." Editorial, "Bush's Full-Court Press," *Los Angeles Times* (Jan. 13, 2003).

THE ISSUE WAS AND REMAINS JUDGE PICKERING'S RECORD

Contrary to the disinformation campaign that was waged by right-wing leaders in support of Pickering's nomination in the last Congress and that is being waged once again, opposition to Judge Pickering's promotion to the Court of Appeals was not then and is not now a personal attack on him as an individual. As was made abundantly clear in the lengthy reports issued by

People For the American Way and other organizations, the opposition to Pickering's confirmation focused precisely on his judicial philosophy and the quality of his judicial work. In particular, those reports addressed Judge Pickering's long public record, first as a Mississippi state Senator and, since 1990, as a federal district court judge, the very positions that reflect most particularly on his qualifications as well as on his view of legal principles and his approach to judging.

As those reports demonstrate, much of the opposition to Pickering's confirmation properly centered on concerns about his troubling civil rights record, which is further discussed below. In response to these legitimate concerns, a number of Pickering's supporters accused those who had raised those concerns of calling Pickering a racist. This was a false and irresponsible charge, made in an effort to deflect scrutiny of the real issues. In effect Judge Pickering's supporters argued that it is impossible to criticize Pickering's public record on the principles that govern civil rights law without accusing him of being a racist. By reducing carefully documented concerns about the impact of Pickering's rulings, judicial philosophy, and record as a public official into an alleged smear about Pickering's personal attitudes on race, some of Pickering's supporters set up a straw man of "race-baiting" that they hoped to dismiss with the fact that some African Americans supported his confirmation.

As with Trent Lott and civil rights, the question is not what is in Judge Pickering's heart but in his record. The question is not whether, as Pickering's supporters claim, he is a decent man who has done personally decent things in his life, but whether he has a judicial philosophy that threatens civil rights protections. We acknowledge, as we have previously, that Pickering has personally performed decent if not courageous acts in Mississippi that have contributed to positive race relations.[1] But the stilted view of some of Pickering's supporters that only

[1] Among these, according to Judge Pickering's supporters, was his brief trial testimony in 1967 against a leader of the Ku Klux Klan. It is true that this was a courageous and commendable act. To the extent, however, that Pickering's supporters have repeatedly cited this act in an effort to bolster his civil rights record, it is worth noting that by 1967, "even the white establishment of Mississippi had begun to decide that Klan violence was bad for business." Clarence Page, "Fight Over Judges Replays Our Bitter History," *Chicago Tribune* (Feb. 13, 2002) (citing William Taylor, who at the time was Staff Director for the U.S. Civil Rights Commission). Indeed, Clear Burning, a book by Chet Dillard, one of Judge Pickering's supporters, indicates that growing Klan violence was threatening the business establishment in Laurel, Pickering's home town.

deliberate racism threatens civil rights principles and progress blinds them to the fact that it is quite possible for Judge Pickering to treat people fairly and decently in his personal interactions and to approach broader constitutional and legal questions in ways that threaten the enforcement of civil rights protections. As the examination of Judge Pickering's record has revealed, his judicial philosophy would pose a grave danger to the rights and liberties of ordinary Americans if he were to be elevated to the Fifth Circuit, which already has issued a number of troubling decisions on civil and constitutional rights.

PICKERING'S RECORD AS A FEDERAL JUDGE

Pickering's record as a federal judge reflects insensitivity and even hostility toward key principles and remedies that now safeguard civil rights. For example, Pickering has criticized the "one-person, one-vote" principle recognized by the Supreme Court under the 14th Amendment. This principle, which calls for election districts to be nearly equal in population in order to protect the equality of all voters in our democracy, has been called one of the most important guarantees of equality in our Constitution. Nonetheless, Pickering has called the principle "obtrusive," and suggested that large deviations from equality in drawing legislative district lines, which the Supreme Court has held presumptively unconstitutional, were "relatively minor" and "de minimis." See "Report of People For the American Way Opposing the Confirmation of Charles W. Pickering, Sr. to the U.S. Court of Appeals for the Fifth Circuit (Jan. 24, 2002) (hereafter "PFAW Report"), at 4-5.

Judge Pickering has also criticized or sought to limit important remedies provided by the Voting Rights Act. In order to redress serious problems of discrimination against African American voters, the courts (including the Supreme Court and the Fifth Circuit) have clearly recognized the propriety and importance of creating majority-black districts as a remedy under appropriate circumstances. Judge Pickering, however, has severely criticized this significant form of discrimination relief, calling it in one opinion "affirmative segregation." He has also suggested a narrow interpretation of a key provision of the Voting Rights Act, contrary to Supreme Court precedent. PFAW report at 5-6.

In cases involving claims of employment discrimination, Judge Pickering has repeatedly inserted into his rulings severe criticisms of civil rights plaintiffs and the use of civil rights laws to address alleged discrimination. For example, he has disparagingly stated that the courts "are not super personnel managers charged with second guessing every employment decision made regarding minorities." He has also demonstrated a propensity to make it harder for some people to obtain access to justice, especially less powerful litigants, including prisoners and people raising civil rights and civil liberties claims. PFAW Report at 6-7; 12-17; 18-20.

In addition, Judge Pickering has been reversed more than a dozen times by the Fifth Circuit in unpublished opinions, used by the Court of Appeals to decide cases in which the district court judge has ignored or violated "well-settled principles of law." Many of these Pickering cases involved constitutional or civil rights, criminal procedure, or labor issues. In this regard, it is worth noting that Pickering was one of two district court judges within the Fifth Circuit nominated by President Bush to the Court of Appeals. The other, conservative Edith Brown Clement, who was elevated to the Fifth Circuit after serving as a district court judge for a slightly shorter period than Pickering, was never reversed in an unpublished opinion by the Fifth Circuit, according to the information that she provided to the Senate. PFAW Report at 12-17.[2]

At his Feb. 7, 2002 confirmation hearing, while Judge Pickering pointed out that, as with most federal trial judges, only a small percentage of his decisions overall have been reversed, he did not explain his reversals for violating "well-settled principles of law." In one such case involving a First Amendment claim by a prisoner and in which Judge Pickering was effectively acting in an appellate capacity reviewing the recommendation of a magistrate, the magistrate had missed or ignored a controlling Fifth Circuit precedent which would have required Pickering to rule in the prisoner's favor. Pickering relied entirely on the magistrate, conducted no research of his own, and essentially rubber stamped what the magistrate had recommended, which was to rule against the prisoner. The Fifth Circuit reversed, citing the decision that the magistrate and Pickering had not even mentioned. When Senator Leahy questioned Judge Pickering about this

[2] Subsequent research by the Judiciary Committee found one such reversal of a Clement ruling that she had apparently overlooked.

case at the Feb. 7, 2002 hearing, Pickering's response was that he and the magistrate had "goofed." This was only one of a number of such "goofs" –- failure to follow controlling law –- as we have previously documented. PFAW Report at 12-17.

This aspect of Judge Pickering's record bears not only on his approach to judging but on the quality of his judicial work. As Senator Leahy stated on March 14, 2002 in explaining why Judge Pickering lacked the qualifications to be promoted to the Court of Appeals, Judge Pickering's "record on the United States District Court bench over the last 12 years, as reflected by a number of distressing reversals, does not commend him for elevation. Instead, it demonstrates a habit of somewhat inattentive judging, of relying to his detriment on magistrates and of misstating and missing the law."[3] And as Senator Biden stated in explaining why Judge Pickering should not be confirmed, "A judge who fails to rule correctly on principles of law that are well-settled should not be elevated to a bench where he would be frequently called upon to address unsettled, complex and difficult legal questions."[4]

PICKERING'S RECORD AS A STATE SENATOR

Several aspects of Pickering's public record before he became a federal judge drew particular attention and concern when President Bush first nominated him to the Court of Appeals. In particular, these included Pickering's record as a Mississippi state Senator on voting rights issues, a record that foreshadowed his actions as a judge on such issues.

As a Mississippi state Senator, Pickering supported voting-related measures that helped perpetuate discrimination against African Americans. For example, in 1973, Pickering voted for a partial Senate redistricting plan that harmed minority voting rights by continuing to provide for county-wide voting in a populous county rather than create single-member districts. In 1975,

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[3] Statement of Chairman Patrick Leahy, Senate Judiciary Committee, On the Nomination of Charles W. Pickering to be a Judge on the United States Court of Appeals for the Fifth Circuit, Executive Business Meeting, at 3 (Mar. 14, 2002).

[4] Statement of Senator Joseph R. Biden, Jr. on the Nomination of Judge Charles W. Pickering, Sr., Committee on the Judiciary, at 2 (Mar. 14, 2002) (emphasis in original).

Pickering voted for a broader Senate-passed measure that simply provided for county-wide voting. Also in 1975, when Congress was to renew Section 5 of the Voting Rights Act mandating pre-clearance of voting changes in jurisdictions with a history of discrimination like Mississippi, some legislators opposed it. Pickering co-sponsored a Mississippi Senate resolution calling on Congress to repeal the provision or apply it to all states (which would in effect have gutted Section 5) regardless of their discrimination history. PFAW Report at 8-9.

In 1976 and 1979, Pickering co-sponsored so-called "open primary" legislation that would have abolished party primaries and required a majority vote to win state office. When Pickering was questioned at his Feb. 7, 2002 hearing by Sen. Feinstein about his support for this legislation, which an African American state legislator had stated would diminish the influence of black voters, Pickering testified that he did not view the open primary bill as having a negative effect on African Americans because, he said, they did not vote in Mississippi in any numbers until 1971. In fact, there were significant increases in African American voting in Mississippi after the 1965 Voting Rights Act. In any event, as noted, Pickering's sponsorship of the open primary bill occurred later, in 1976 and 1979, and both times the Justice Department stopped it from taking effect precisely because of concerns about its discriminatory impact on African American voters. PFAW Report at 9.

Pickering has long been a staunch opponent of a woman's right to reproductive freedom. Among other things, as a state Senator, he voted for a resolution calling for a constitutional convention to propose a "human life" amendment to the Constitution. PFAW Report at 24. Although Judge Pickering as of his February 2002 confirmation hearing had not had a case come before him dealing with reproductive freedom and still has not to our knowledge, the Fifth Circuit has heard at least a dozen such cases since 1992. This made and still makes Pickering's record on these important issues pertinent in considering how he, as a judge, would approach cases that raise them.

PICKERING'S CONFIRMATION HEARINGS NOT ONLY RAISED ADDITIONAL CONCERNS ABOUT HIS RECORD BUT ALSO BROUGHT TO LIGHT ETHICAL LAPSES IN HIS CONDUCT AS A FEDERAL JUDGE

Unlike many of President Clinton's nominees to the federal bench who were never even given a hearing by the Senate Judiciary Committee when it was controlled by Republicans, Charles Pickering received not one but two hearings before the Judiciary Committee chaired by Senator Leahy. These hearings, and in particular the second hearing, which was held on Feb. 7, 2002 after many of Judge Pickering's numerous unpublished opinions had been made available, afforded Judge Pickering an opportunity to respond to serious concerns raised by Senators about his record as a federal judge and prior to that as a state legislator. Pickering failed to make a case that his record merited his elevation to a lifetime seat on the Fifth Circuit.

Not only did Judge Pickering's testimony fail to resolve troubling issues that People For the American Way and others had raised about his record, but questioning by Senators also revealed several important new and disturbing ethical and related issues involving his conduct as a federal judge. In addition, as to certain matters about which he was questioned, Pickering was, at best, less than forthcoming with the Committee. When these problems were combined with his troubling record on a range of important civil and constitutional rights issues, both before and after becoming a judge, the case against Pickering's confirmation became and remains overwhelming.

Judge Pickering's testimony concerning the following aspects of his record was particularly significant:

- **Pickering's apparent predisposition against plaintiffs in employment discrimination cases**

As discussed above, prior to Judge Pickering's Feb. 7, 2002 hearing, People For the American Way and other public interest organizations opposed to Pickering's confirmation had documented that his public record as a state Senator and federal judge demonstrates insensitivity and hostility to basic civil rights principles and laws, including voting rights and access to the courts. At that hearing, Pickering raised even more concerns about his views as a judge on civil rights cases. Senator Kennedy and others questioned Pickering closely about disparaging

remarks he has injected into cases about anti-discrimination laws and the people who file employment discrimination cases. As part of his response, Pickering stated his belief that the EEOC through its own mediation efforts resolves most of the "good" job bias cases and that cases that come to court generally have already been investigated by the EEOC and determined to have no basis.

Essentially, Pickering admitted that when a case of employment discrimination brought under Title VII comes before him, he is predisposed to believe that it does not have merit because he thinks that, if it did, the EEOC would have taken care of it. As Senator Durbin observed on March 14, 2002 in citing Judge Pickering's presumptions about employment discrimination cases as one of the reasons why he should not be confirmed, this was "a startling admission by a Federal judge who should know better."[5]

Not only is it improper for a judge to be predisposed to believe that a particular type of case lacks merit, but also the premise on which Pickering's preconception rests is plainly inaccurate. As Senator Durbin further observed, "the EEOC lacks the legal authority to impose mediation and lacks the resources to investigate the vast majority of discrimination cases."[6] Indeed, the EEOC is overburdened, with a backlog of nearly 35,000 cases.[7] In addition, almost two-thirds of employers decline to participate in EEOC mediation of discrimination complaints, leaving employees with little option but to go to court.[8] And the EEOC is so lacking in resources that it typically litigates only 3.5 percent of the charges (complaints) in which it finds reason to believe discrimination has occurred.[9] Because of these delays and limitations, victims of discrimination often obtain "right to sue" letters from the EEOC after months of EEOC inaction, enabling them to pursue their claims in court rather than have their claims languish in administrative limbo. Indeed, federal law specifically allows victims of discrimination to do this. As Senator Kennedy stated on March 14, 2002, "Congress has always contemplated that the

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5 United States Senate, Committee on the Judiciary, Committee Business, Unofficial Transcript at 74 (Mar. 14, 2002).

6 Id.

7 Letter to the Editor of Marcia D. Greenberger, Co-President, National Women's Law Center, *Washington Post*, A32 (Feb. 14, 2002).

8 Id.

9 Id.

federal court would be a central place for enforcing the rights of employees facing discrimination. . . [I]t is deeply troubling that Judge Pickering fails to understand the role of the EEOC and of the courts."[10]

The misguided predisposition against discrimination cases reflected in Judge Pickering's opinions and testimony strongly supported the decision by the Judiciary Committee to reject his confirmation and warrants the same decision now.

- **Pickering and the Mississippi Sovereignty Commission**

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One of the important civil rights issues that had been raised at Pickering's confirmation hearings in connection with his service as a state Senator concerned the notorious Mississippi Sovereignty Commission. The Sovereignty Commission, a state-funded agency, was created not long after the decision in Brown v. Board of Education in order to resist desegregation, and was empowered to act as necessary to protect the "sovereignty" of the state of Mississippi from the federal government. The Commission infiltrated and spied on civil rights and labor organizations and reported on their activities. It compiled dossiers on civil rights activists and used the information to obstruct their activities. The Commission existed until 1977, when the state legislature voted to abolish it and to seal its records for 50 years. Pickering, who was a state Senator at the time, voted in favor of sealing the records, stating at his confirmation hearings that the choice was to seal or destroy them.

The Senate Judiciary Committee first asked Pickering about the Sovereignty Commission at his 1990 confirmation hearing in connection with his nomination to be a federal district court judge. At that time, Pickering testified that "I never had any contact with that agency and I had disagreement with the purposes and the methods and some of the approaches that they took. . . I never had any contact with the Sovereignty Commission." He further testified, pertaining to the time during which he served in the state Senate before the abolition of the Commission (1972-1978), that "this commission had, in effect, been abolished for a number of years. During the

[10] Statement of Senator Edward M. Kennedy Regarding the Nomination of Judge Charles W. Pickering to the Fifth Circuit Court, at 2 (Mar. 14, 2002).

entire time that I was in the State Senate, I do not recall really of [sic] that commission doing anything. It already was de facto abolished. It was just not functioning." Pickering stated that "I know very little about what is in those [Commission] records. In fact, the only thing I know is what I read in the newspapers." PFAW Report at 9-10.

In fact, as a state Senator, Pickering voted in 1972 and 1973 to appropriate money "to defray the expenses of" the Sovereignty Commission. These votes suggest not only that the Commission was still active at that time, but also that Pickering was familiar with and supported its activities, at least enough to vote in favor of appropriating state monies to fund them. Moreover, according to a 1972 Commission memorandum publicly released only in the past few years as a result of a court order unsealing the Commission's records, Pickering and two other state legislators were "very interested" in an on-going Commission investigation into union activity that had resulted in a strike against a large employer in Laurel, Pickering's home town. Also according to the same Commission memorandum, Pickering and the other legislators had "requested to be advised of developments" concerning the union investigation, and had requested background information on the union leader. PFAW Report at 10.

This discrepancy between the documentary evidence and Pickering's 1990 sworn disclaimer of "any contact" with the Sovereignty Commission and his description of it as "just not functioning" during the time when he was in the state Senate was and remains extremely disturbing, and Pickering was specifically questioned about it at his confirmation hearing on Feb. 7, 2002. At that hearing, Pickering in his opening statement described his 1972 and 1973 votes to appropriate money for the Commission as "practical politics" and further testified that it was his understanding that "the Commission still had some old employees, but its days of high-profile investigations were long over," an assertion that seems inconsistent with the 1972 Commission memorandum regarding the on-going investigation in Pickering's home town. In addition, confronted with that 1972 Commission document that conflicts not only with his 1990 denial of contact with the Sovereignty Commission but also with his professed lack of knowledge about the Commission, Pickering suggested at his Feb. 7, 2002 hearing that he was worried about Ku Klux Klan attempts to infiltrate the union. The Sovereignty Commission, however, worked to infiltrate and spy on civil rights organizations and to obstruct desegregation,

hardly the group to turn to if concerned about the Klan, as Senator Durbin observed at the February 7 hearing.

Moreover, the Commission memorandum itself, which Pickering read before the hearing in order to refresh his recollection, contains no foundation for the suggestion that Pickering's request had anything to do with the Klan. To the contrary, it states that the request from Pickering and the other legislators was to be "advised of developments in connection with SCEF [Southern Conference Educational Fund] infiltration of GPA [Gulfcoast Pulpwood Association] and full background on James Simmons [President of the GPA]." The SCEF was a pro-civil rights group.[11]

Judge Pickering appears to have been less than forthcoming with the Judiciary Committee about this entire matter. The concern here is not only Pickering's involvement as a state Senator with Mississippi's segregationist past, but also how he responded when asked under oath by the Judiciary Committee about this matter, not just in his 1990 testimony but particularly in 2002 when he had the pertinent documentary material to refresh his recollection. Pickering's testimony concerning the Sovereignty Commission prompted one columnist to write that "Pickering's habit of whitewashing his past conduct has led him perilously close to lying under oath." Joe Conason, *Joe Conason's Journal*, "Still Burning," *Salon.com* (Jan. 9, 2003).

- **Pickering's article regarding the criminalization of interracial marriage**

When he was in law school, Pickering had written an article that described for the state legislature how it "should" fix the state's law penalizing interracial marriages so that it could be enforced, advice that the Mississippi legislature promptly took. In his article, Pickering expressed no moral outrage over laws prohibiting and criminalizing interracial marriage, nor did

[11] In his response to written questions submitted by Senator Kennedy after the hearing, Judge Pickering stated that he had mentioned the Klan at his hearing because there had been a strike five years earlier at the same plant by a different union, one that the Klan had infiltrated. Responses of Charles W. Pickering, Sr. to Written Follow-up Questions of Senator Edward M. Kennedy (Mar. 5, 2002), Ans. 1A. Nevertheless, Judge Pickering had specifically reviewed the 1972 Commission memorandum identifying the SCEF prior to his February 7, 2002 hearing.

he condemn them. PFAW Report at 10-11. This subject was raised at each of Pickering's confirmation hearings.

Although some of Pickering's supporters have sought to dismiss the significance of this troubling article because it was written many years ago, no such rationale explains Pickering's present day testimony about the article. First, Pickering has never taken the opportunity presented to him at any of his confirmation hearings to repudiate the article or to express regret for having written it. To the contrary, at his first judicial confirmation hearing, in 1990, he sought to brush the article aside as an "academic exercise." Then, at the initial hearing on his appellate court nomination on October 18, 2001, Pickering mischaracterized what he had written, telling the Senate Judiciary Committee that "I predicted in that article that those statutes would be changed in the future...." In fact, in his article he had "submitted that the Supreme Court will not invalidate the miscegenation statutes, for some time at least." PFAW Report at 11-12. And then, at his hearing on Feb. 7, 2002, Pickering once again sought to dismiss his article as an "academic exercise."

While some of Pickering's supporters and many media reports have accepted this characterization at face value, the article was far more than that. There was nothing "academic" about these laws, which harmed real people, or about Pickering's advice to the legislature that the state law making interracial marriage a felony punishable by up to ten years in prison "should" be amended, or about the fact that the legislature did amend the law as he had suggested, making it enforceable. Moreover, Pickering's recent statements to the Judiciary Committee when asked about this article further reflect the disturbing insensitivity and indifference to civil rights concerns seen in his record as a state Senator and as a federal judge.

- **Pickering's unethical conduct in a cross-burning case**

Judge Pickering's Feb. 7, 2002 hearing brought to light the extraordinary lengths to which he had gone on behalf of one of the defendants in a cross-burning case, exposing inappropriate judicial conduct on his part. The case concerned the burning of an eight-foot cross by two men and a juvenile on the lawn of an interracial couple with a young child. The juvenile

and one of the men, described as borderline mentally retarded, pleaded guilty and received reduced sentences. The third, described by the Justice Department as "the leader of the conspiracy,"[12] refused to plead and was convicted after a trial. He faced a much more severe sentence, largely because of a mandatory minimum sentence for crimes involving arson that had been enacted by Congress. Defendants who cooperate with the prosecution and do not force the government to go to trial are routinely given reduced sentences, but Pickering took unusual and ethically questionable steps in getting the government to drop the charge with the mandatory minimum and acquiesce in a shorter sentence.

Specifically, as brought to light through court and Justice Department documents as well as questioning by Senator Edwards, Pickering had threatened to order a new trial in the case (even though the time for such an order had expired and Pickering had no authority to order it on his own motion), ordered Justice Department lawyers to take his complaints about the proposed sentence personally to the Attorney General, and initiated an *ex parte* communication with a high-ranking Justice Department official to complain about the case. A Justice Department letter released after the hearing revealed a series of "off-the-record" efforts by Pickering to pursue his complaints, including a direct phone call by him to the home of one prosecutor the day after New Year's Day, 1995. Senator Edwards expressed serious concern that Judge Pickering had violated Rule 3.A.4 of the Code of Conduct for U.S. Judges, which specifically forbids *ex parte* contacts between a judge and attorneys for one side of a case about that case.

At the hearing, Pickering tried to justify his actions, focusing on his concern about the disparity in sentencing among the three defendants, but Senators clearly remained troubled. Although Pickering had referred to the cross-burning as reprehensible, Senator Durbin was concerned about the extreme lengths to which Pickering had gone to assist the defendant to obtain reduced punishment for conduct –- the cross-burning –- that Pickering at one point called a "drunken prank." Senator Schumer stated that Pickering's explanation concerning the sentencing disparity "doesn't wash," particularly in light of other sentencing disparities when

[12] Department of Justice Memorandum from Brad Berry to Linda Davis, Chief, Criminal Section, Civil Rights Division (Nov. 29, 1994), at 2.

one defendant pleads guilty in a case, the invidious nature of the crime, and the fact that Congress had established a mandatory minimum sentence that Pickering was trying to avoid.

In written questions submitted to Judge Pickering after the hearing, Senator Biden asked Pickering in connection with the cross-burning case, "Would you today still characterize these activities as a 'drunken prank' Why or why not? If your view has changed, explain why." Judge Pickering began his written answer by denying that he had so characterized this crime: "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.'" Response of Judge Charles W. Pickering, Sr. to written questions of Senator Biden, Ans. 1 (Mar. 1, 2002) (emphasis added). The record, however, is irrefutable on this point. At the sentencing hearing for one of the three defendants who had been convicted of the cross-burning, Judge Pickering stated:

> Now, Mr. Thomas, I have taken in consideration, in being as lenient with you as I have been, the fact of your capacity and the fact that you obviously have been kind to members of other races, to blacks, and that you have not been a racist. . . And I feel that I have –- I've tried to be strong enough to send the message that this kind of conduct is not acceptable and will not be tolerated; at the same time, not to wreck your life; and to make the punishment commensurate with the drunken prank that I think it was, even though it did have racial overtones. It was a stupid thing to do, and it was something that was done –- folks just should not have to have the fear that somebody is going to be burning a cross in their front yard.

United States v. Thomas, Crim. Action No. 2:94cr3PR, Transcript of Sentencing Hearing, at 18-19 (Aug. 15, 1994) (emphasis added).

Following Judge Pickering's Feb. 7, 2002 confirmation hearing, three independent ethics experts confirmed the serious impropriety of Pickering's conduct in the cross-burning case. Professor Steven Lubet of Northwestern University Law School wrote that Pickering's *ex parte*

communication with a Department of Justice official was a "manifest violation" of the Code of Conduct. Letter of Professor Steven Lubet to Hon. John Edwards (Feb. 25, 2002), at 2. Professor John Leubsdorf of Rutgers Law School found that Pickering had "departed from his proper judicial role of impartiality," that he had behaved "more like an usually adversarial attorney than like a judge," and that his actions "were inappropriate and violated rules governing judicial conduct." Letter of Professor John Leubsdorf to Senator John Edwards (Feb. 25, 2002) at 6. Professor Stephen Gillers of New York University Law School concluded that "Judge Pickering's conduct was wrong." Letter of Professor Stephen Gillers to Hon. John Edwards (Feb. 25, 2002), at 2. (See attached resource list for these letters on-line.)[13]

Judge Pickering's supporters have attempted to defend his conduct in the cross-burning case by claiming that he was concerned about what he perceived to be a sentencing disparity among the three defendants. However, according to Professor Lubet, Judge Pickering "in more than 11 years on the bench . . . has never published any other opinion decrying disproportionate sentencing. According to the Almanac of the Federal Judiciary, he is best known for increasing sentences rather than lowering them." S. Lubet, "The Judge and the Cross Burner," *Baltimore Sun* (Feb. 28, 2002). Most important, apart from the fact that sentencing disparities routinely exist among defendants who accept responsibility, plead guilty, and spare the government the expense of trial and those who do not, it was improper for Judge Pickering to address whatever concerns he may have had through unethical conduct. As Professor Leubsdorf wrote, "Whatever Judge Pickering's motives may have been, this was no way for a judge to behave." Letter of Professor John Leubsdorf to Hon. John Edwards (Feb. 25, 2002), at 1.

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[13] Law professor Michael I. Krauss of George Mason University Law School provided a post-hearing letter to Senator Hatch confined to Krauss' examination of two documents signed by Judge Pickering related to the cross-burning case –- an order by Judge Pickering dated Jan. 4, 1995, and a Feb. 8, 2002 letter from Pickering to Senator Leahy concerning the case. Prof. Krauss opined that "neither of these documents provide any evidence of unethical behavior by Judge Pickering." Letter from Michael I. Krauss to Senator Orrin Hatch (Feb. 11, 2002), at 1. In his confined view of the matter, Prof. Krauss did not mention or consider some of the facts, including, for example, Judge Pickering's *ex parte* telephone call to the home of one of the prosecutors the day after New Year's Day, 1995. Also, Prof. Krauss gave his view of the ethics of only three isolated instances of Judge Pickering's conduct during the case, and did not evaluate the Judge's conduct overall in determining whether, for example, Judge Pickering had impermissibly crossed the line from being a neutral magistrate to an advocate for one of the parties, as others had concluded he had.

Several weeks after Judge Pickering's Feb. 7, 2002 hearing, Brenda Polkey, one of the victims in the cross-burning case, wrote to Senator Leahy to express her "profound disappointment in learning of Judge Pickering's actions toward the defendant, Daniel Swan," whose sentence Pickering had gone to such lengths to reduce. Mrs. Polkey described how her family had "suffered horribly" as a result of the cross-burning on their lawn. She explained that, as a native southerner who had grown up during the racial violence of the 1960s and lost a family member due to a racial killing, she "never imagined that violence based on racism would come my way again in the 1990s." Prior to learning what Judge Pickering had done, she had been heartened that the individuals who had burned a cross on her lawn had been brought to justice, stating that "I experienced incredible feelings of relief and faith in the justice system when the predominantly white Mississippi jury convicted Daniel Swan for all three civil rights crimes." She went on to state that "My faith in the justice system was destroyed, however, when I learned about Judge Pickering's efforts to reduce the sentence of Mr. Swan. . . . I am astonished that the judge would have gone to such lengths to thwart the judgment of the jury and to reduce the sentence of a person who caused so much harm to me and my family. I am very much opposed to any effort to promote Judge Pickering to a higher court." Letter from Brenda Polkey to Senator Patrick Leahy (Mar. 5, 2002).

Senator Cantwell referred specifically to Mrs. Polkey's disillusionment with the justice system in explaining the reasons why Judge Pickering should not be confirmed, stating that "this committee should work very hard to protect the faith that the public has in our judicial system."[14] Indeed, virtually every Senator who voted not to confirm Judge Pickering specifically mentioned his conduct in the cross-burning case as one of the reasons why he should not be confirmed. Senator Kennedy, for example, explained that "Judge Pickering's conduct in presiding over the cross-burning case in 1994 encapsulates all of my concerns about his temperament, his willingness to follow the law as opposed to his personal opinion, and his fairness in civil rights cases."[15] And Senator Durbin explained that Judge Pickering's conduct was disturbing not only as a matter of judicial ethics but also as a matter of judicial activism, stating that "I can think of

[14] United States Senate, Committee on the Judiciary, Committee Business, Unofficial Transcript at 85 (Mar. 14, 2002).

[15] Statement of Senator Edward M. Kennedy Regarding the Nomination of Judge Charles W. Pickering to the Fifth Circuit Court, at 2 (Mar. 14, 2002).

no clearer case of judicial activism than a judge who after a jury conviction refuses to impose a mandatory minimum sentence because he does not personally agree with the Justice Department's exercise of prosecutorial discretion."[16]

- **Other ethical issues**

Additional concerns about Judge Pickering's conduct as a judge were raised at his Feb. 7, 2002 hearing in connection with his efforts to obtain letters in support of his elevation to the Fifth Circuit. At the hearing, Senator Feingold questioned Judge Pickering about his conduct the previous October in contacting a number of lawyers who practice before him, or who may appear before him in the future, to solicit letters of support for his confirmation. Pickering admitted that he not only had contacted a number of attorneys with that request, but also that he had asked that those letters be sent directly to him. He testified that he read most of the letters before sending them on to the Justice Department. In responding to Senators' written questions after the confirmation hearing, Judge Pickering stated that the Department of Justice had told him that he should have the lawyers fax their letters to his chambers and that he should then fax them to the Department. Response of Judge Charles W. Pickering, Sr. to written questions of Senator Feingold, Ans. 1 (Mar. 6, 2002).

Regardless of whether Pickering intended any coercion, this solicitation activity by a sitting judge violates canons of professional responsibility requiring the avoidance of even an appearance of impropriety. It was then and remains disturbing that in his testimony, Judge Pickering appeared not to recognize the potential coerciveness and impropriety of a federal judge making such requests of lawyers who know they may appear before him in the future. Whether or not Pickering is ultimately elevated to the Fifth Circuit, he will remain a federal district court judge.

After the hearing, legal ethics expert Stephen Gillers of New York University Law School concluded that Pickering's conduct had violated ethical standards, regardless of whether

[16] United States Senate, Committee on the Judiciary, Committee Business, Unofficial Transcript at 75 (Mar. 14, 2002).

he had the subjective intent to "coerce" lawyers into writing letters supporting his confirmation. Letter of Prof. Stephen Gillers to Hon. Russell D. Feingold (Feb. 20, 2002). And ethics expert Steven Lubet of Northwestern University Law School, cited by *Legal Times*, likewise suggested that Pickering's actions could involve a kind of "unintentional coercion" similar to that which can arise when judges solicit lawyers for charitable contributions, which is forbidden by the Code of Conduct for federal judges. J. Groner, "New Line of Questioning at Pickering Hearing," *Legal Times* (Feb. 11, 2002).

In a post-hearing letter to Senator Hatch, Professor Richard W. Painter of the University of Illinois Law School responded to Senator Hatch's request for his opinion as to whether "rules of judicial conduct prohibit a federal judge who has been nominated for a higher federal judgeship from soliciting lawyers to write letters in support of his confirmation." Letter of Prof. Richard W. Painter to Senator Orrin Hatch, at 1 (Mar. 5, 2002). In Prof. Painter's opinion, "[e]xisting rules on this subject do not impose a blanket ban on solicitation of such letters. Although some solicitations might violate existing rules of judidial conduct, other solicitations would not." Id. However, as Senator Feingold observed on March 14, 2002 in citing Judge Pickering's conduct as one of the reasons why Pickering should not be confirmed, Prof. Painter's letter failed to take into account the fact that Judge Pickering had asked that the letters be sent directly to him.[17] This meant that Pickering would know which lawyers had taken him up on his request and what they had written about him, facts important to the "coercion" implicit in his solicitation of the letters. As Senator Feingold recognized, Professor Painter's failure to address a salient part of Judge Pickering's conduct undermined the relevance of his views.[18]

Senator Feingold summarized his concerns about Judge Pickering's conduct by saying: "We should want judges who are beyond reproach, who know that ethical conduct is at the core

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[17] Statement of U.S. Senator Russ Feingold on the Nomination of Judge Charles Pickering Before the Senate Committee on the Judiciary, at 4 (Mar. 14, 2002).

[18] Id. Responding to Senator Feingold, Senator Sessions said that the reason the "ethics inquiry" to Prof. Painter did not include the fact that Judge Pickering had asked that the letters be faxed directly to him was that the Department of Justice had requested he do this. United States Senate, Committee on the Judiciary, Committee Business, Unofficial Transcript at 111 (Mar. 14, 2002). However, the Department of Justice cannot create exceptions to the rules of judicial ethics; it is up to each individual judge to know what judicial conduct is proper and what is not.

of their responsibilities, because such conduct helps ensure that the public will respect their decisions. I believe that Judge Pickering's conduct fell far short in this instance."[19]

CONCLUSION

Because the Supreme Court hears fewer than 90 cases a year, the protection of civil and constitutional rights by the judiciary depends in large measure on the appellate courts, which are the courts of last resort for most Americans. Indeed, at Pickering's confirmation hearing on Feb. 7, 2002, Senator Feinstein said that the seat to which Pickering had been nominated is, in a sense, "as important as a Supreme Court seat." She observed that while the Fifth Circuit during the 1960s and 1970s was considered a trailblazer in protecting individual rights and dismantling systemic segregation, the Fifth Circuit today dismally fails to live up to the legacy of its predecessors.

As the Senate Judiciary Committee recognized, Judge Pickering's record did not support his elevation to the Court of Appeals. Far from meeting the burden to demonstrate a history of commitment to civil and constitutional rights, Pickering's record shows insensitivity and hostility toward key legal principles protecting the civil and constitutional rights of minorities, women, and all Americans. Especially in the Fifth Circuit, which has the largest minority population of any circuit –- 42 percent –- and which has already issued a number of troubling decisions on civil and constitutional rights, adding another judge like Charles Pickering would pose a grave danger to the rights and liberties of ordinary Americans. In addition, the ethically questionable conduct in which Judge Pickering has engaged as well as the concerns about the quality of his judicial work serve to underscore the conclusion that he should not be promoted. The Judiciary Committee was right to reject Judge Pickering's lifetime elevation to the Court of Appeals. If President Bush does not withdraw this nomination, it should be rejected again.

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[19] Statement of U.S. Senator Russ Feingold on the Nomination of Judge Charles Pickering Before the Senate Committee on the Judiciary, at 5 (Mar. 14, 2002).

APPENDIX

Resources on the Record of Judge Charles W. Pickering, Sr.

PFAW Report Opposing The Confirmation of Charles W. Pickering, Sr. to the U.S. Court of Appeals for the Fifth Circuit
http://www.pfaw.org/pfaw/general/default.aspx?oid=1207

PFAW Editorial Memorandum: Hearing Strengthens Case Against Judge Charles Pickering's Confirmation; Testimony Highlights Problems with Nominee's Record as Judge and State Senator
http://www.pfaw.org/pfaw/general/default.aspx?oid=1287

PFAW Response to *Wall Street Journal* Editorial Board
http://www.pfaw.org/pfaw/general/default.aspx?oid=1285

PFAW Editorial Memorandum: Opposition to Judge Pickering and Charges of Irresponsibility and Race-Baiting
http://www.pfaw.org/pfaw/general/default.aspx?oid=1273

NARAL Report: Charles Pickering, Nominee for United States Court of Appeals for the Fifth Circuit
www.naral.org/mediaresources/fact/pickering_rpt.html

National Women's Law Center Report: Women's Rights at Stake in Senate Confirmation of Judges: The Nomination of Charles Pickering to the Fifth Circuit
www.nwlc.org/pdf/PickeringReport.pdf

Alliance for Justice Report: The Case Against the Confirmation of Charles W. Pickering Senior to the U.S. Court of Appeals for the Fifth Circuit

http://www.allianceforjustice.org/judicial/research_publications/research_documents/pickering_full_report.pdf

Post-Confirmation Hearing Letters by Ethics Experts
http://www.pfaw.org/pfaw/general/default.aspx?oid=1264

A clearinghouse of information on Judge Pickering's record is available at www.fairjudges.org