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

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The nomination of Charles W. Pickering, Sr. of Mississippi to the United States Court of Appeals for the Fifth Circuit has generated significant controversy and concern. Last fall, Judge Pickering's confirmation was opposed by both the Mississippi NAACP and the Congressional Black Caucus because of his "career and record on civil rights." The National Abortion and Reproductive Rights Action League also opposed the nomination based on Pickering's "hostility to reproductive rights." On October 15, 2001, a number of other civil rights groups (including People For the American Way) expressed concern about the nomination, noting that several of Pickering's published opinions as a federal trial judge "suggest a hostility to civil and Constitutional rights." The letter also noted that the Fifth Circuit has the largest and most diverse minority population of any Circuit in the country, making the position to which Pickering has been nominated "a critical one for minorities and women."

Accordingly, People For the American Way has extensively reviewed the record of Judge Charles Pickering. We have been guided in that review by the criteria suggested by more than 200 law professors in a letter to the Senate Judiciary Committee in July, 2001. As these professors explained, no federal judicial nominee is presumptively entitled to confirmation. Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria. These criteria include an "exemplary record in the law," an "open mind to decision-making," a "commitment to protecting the rights of ordinary Americans," and a "record of commitment to the progress made on civil rights, women's rights and individual liberties."[1]

Based on these criteria, People For the American Way has concluded that we must oppose Judge Pickering's confirmation to the Fifth Circuit. Pickering's record, both before and after he became a judge, demonstrates insensitivity and hostility toward key principles protecting the civil and constitutional rights of minorities, women, and all Americans. He has been reversed on a number of occasions by conservative appellate court judges for

[1] See Law Professors' Letter of July 13, 2001. A full copy of the letter, which elaborates further on these criteria, is available from People For the American Way.

disregarding controlling precedent on constitutional rights and for improperly denying people access to the courts. Elevating Pickering to a powerful appellate court position would give him enormous influence on the interpretation of statutory and constitutional provisions that safeguard the rights of all Americans. The Senate Judiciary Committee should reject his confirmation.

The Nominee's Record

Charles W. Pickering, Sr., was appointed to his present position as a judge on the United States District Court for the Southern District of Mississippi in 1990 by President George H.W. Bush. A lifetime Mississippi resident, Pickering practiced law in Laurel, Mississippi until he became a judge. During that time, and while still in private practice, he served in various appointed and elected positions as well, including as a Mississippi state senator from 1972-80, chair of the Mississippi Republican Party in 1976, and President of the Mississippi Baptist Convention from 1983-85.

In his 11 years on the bench, Judge Pickering has published fewer than 100 of the approximately 1,100 opinions that he has estimated he has written in that time.[2] In contrast, Judge Edith Brown Clement, who was a federal District Court judge before her confirmation to the Fifth Circuit in 2001, has more than 14 times as many published opinions during a ten-year period. Recognizing the importance of reviewing Judge Pickering's complete record as a District Court judge when considering him for a lifetime appointment to the Court of Appeals, the Senate Judiciary Committee requested that Pickering provide copies of all of his unpublished decisions, which represent the bulk of that record. Unfortunately, Judge Pickering has been able to provide only approximately 600 of his estimated 1000 unpublished decisions, and has indicated that the remainder, approximately 40% of the rulings that he estimated he has issued as a judge, are not available.

Obviously, neither we nor the public in general can know what is in those hundreds of decisions by Judge Pickering that he has not provided. We cannot know what aspects of Judge Pickering's record as a judge will now go unreviewed during the confirmation process. Most important, the Senate, charged by the Constitution with examining Judge Pickering's qualifications and fitness to be elevated to a lifetime position on the Fifth Circuit, does not have available to it some of the material most relevant to that decision. This is deeply troubling in the context of an appellate nomination of a district court judge.

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[2] Transcript of Nominations Hearings, Senate Committee on the Judiciary, Oct. 18, 2001 (hereafter "2001 Hearings"), at 40-41.

The Judiciary Committee should continue to pursue the issue of access to all of Judge Pickering's rulings.

We have reviewed that portion of Judge Pickering's judicial record that is available, as well as important aspects of his record before becoming a judge. That review leads to the conclusion that his record does not meet the criteria that should be demanded of a federal appellate court nominee. This conclusion is based on his record in several specific areas: civil rights, the pattern of appellate reversals of some of his decisions, access to justice, church-state separation and religion, and reproductive freedom.

A. Pickering and civil rights

Civil rights issues have frequently come before Charles Pickering, both as a federal judge in Mississippi and as a life-long resident of that state. His record both before and after becoming a judge, however, does not demonstrate an affirmative commitment to civil rights protections. To the contrary, his record reflects insensitivity and even hostility toward key principles and remedies that now safeguard civil rights and indifference toward the problems caused by laws and institutions that have previously created and perpetuated discrimination.

1. Pickering as a federal judge

Most of Judge Pickering's opinions and orders on civil rights issues are unpublished, which has therefore limited our review. In the vast majority of the published and unpublished civil rights cases we reviewed, Pickering ruled against civil rights plaintiffs. Without access to the arguments, briefs, and other parts of the record in those cases, it is difficult to evaluate the specifics of these rulings. An analysis of Pickering's opinions themselves, however, is deeply troubling. In many of his opinions, Judge Pickering goes out of his way to disparage civil rights protections and plaintiffs. Usually in dicta not even necessary to his decisions, Pickering has criticized principles protecting civil rights, sought to limit their application, and denigrated those who seek to invoke civil rights laws.

For example, in several cases Judge Pickering has discussed the fundamental "one-person one-vote" principle recognized by the Supreme Court under the Fourteenth 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. See Wesberry v. Sanders, 376 U.S. 1, 8, 17-18 (1964) (majority opinion by Justice Black). In a lengthy criticism of the principle in one case, however, Judge Pickering called it "obtrusive" and something that legislatures

have reluctantly learned they "must live with." Fairley v. Forrest County, 814 F.Supp. 1327, 1330, 1338 (S.D. Miss. 1993). In that case, the defendants conceded that a deviation of more than 25% from equality was improper, in accordance with Supreme Court rulings that deviations of more than 16.4% are presumptively unconstitutional. Id. at 1330; Connor v. Finch, 431 U.S. 407, 417-18 (1977). In dicta, however, Pickering suggested that these deviations were "relatively minor" and "de minimis" and that he might well have held that they "would not violate the Constitution" had that argument been raised. Fairley, 814 F.Supp. at 1345, 1330 n.2. Pickering also declined to order special elections as a remedy in the case, even though he acknowledged that this remedy had been ordered in previous one-person, one-vote cases by the Fifth Circuit. Id. at 1340-41, 1346.

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 in some cases, 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.[3] Judge Pickering, however, has severely criticized this significant form of discrimination relief. In one opinion, he called it "affirmative segregation." Bryant v. Lawrence County, 814 F. Supp. 1346, 1351 (S.D. Miss. 1993). In another opinion in the same case, he claimed that such districts produce "polarization" and complained that candidates elected in such districts "may well feel little need to accommodate the views of their minority white constituents." Id., 876 F.Supp. 122, 127 (S.D. Miss. 1995).

Judge Pickering has also suggested a narrow interpretation of a key provision of the Voting Rights Act, contrary to Supreme Court precedent. Under Section 5 of the Act, any changes in voting-related procedures in jurisdictions like Mississippi with a history of voting discrimination must be pre-cleared by the Justice Department or the federal district court in Washington D.C. to ensure that they have no discriminatory purpose or effect. The Supreme Court has made very clear that other federal courts have a limited but important role in this process; they can provide relief to voters by ensuring that proposed changes are submitted for pre-clearance, but are not themselves to evaluate or consider whether the changes are discriminatory. The Supreme Court clearly explained this protection in a case arising out of Mississippi, and has repeated it several times since.[4] In

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[3] See, e.g., Theriot v. Parish of Jefferson, 185 F.3d 477, 489-90 (5th Cir. 1999); Clark v. Calhoun County, 88 F.3d 1393 (5th Cir. 1996).

[4] See Perkins v. Mathews, 400 U.S. 379, 385 (1971). Accord,

one case, however, Judge Pickering strongly suggested that the "application" of the principle that voters can sue to require Section 5 pre-clearance "should be limited" to cases where racial discrimination is specifically charged, contrary to the Act and Supreme Court precedent. Citizens' Right to Vote v. Morgan, 916 F. Supp. 601, 604 (S.D. Miss. 1996). Pickering harshly criticized the plaintiffs for even bringing that case, stating that it was "simply another of those cases which demonstrates that many citizens have come to view the federal courts as a potential solution to whatever problem comes along," a "notion" that he believed had been "fostered" by federal courts. Id.

Unpublished opinions by Pickering in a number of discrimination cases contain much more severe criticisms of civil rights plaintiffs and the use of civil rights statutes. In one case in which he rejected a race discrimination claim, Pickering harshly complained about "the side effects resulting from anti-discrimination laws," which he suggested cause people "covered by such laws" to "spontaneously react that discrimination caused" any adverse action against them. Foxworth v. Merchants Co., No. 2:95CV278PG (S.D. Miss., July 9, 1996) (slip op. at 8-9).

In two cases dismissing claims of race discrimination in employment, Pickering used identical language striking a similar theme. He wrote in both that "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" and that the courts "are not super personnel managers charged with second guessing every employment decision made regarding minorities."[5] Pickering similarly disparaged the plaintiff in an age discrimination case, proclaiming that the Age Discrimination in Employment Act "is not a vehicle by which any replaced worker over the age of forty may have a federal court review the merits of his job performance or the demerits of his termination." Jarrell v. F-S Prestress, Inc., No. 2:97-CV-108PG (S.D. Miss., Feb. 24, 1998) (slip op. at 11), summary judgment for def't aff'd, 166 F.3d 338 (5th Cir. 1998).

Even more questionable was Pickering's reported conduct in another discrimination case. Acting on his own motion, Pickering halted a race discrimination lawsuit filed by a local chapter of

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Lopez v. Monterey County, 519 U.S. 9, 29 (1996); City of Lockhart v. United States, 460 U.S. 125, 129 n.3 (1983)(noting that district court "lacked jurisdiction to pass on the discriminatory purpose or effect" of proposed changes); United States v. Board of Supervisors, 429 U.S. 642, 645-47 (1977)(per curiam).

[5] See Seeley v. City of Hattiesburg, No.2:96-CV-327PG (S.D. Miss., Feb. 17, 1998) (slip op. at 12); Johnson v. South Mississippi Home Health, No. 2:95-CV-367PG (S.D. Miss., Sept. 4, 1996)(slip op. at 10).

the NAACP against Dixie Electric Power Association in December 1993. In what was described as a potentially precedent-setting case, the NAACP charged that Dixie had discriminated against African American employees, and also against African American customers in terms of rate-setting and termination-of-service practices. According to a press report, immediately after the suit was filed, Pickering suspended all proceedings, issued a gag order prohibiting the parties from discussing the case publicly, and directed the two sides to explore settlement in a three month period.[6] Apparently, Pickering also suspended the requirement that Dixie file an answer stating its position on the claims.[7] In January 1994, officials of the NAACP chapter "were quoted in local press reports saying they believed the case was very important and could establish a precedent for similar cases against other rural cooperatives."[8] When Pickering learned of these comments, he reportedly issued another gag order prohibiting the parties from commenting on the case.[9] Pickering's handling of the case was one of the factors specifically mentioned by the state NAACP in opposing his nomination.

In short, Pickering's conduct as a federal judge would hardly inspire confidence by civil rights plaintiffs in his handling of civil rights cases. It does not meet his burden to demonstrate a commitment to basic civil rights principles. To the contrary, his troubling conduct in going out of his way to criticize crucial civil rights principles and remedies and to disparage and limit plaintiffs in civil rights cases documents the state NAACP's conclusion of a "hostile attitude" by Judge Pickering in such cases.

2. Pickering's pre-judicial conduct

Although we have not been able to review Judge Pickering's entire 30-year public record before becoming a federal judge, several aspects of his activities with respect to civil rights have drawn attention and concern. These include his record as a state senator on voting rights issues, and two subjects about which he has testified before the Senate Judiciary Committee: an article he wrote concerning a former Mississippi law providing criminal penalties for interracial marriage, and his involvement with the notorious Mississippi Sovereignty Commission.

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[6] "Litigation NAACP Chapter: Discrimination Suit Against Dixie Co-Op is Precedential," *Electric Utility Week* (Feb. 7 1994) at 5.

[7] Id.

[8] Id.

[9] Id.

During the period of Pickering's service as a Mississippi state senator in the 1970s, the Senate passed voting-related measures that helped perpetuate discrimination against African Americans. When Pickering was elected in 1972, blacks in Mississippi were already litigating a lawsuit, Connor v. Johnson, challenging multi-member state legislative districts that seriously harmed minorities and helped keep the state Senate all-white until the end of the 1970s. In 1973, Pickering voted for, and the Senate passed, a partial Senate redistricting plan that continued to provide for county-wide voting in a populous county, rather than creating single-member districts, harming minority voting rights.[10] In 1975, Pickering voted for a broader Senate-passed measure that similarly provided for county-wide district voting.[11] Pickering was Secretary of the Elections Committee that wrote legislative history for the 1975 plan. In language foreshadowing Pickering's criticism as a judge of reapportionment necessitated by court orders, the committee stated that it was seeking to avoid "unwarranted hardship upon voters and election officials by structuring voting precincts on [census] enumeration districts which are subject to frequent change."[12] Only after pressure from court orders in Connor at the end of the 1970s did the Mississippi legislature finally enact single-member districts, helping result in the election of two African American Senate members.[13]

As a state senator, Pickering also co-sponsored legislative proposals that were harmful to minority voting rights. 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 southern

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[10] See Journal of the Senate of the State of Mississippi, Regular Session Commencing January 2, 1973 at 253 (vote on S.B. No. 1701); "Waller Signs Bills Reshuffling Districts," *The Clarion Ledger* (Feb. 10, 1973); F. Parker, Black Votes Count 119 (1990).

[11] See Journal of the Senate of the State of Mississippi, Regular Session Commencing Jan. 7, 1975 at 1238, 1654 (vote on and approval of S.B. No. 2976); "Panels Working on 2 Measures to Reapportion," *The Clarion Ledger* (March 6, 1975); F. Parker, Black Votes Count 119-20 (1990).

[12] Journal of the Senate of the State of Mississippi (1975) at 1241, 1242. Compare Fairley, supra, 814 F. Supp. at 1336, 1338 (complaining about court-approved reapportionment that is based on "[c]ensus workers" lines and that does not sufficiently consider "inconvenience to voters" and efforts to "avoid disruption").

[13] One of those decisions was the Supreme Court's ruling in Connor v. Finch, 431 U.S. 407 (1977), which Pickering as a judge has sought to limit, as discussed above.

legislators opposed it. Pickering co-sponsored a Mississippi Senate resolution calling on Congress to repeal the provision or apply it to all states, regardless of their discrimination history.[14] In addition, both 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. The measure was criticized as discriminatory before its passage in 1976, and both years it was prevented from taking effect due to Justice Department objections under the Voting Rights Act.[15]

Another important civil rights issue that came up during Pickering's service as a state senator concerned the infamous 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, and was asked about the subject at his 1990 confirmation hearing before the Senate Judiciary Committee. In 1990, 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."[16] 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 entire time that I was in the State Senate, I do not recall really of that commission doing anything. It already was de facto abolished. It was just not functioning."[17] Pickering stated that

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[14] See 1975 Senate Journal at 124 (S.C.R. No. 549); F. Parker, Black Votes Count 190 (1990).

[15] See Journal of the Senate of the State of Mississippi, Regular Session Commencing Jan. 6, 1976 at 278, 1918 (S.B. Nos. 2732, 2733); Journal of the Senate of the State of Mississippi, Regular Session Commencing Jan. 2, 1979 at 182, 1911 (S.B. No. 2802); "Open Primary Bill Passes 1st Hurdle," *The Clarion-Ledger* (March 16, 1976); F. Parker, Black Votes Count 35, 62-63 (1990)

[16] Confirmation Hearings on Federal Appointments: Hearings Before the Committee on the Judiciary of the United States, 101st Cong., 2d Sess. (1990) (hereafter "1990 Hearings"), at 656, 657.

[17] Id. at 656.

"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."[18]

In fact, as a state senator, Pickering voted in 1972 and 1973 to appropriate money "to defray the expenses of" the Sovereignty Commission.[19] 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, evidence indicates Judge Pickering did have contact with the Sovereignty Commission. At the time of Judge Pickering's 1990 confirmation hearing, the records of the Sovereignty Commission were still sealed, pursuant to the legislature's directive. However, several years ago, in response to litigation, the courts in Mississippi ordered that the Commission records be made public. A review of those records has uncovered documents indicating contact between Pickering and the Commission. A memorandum by a Commission investigator to the Director of the Commission dated January 5, 1972 stated that "Senator Charles Pickering" and two other state legislators were "very interested" in a Commission investigation into union activity that had resulted in a strike against a large employer in Laurel, Pickering's home town. Also according to this memorandum, Pickering and the other legislators had "requested to be advised of developments" concerning infiltration into the union, and had requested background information on the union leader. Memorandum from Edgar C. Fortenberry to W. Webb Burke (January 5, 1972), at 3. Subsequent memoranda written in 1972 by the same investigator indicate follow-up activities of the nature identified in the January 5, 1972 memorandum. Particularly in light of his 1990 testimony, Pickering's votes in favor of funding the Sovereignty Commission and his other apparent involvement with it are extremely disturbing.

The Mississippi NAACP and other critics of Pickering have also raised the issue of a law review article he wrote on Mississippi's law criminalizing interracial marriage. Until 1967, when the United States Supreme Court held such laws to be unconstitutional,[20] interracial marriage was prohibited by statute in a number of states, including Mississippi. In that state,

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[18] Id. at 657.

[19] See Journal of the Senate of the State of Mississippi, Regular Session Commencing January 4, 1972, at 1165 (vote on H.B. No. 1294); Journal of the Senate of the State of Mississippi, Regular Session Commencing January 2, 1973, at 948 (vote on H.B. No. 1273). In 1973, the measure was vetoed by the Governor.

[20] Loving v. Virginia, 388 U.S. 1 (1967).

interracial marriage was a felony punishable by up to ten years in prison. In 1958, the Mississippi Supreme Court held that a problem in the language of the state statute criminally penalizing interracial marriage made the criminal law unenforceable. The court therefore reversed the conviction of an African American woman for "cohabiting with" a white man.[21]

In 1959, while he was a law student at the University of Mississippi, Pickering wrote an article concerning the result of that state Supreme Court case, which had rendered unenforceable the state's law penalizing interracial marriage. Charles W. Pickering, "Criminal Law – Miscegenation - Incest," Vol. XXX, Mississippi Law Journal 326 (1959) (hereafter "Pickering, 'Miscegenation.'"). In his article, Pickering advised the state legislature as to how it could cure the problem in the statute so as to render the law enforceable. The article specifically stated that if the law were to "serve the purpose that the legislature undoubtedly intended it to serve, the section should be amended." Pickering, "Miscegenation," at 329 (emphasis added). The very next year, the state legislature amended the statute in accordance with Pickering's advice.[22]

In his article, Pickering expressed no moral outrage over laws prohibiting and criminalizing interracial marriage, nor did he condemn them. Indeed, even though the California Supreme Court ten years earlier had held its state laws prohibiting interracial marriage to be unconstitutional,[23] Pickering pointed out in his article that there had been what he called a "vigorous dissent" in that case. Pickering, "Miscegenation," at 328 n.9.[24]

While this article was written many years ago, Pickering has not taken the opportunity presented to him at either of his confirmation hearings to repudiate it. At each of his two hearings before the Senate Judiciary Committee (in 1990 when he was nominated to the District Court and in October 2001 concerning the pending nomination) Pickering was asked about this

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[21] Ratcliff v. State, 107 So.2d 728 (Miss. 1958).

[22] See Laws of the State of Mississippi (1960), at 356-57, listing Mississippi S.B. No. 1509 (approved Feb. 24, 1960), amending Section 2000, Mississippi Code of 1942.

[23] Perez v. Sharp (also called Perez v. Lippold), 198 P.2d 17 (CA 1948).

[24] The author of the dissent in the California case claimed that there was "not only some but a great deal of evidence to support the legislative determination (last made by our Legislature in 1933) that intermarriage between Negroes and white persons is incompatible with the general welfare and therefore a proper subject for regulation under the police power." Perez, 198 P.2d at 45.

disturbing article. While Pickering testified last year that he believes that "who one marries is a personal choice and that there should not be legislation on that,"[25] at neither hearing did he even express regret over having written the article. To the contrary, at the first hearing he sought to brush aside the article as an "academic exercise."[26] Moreover, at his most recent hearing, 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...."[27] In fact, what he had written was this:

> Certainly, recent decisions in the fields of education, transportation, and recreation, would cause one to wonder how long the Supreme Court will allow any statute to stand which uses the term "race" to draw a distinction. However, it is submitted that the Supreme Court will not invalidate the miscegenation statutes, for some time at least.

Pickering, "Miscegenation," at 329 (emphasis added). The fact that Pickering still defends his writing of this article and does not seem to evidence any understanding of the evil wrought by such laws indicates disturbing insensitivity to civil rights concerns.

B. Judge Pickering's troubling record of reversals in the Court of Appeals

According to his answers to the Senate Judiciary Committee questionnaire, Judge Pickering has been reversed in 26 cases that were appealed to the Fifth Circuit. In only one of those cases was there a dissent as to the issue on which Judge Pickering was reversed. In contrast, Judge Edith Brown Clement, who as noted above was recently elevated to the Fifth Circuit after serving as a district court judge for a slightly shorter period than Pickering, was reversed in only 17 cases. Even more troubling, Clement's questionnaire states that she was never reversed in an unpublished opinion by the Fifth Circuit, but Pickering was reversed 15 times in such opinions. According to Fifth Circuit Rule 47.5, unpublished rulings are used to decide "particular cases on the basis of well-settled principles of law." Eleven of those 15 cases in which Pickering violated "well-settled principles of law" involved constitutional, civil rights, criminal procedure, or labor issues, and raise troubling concerns about Pickering.

For example, in several unpublished reversals, Pickering committed clear errors of law in approving magistrate

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[25] 2001 Hearings at 64.

[26] 1990 Hearings at 652.

[27] 2001 Hearings at 64.

recommendations to reject constitutional claims. In Rayfield Johnson v. McGee, No. 2:96CV291PG (S.D. Miss., May 13, 1998), Pickering rejected an inmate's contention that a jail's blanket rule prohibiting inmates from receiving magazines by mail violated the plaintiff's First Amendment right to receive religious materials. After a "full review," Pickering accepted the magistrate's conclusion that the rule was justified to prevent fire hazards and the clogging of plumbing. The Fifth Circuit reversed, citing its own published decision more than ten years earlier in Mann v. Smith, 796 F.2d 79 (5th Cir, 1986), which was not even mentioned by Pickering or the magistrate. Rayfield Johnson v. Magee, No. 98-60556 (5th Cir., Feb. 15, 2000), slip op. at 3. In Mann, the court struck down a similar jail prohibition on the receipt of magazines by pre-trial detainees, rejecting fire hazard and plumbing justifications very similar to those accepted by Pickering and the magistrate. Mann, 796 F.2d at 82.

Pickering similarly adopted a magistrate's recommendation to deny, without a hearing, an inmate's motion to set aside a guilty plea because of ineffective assistance of counsel in U.S. v. Marlon Johnson, No. 1:97-CV-571PG (S.D. Miss., Oct. 2, 1998). The Fifth Circuit, in an unpublished decision written by Reagan-appointee Jerry Edwin Smith, vacated the ruling and remanded for a hearing on whether the prisoner had asked counsel to file a direct appeal of his conviction and whether the attorney had failed to do so. United States v. Marlon Johnson, No. 99-60706 (5th Cir., Dec. 7, 2000). According to the court of appeals, citing two published Fifth Circuit opinions, the inmate's "allegation that he asked his counsel to file a direct appeal triggered an obligation to hold an evidentiary hearing." Id., slip op. at 4. Neither Pickering nor the magistrate even mentioned either of these controlling rulings.

Another case in which Judge Pickering (as part of a three-judge district court) did not abide by published, controlling appellate precedent was Watkins v. Fordice, a voting rights case involving an award of attorneys' fees. Watkins v. Fordice, 852 F. Supp. 542 (S.D. Miss. 1994). In that matter, a unanimous Fifth Circuit reversed the decision of the three-judge district court, of which Judge Pickering was a part, on the issue of the hourly rate to be used in calculating the fees. Watkins v. Fordice, 7 F.3d 453 (5th Cir. 1993). The plaintiffs' attorneys had sought fees based on their customary billing rates. The three-judge court declined to award fees based on the attorneys' normal rates, but did not say why. The Fifth Circuit "reluctantly" remanded the case so that the district court could either "award each attorney's customary billing rate" or "state the reasons for its decision to do otherwise." 7 F.3d at 459. In so ruling, the Court of Appeals cited an earlier decision of its own in which the court had "held that if the attorney's normal billing rate is within the range of market rates for

attorneys with similar skill and experience, and the trial court chooses a different rate, the court must articulate its reasons for doing so." Id. (emphasis added, citing Islamic Center of Miss. v. Starkville, 876 F.2d 465, 469 (5th Cir. 1989)).[28]

Several other reversals of Pickering's decisions involve issues concerning access to justice, and suggest a troubling haste by Pickering to deny such access to certain litigants. For example, in Hepinstall v. Blunt, No. H90-0254(P)(N) (S.D. Miss., May 19, 1992), Pickering imposed the ultimate sanction –- dismissal with prejudice (precluding the plaintiff from ever re-filing his claim) –- as a first sanction on an inmate claiming violation of his constitutional rights. The defendants had noticed the deposition of the plaintiff, who declined to appear without counsel. When the defendants threatened to move for dismissal, the plaintiff answered several questions and then abruptly ended the deposition. Pickering dismissed the case with prejudice as a sanction. Citing prior case law, the Fifth Circuit held in an unpublished decision that such a dismissal with prejudice "is a 'remedy of last resort' which should only be applied in extreme circumstances." Heptinstall v. Blount, No.

[28] In other cases apparently not considered by the Fifth Circuit on appeal, Judge Pickering has clearly misinterpreted Supreme Court precedent on several constitutional issues. In one case, Pickering wrote that the Supreme Court had "acknowledg[ed]" that "the Miranda warning is not a constitutional mandate" in Withrow v. Williams 507 U.S. 680, 690 (1993). See Barnes v. Mississippi Dep't of Corrections, 907 F.Supp. 972, 975 (S.D. Miss. 1995). In fact, the Court clearly did not so acknowledge this in Withrow, but simply assumed the proposition for purposes of evaluating the petitioner's arguments, and then rejected those arguments in any event. Withrow, 507 U.S. at 690. In fact, the Supreme Court recently reaffirmed that the Miranda warning is a constitutional mandate. See Dickerson v. United States, 530 U.S. 428 (2000).

Judge Pickering has also expressed troubling views about judicial precedent generally. In one case concerning the Fourteenth Amendment he stated, "While judicial interpretations should always begin, and in the opinion of this Court should usually end, after determining the literal meaning of a constitutional provision or statute, nevertheless, 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." Randolph v. Cervantes, No. 2:95-CV-259PG (S.D. Miss., Dec. 30, 1996) (slip op. at 12). This has potentially disturbing implications for recognized constitutional protections, such as the right of privacy, that do not appear "literally" in the Constitution.

92-7481 (5th Cir., Aug. 11, 1993), slip op. at 5.[29] Pickering's unpublished order cited no case law on sanctions and referred to no special circumstances, but simply stated that he considered his sanction "appropriate." Hepinstall v. Blunt, No. H90-0254(P)(N), slip op. at 4.

Three years later, Pickering was again reversed by the Fifth Circuit without a published opinion for dismissing claims with prejudice –- this time, the claims of eight plaintiffs in a toxic torts case, which were dismissed for failure to comply with a case management order. Abram v. Reichhold Chemicals, No. 2:92-CV-122PR (S.D. Miss., Nov. 1, 1995). Citing a published ruling, the Fifth Circuit explained that such dismissal 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 the action." Abram v. Reichhold Chemicals, No. 95-60784 (5th Cir., July 2, 1996), slip op. at 3 (emphasis in original). Despite the Fifth Circuit's prior ruling in his Hepinstall case and the governing case law, Pickering did not even acknowledge the importance of utilizing lesser sanctions before throwing a case out of court. In reversing Pickering, the Fifth Circuit pointedly noted that the record did not reflect the "required prior recourse to lesser sanctions and we necessarily must conclude that the dismissal order was granted improvidently." Slip op. at 3.

In a published decision in a related case against Reichhold Chemicals reversing another access to justice ruling by Judge Pickering, the Fifth Circuit affirmed Pickering's denial of class certification, but vacated his dismissal of the plaintiffs' complaint based on what Pickering held to be a violation of a blanket order "of this Court" that all future suits against the defendant chemical company should be filed separately, with separate filing fees paid. Applewhite v. Reichhold Chemicals, Inc., 67 F.3d 571 (5th Cir. 1995), reversing No. 2:93-CV-190PR (S.D. Miss., July 7, 1994). In so ruling, the unanimous panel of the Fifth Circuit stated that "[g]enerally, permissive joinder of plaintiffs under Federal Rule of Civil Procedure 20 is at the option of the plaintiffs, assuming they meet the requirements set forth in Rule 20." 67 F.3d at 574 (emphasis added). While the court noted that a district judge has the discretion under Rules 20 and 21 to sever an action "if it is misjoined or might otherwise cause delay or prejudice," and discretion to sever claims under Rule 42(b), it held that "[t]his discretion, however, should be exercised after an examination of the individual case." Id. The court remanded the case to Pickering

[29] The spelling of the parties' names is different in Judge Pickering's ruling and in that of the Fifth Circuit.

to consider whether the plaintiffs were properly joined and should be allowed to continue in one action.

In another case Pickering adopted, without opinion and after a "full review," a magistrate's recommendation to dismiss an inmate's petition for a writ of habeas corpus raising issues about the voluntariness of his confession to murder, which allegedly had been procured after he had been held incommunicado in a jail cell for approximately 80 hours. Barnes v. S.W. Puckett, No. H88-0223 (P) (S.D. Miss., June 4, 1992). The magistrate and Judge Pickering had considered the inmate's claims only under the Fourth Amendment. The Fifth Circuit, in an unpublished decision written by conservative Reagan-appointee Edith Jones, vacated Pickering's ruling, holding that the inmate's claims as to his uncounseled and allegedly involuntary confession raised constitutional issues under the Fifth, Sixth and Fourteenth Amendments that Pickering had failed to consider. Barnes v. Hargett, No. 92-7436 (5th Cir., Apr. 15, 1994).

In United States v. Arthur Loper, No. 1:94-CV-560PR (S.D. Miss., April 21, 1995), Pickering issued a four-line order summarily denying an inmate's motion to set aside his sentence, a sentence that the inmate contended had been imposed upon him illegally by Pickering. The petitioner was a federal inmate who had been convicted of a drug offense and was given an enhanced sentence by Judge Pickering because of a prior drug offense. The inmate contended that the enhanced sentence was illegal because the government had not filed a notice of enhancement as required by federal law. In an unpublished decision, the Fifth Circuit held that Pickering had abused his discretion in denying the inmate's motion, and vacated the sentence that Pickering had imposed. United States v. Loper, No. 95-60274 (5th Cir., May 27, 1996). The court of appeals cited the clear statutory requirement that under ordinary circumstances, the trial judge "shall ... grant a prompt hearing" and "make findings of fact and conclusions of law" on the petitioner's claims. 28 U.S.C. § 2255; slip op. at 3, n.2. Here, according to the Fifth Circuit, "without holding a hearing or ordering a response from the Government," Pickering "denied the motion in a one-page order that did not contain [his] reasoning." Slip op. at 2. In its ruling, the Fifth Circuit also pointedly reminded Judge Pickering that "[a] statement of the court's findings of fact and conclusions of law is normally 'indispensable to appellate review.'" Slip op. at 3. The court of appeals remanded the case so that the inmate could be resentenced. Judge Pickering's summary denial of the inmate's motion, without even seeking a response from the government, was itself troubling. In addition, according to the Fifth Circuit, the government conceded that "because of [its] failure to comply with [the sentencing law's] procedural requirements, the district court could not enhance Loper's sentence under the statute based on his prior drug conviction." Slip. op. at 3.

Last year, Pickering was again reversed in an unpublished opinion in an access to justice case. In United States v. Nix, No. 1:91cr40PR (S.D. Miss., May 30, 2000), he threw out as too late an attempt by criminal defendants to file an appeal of the dismissal of their motion for a new trial. The defendants' notice of appeal was filed late because, they claimed, the court clerk had not mailed a crucial notice to their current address. Pickering held that the defendants were at fault for not providing written notice of their change of address, allegedly violating a local rule notifying them of a "continuing obligation to apprise the court of any address change." United States v. Nix, No. 99-60069 (5th Cir., Mar. 7, 2001), slip op. at 7. The defendants claimed that they had given such notice orally, that they had sent documents to the court marked with their current addresses, and that the court had mailed correspondence to those addresses prior to the dismissal of their motion. The Fifth Circuit held that Pickering's construction of the Local Rule to require written notice was "unfair" and "unreasonable in the light of the plain meaning of the word 'apprise' and the lack of any reference to a writing requirement." United States v. Nix, No. 99-60069 (5th Cir., Mar. 7, 2001), slip op. at 8. The court also criticized Pickering for determining at that point that the underlying motion for a new trial was in bad faith and that this "poisons all pleadings and filings made in the furtherance of it." Id., slip op. at 9.

Most of the opinions in the Fifth Circuit's unpublished rulings reversing Pickering were written per curiam by all three judges and do not list a single judge as their author. The panels in a number of these cases, however, included some of the most conservative members of the Circuit appointed by Presidents Reagan and Bush, such as Edith Jones, Rhesa Barksdale, and Emilio Garza. The Fifth Circuit is widely regarded as one of the most conservative in the country, and has already issued a number of rulings significantly limiting civil and constitutional rights, some of which have been reversed as too conservative by the Supreme Court.[30] Adding Judge Pickering to the Fifth Circuit would only further increase the threat to the civil and constitutional rights of all Americans.

[30] See, e.g., Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)(unanimously reversing Fifth Circuit decision making it significantly more difficult to prove intentional employment discrimination); Houston Lawyers' Association v. Attorney General, 501 U.S. 419 (1991)(reversing Fifth Circuit decision ruling that Section 2 of the Voting Rights Act did not apply to state district judge elections).

C. Pickering's disturbing record regarding access to justice for some litigants

As the prior discussion of Judge Pickering's reversed decisions shows, he has a troubling propensity to make it more difficult for some litigants to obtain access to justice. This is particularly true with respect to less powerful litigants, such as plaintiffs raising civil liberties or civil rights claims and prisoners. For example, as previously noted, Pickering has misused the ultimate sanction of dismissal, literally throwing cases out of court before exploring lesser sanctions, he has enforced a burdensome order requiring plaintiffs to file separate suits against the same defendant arising out of the same circumstances, and he has narrowly construed a court rule in an "unfair" (in the words of the Fifth Circuit) manner resulting in a notice of appeal being time-barred.

Similarly disturbing concerns about Judge Pickering's denial of access to justice arise from other rulings. As a number of the cases discussed above demonstrate, Pickering appears to have a particular hostility toward cases brought by prisoners, including habeas corpus cases. Indeed, in dicta, Pickering has stated his belief that "the scope of habeas corpus is entirely too broad." Barnes v. Mississippi Dept. of Corrections, 907 F. Supp. 972, 982 (S.D. Miss. 1995). Moreover, he believes that the courts are drowning in "frivolous prisoner complaints," and has suggested that prisoners file complaints merely to "get a trip out of the penitentiary for a court hearing." Rudd v. Jones, 879 F. Supp. 621, 622 (S.D. Miss. 1995).

These views are reflected in the harshness with which Judge Pickering has handled a number of prisoner cases. For example, in Rudd v. Jones, 879 F. Supp. 621 (S.D. Miss. 1995), Pickering was faced with a pro se complaint by a prisoner concerning the conditions of his confinement and an application by the inmate to proceed in forma pauperis. After reviewing the complaint and the in forma pauperis application, Pickering issued a ruling consisting in large measure of a diatribe against the filing of what he called "frivolous" lawsuits by prison inmates. He issued this diatribe despite acknowledging that, under Supreme Court precedent, "[t]he complaint now before this Court could be construed to state a cause of action under the premise that a pro se plaintiff is entitled to have his complaint liberally construed." 879 F. Supp. at 623. Despite that acknowledgement, Pickering proceeded, apparently on his own, to order the inmate to amend his complaint within 20 days to provide specific allegations as to who had violated his constitutional rights and when. He held that "the defendants should not be compelled to defend this action and neither should this Court be expected to conduct a hearing" until such specificity had been provided. Id. "Until that is done," Pickering ruled, "this Court will not allow

this proceeding to go any further." Id. Pickering warned the inmate that failure to comply timely with the order that he amend his complaint would result in the case "being dismissed with prejudice without further written notice." Id. He further warned the inmate that "[p]arties who file frivolous actions are subject to sanction by this Court." Id.

In Holtzclaw v. United States, 1995 U.S. Dist. LEXIS 14632 (Sept. 22, 1995), denial of habeas aff'd, 96 F.3d 1441 (5th Cir. 1996), cert. denied, 1997 U.S. LEXIS 966 (1997), Pickering was dealing with what he called the first habeas corpus petition filed by the prisoner. The inmate's claims pertained to the Speedy Trial Act, the suppression of evidence, and the ineffective assistance of counsel. Pickering held that the petition was "frivolous" because he had rejected the petitioner's claims during the trial and the court of appeals had affirmed. Pickering launched into a diatribe against "frivolous" prisoner litigation similar to the one he had issued in Rudd, and went on to state that, "in the future, this Court will give serious consideration to requiring prison authorities to restrict rights and privileges of prison inmates who file frivolous petitions before this Court." 1995 U.S. Dist. LEXIS 14632, *5. Addressing this inmate specifically, Pickering then stated:

> [T]his Court gives notice to Roger Franklin Holtzclaw that should he file another frivolous petition for habeas corpus 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 Petitioner for a period of from three to six months and/or that the Court will also consider appropriate sanctions. Petitioner Roger Franklin Holtzclaw is instructed not to file further frivolous petitions.

Id. (emphasis added). It is not disputed that the filing of "frivolous" litigation needlessly burdens the judiciary and opposing litigants and is a legitimate concern of a federal judge. For that reason, District Court judges have the authority (as under Fed. R. Civ. P. 11) to sanction litigants who file frivolous lawsuits. But they have no authority to order correctional officials to penalize an inmate who may have filed a "frivolous" lawsuit and no authority to dictate the conditions of such an inmate's confinement. This type of threat by Judge Pickering plainly overstepped the bounds of his judicial authority.

In Washington v. Hargett, 889 F. Supp. 260 (S.D. Miss. 1995), Judge Pickering denied the plaintiff's petition for a writ of habeas corpus. The plaintiff had been convicted in state court thirteen years earlier of rape. In his petition, he claimed that he was innocent and asked that a DNA test be performed and that he be given a new trial. At the plaintiff's

original trial, the state's forensic serologist had testified that his tests did not establish that the plaintiff was the rapist, only that he was not excluded from that portion of the population who could have committed the rape. The victim identified the plaintiff as the rapist, and other witnesses disputed the plaintiff's alibi defense. Judge Pickering, after reviewing the trial transcript, concluded that the plaintiff had not demonstrated "a fair probability that the trier of fact would or should have entertained a reasonable doubt as to his guilt," adding that no jurist could read the transcript "and say that no 'rational juror' could have found the Plaintiff guilty." 889 F. Supp. at 265. Although Judge Pickering used this case as another opportunity to criticize habeas corpus review and state his opinion that such review should be available only with respect to claims of "actual innocence," id. at 261, he placed the plaintiff in a virtual Catch-22 by denying his request for DNA testing –- the very testing that can actually establish innocence in a rape case.

D. Judge Pickering's promotion of religion from the bench

In 1984, Pickering, then President of the Mississippi Baptist Convention, gave the President's Address before the annual meeting of the Convention in which he stated, according to the written text he has provided to the Senate Judiciary Committee, that the Bible should be "recognized as the absolute authority by which all conduct of man is judged . . . ." Charles W. Pickering, "God Will Hold Us Accountable," Mississippi Baptist Record (November 29, 1984).[31]

At his 1990 confirmation hearing before the Senate Judiciary Committee, Pickering was expressly reminded of his statement about the "absolute authority" of the Bible and asked how, if confirmed, how he would separate his "religious beliefs from [his] duties as a judge," and whether he would "have any problems in doing so."[32] Pickering assured the Committee that he did not think he would have any problems in this regard. Id. There is disturbing evidence, however, that Pickering has had

[31] A news article about Pickering's speech suggests that in delivering the address Pickering went even further than his subsequently published, written text in condemning various aspects of society based on his interpretation of the Bible. According to the article, Pickering "called on Baptists to be about 'God's work' in helping influence morality. 'We as Southern Baptists should lead the way in strengthening traditional moral values,' he said, adding that society has been degraded by such things as pornography, homosexuality and divorce." "Baptist Head Urges Moral Values," *The Clarion-Ledger*, (Nov. 13, 1984).

[32] 1990 Hearings at 658.

difficulty doing just that and has in fact used his position as a federal judge to promote specific religious beliefs and to urge specific religious conduct by litigants appearing before him. For example, the Almanac of the Federal Judiciary, an independent publication that profiles all federal judges, includes this statement from one lawyer who has practiced before Judge Pickering:

> He is the judge who concerns me the most. He's a fine person, but he's almost so pious that it interferes with his assignment as a judge.

Vol. I, Almanac of the Federal Judiciary, Fifth Circuit, at 46 (2001).

For more than 20 years, People For the American Way has worked vigorously to defend the constitutional right of every American to freedom of religion and freedom of conscience. There is no question that Judge Pickering, like every person, is entitled to hold and practice his religious beliefs. The information in the Almanac of the Federal Judiciary, however, and Pickering's uncompromising statement that the Bible should be "recognized as the absolute authority by which all conduct of man is judged," raise legitimate concerns about whether Pickering, as a judge, is able to separate his own personal religious beliefs from his role as a judge, as asked by the Senate Judiciary Committee in 1990. While it would be impossible to review the entirety of the actions of a judge who has been on the bench for more than ten years, reports in the press and elsewhere have led us to a number of court proceedings in which Judge Pickering has specifically used his judicial position to promote the role of religion in a person's life and urged litigants to undertake particular religious practices. In particular, this has occurred in cases involving perhaps the most vulnerable category of litigants before a judge –- people being sentenced after conviction of a crime. For example, in sentencing one criminal defendant to 18 years in prison following his conviction in a conspiracy case involving murder, Pickering told him:

> It's too late for you not to pay a price for what you've done. However, it is not too late for you to form a new beginning. For yourself and others, I hope you will do that. You have a lot to offer. You can become involved in Chuck Colson's prison fellowship or some other such ministry, and be a benefit to your fellow inmates and to others and to their families. I hope you will have a new beginning even in prison; that you will make a positive contribution to society. It won't be easy, but it can be done.

United States v. Halat, No. 2:96cr30PG, Transcript of Sentencing Hearing, at 93 (Sept. 22, 1997) (emphasis added).

Pickering made a similar statement when he imposed an 18-month prison sentence on a lawyer who had been convicted of receiving and sending child pornography over the Internet:

> [I]n the penitentiary, there are many ways to become involved. There are many areas of service and ministry that you can engage in in the penitentiary...[T]here are many other good programs and missions and –- you know, you have indicated spiritual growth. Some of those in their letters that have written to me have indicated spiritual growth. I hope that you will continue and that you will find meaning and purpose in life.

United States v. Holleman, No. 1:97cr51PG, Transcript of Sentencing Hearing, at 83-4 (Mar. 18, 1998) (emphasis added).

In another sentencing hearing, Judge Pickering told a defendant who had been convicted of conspiracy in a murder case that his life "has indeed epitomized the work of the devil." United States v. Gillich, No. 1:90cr77PR, Transcript of Hearing on Motion to Reduce Sentence, at 32 (Sept. 23, 1997). In what one news article described as a "move true to his religious connections,"[33] Pickering then ordered that upon the defendant's release from prison, during a period of supervised release and/or probation:

> you will involve yourself in some type of systematic program whereby you will be involved in the study and consideration of effects and consequences of crime and/or appropriate behavior in a civilized society. This may be a program through your church or some other such agency or organization so long as it is approved in advance by the probation service.

United States v. Gillich, No. 1:90cr77PR, Transcript of Hearing on Motion to Reduce Sentence, at 38 (Sept. 23, 1997) (emphasis added).

Last summer, Judge Pickering reduced to ten years the sentence of a criminal defendant who had served five years of a life sentence for a drug-related crime. According to the defendant, he had spent time in prison "seeking God, reading and studying God's word," and learned he had to change. United States v. Edmond C. Brown, No. 1:96cr57PG, Transcript of Hearing on Motion for Reduction of Sentence, at 16 (Aug. 13, 2001). Apparently, he then provided substantial cooperation to the

[33] Associated Press, "Pickering Gives Gillich Mother of All Lectures" (Sept. 29, 1997).

government, which supported his motion for a reduced sentence. At the resentencing hearing, Judge Pickering told the defendant:

> [L]et me share an impression that I have. You know, whenever your case first came before me, I was saddened and impressed with the fact that I thought: What a loss. What a waste. Two or three reasons. You obviously had considerable talent as a baseball player. Physically, you're blessed beyond what most young men have. You're nice looking. You're neat. . . You're not overweight. You were a good physical specimen. That was evidenced by your ability to play ball. But I got the distinct impression that you thought you were going to have a professional ball career in your future. And that didn't materialize. And that when you didn't have the big cars and the big money that you had expected from being a professional ballplayer, that that caused you to change your direction and to become dishonest and to deal drugs. And I thought that was a tragedy. What a waste when there's such a great need for role models, for Christian examples.

United States v. Edmond C. Brown, No. 1:96cr57PG, Transcript of Hearing on Motion for Reduction of Sentence, at 17-18 (emphasis added).[34]

It should also be noted that in another case, Pickering cited the Bible as recorded law on par with the Supreme Court. In Barnes v. Mississippi Dept. of Corrections, 907 F. Supp. 972 (S.D. Miss. 1995), Pickering denied a habeas corpus petition by a defendant who had received a life sentence. In his ruling, Pickering criticized the availability and extent of habeas corpus relief. He wrote that jurists with law clerks have ample time to spend second-guessing law enforcement officers, and noted that these decisions affect "real people and the way they live their lives and the way they are protected or not protected." 907 F. Supp. at 981. Pickering then continued: "Judges and legal scholars throughout the ages have warned against what we are doing now. 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.' [Fn. 15: The Bible, Exodus 23:7]." Id. Pickering then proceeded to cite English jurist Sir Edward Coke (a 17th century authority on common law) as well as a decision of

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[34] At the time of the defendant's trial, someone had circulated a leaflet in Jackson County, Mississippi, accusing Judge Pickering and the prosecutors of being racist. At the resentencing hearing, Judge Pickering asked who had been responsible for the leaflet and was told it was the defendant's mother. Upon learning this, Pickering told the defendant: "[I]f your mama hasn't prayed for forgiveness and if she hasn't apologized for it, she ought to." Id. at 13 (emphasis added).

the Supreme Court. His reference to the Bible placed the Bible on the same plane as Coke and the Supreme Court in terms of sources of jurisprudence.

It should be emphasized again that our concern does not relate to Judge Pickering's personal religious beliefs. Judge Pickering, like every American, is entitled to hold and to practice his religious beliefs. But it is of great concern when a federal judge, acting in that capacity, attempts to promote those beliefs or suggest to those appearing before him that they should undertake particular religious practices or bring religion into their own lives.

E. Pickering's opposition to women's reproductive rights

Pickering has long been a staunch opponent of a woman's right to reproductive freedom. In 1976, he was chair of the Human Rights and Responsibilities Subcommittee of the National Republican Party Platform Committee that approved a plank for the party platform protesting Roe "as an intrusion into the family structure" and supporting the efforts of those calling for a "right to life" amendment to the Constitution.[35] Pickering supported the Subcommittee's plank,[36] and in fact publicly announced before leaving Mississippi for the Republican Convention that he "would push for a platform with a statement against 'abortion on call.'"[37] Although the Republican Party today is well known for its opposition to reproductive choice in its platform, the 1976 Republican Party Platform was the first to oppose Roe v. Wade.

When he served in the Mississippi State Senate, Pickering voted for a resolution calling for a constitutional convention to propose a "human life" amendment to the Constitution.[38] In 1984,

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[35] Richard L. Madden, "G.O.P. Panel Backs Anti-Abortion Plank," *The New York Times*, Aug. 11, 1976, at A1.

[36] Fredric N. Tulsky, "Pickering's Panel Avoids ERA Stand, Opposes Abortion," *The Clarion-Ledger*, Aug. 12, 1976.

[37] "Pickering Will Chair GOP Panel," *The Clarion-Ledger*, Aug. 10, 1976, at A16. Pickering's Subcommittee, also with his approval, refused to support a plank endorsing the Equal Rights Amendment. Fredric N. Tulsky, "Pickering's Panel Avoids ERA Stand, Opposes Abortion," *The Clarion-Ledger*, Aug. 12, 1976. The platform committee, however, endorsed the ERA, rejecting the recommendation of Pickering's subcommittee that it "duck the issue." "Pickering Loses ERA Battle As Platform Backs Amendment," *The Clarion-Ledger*, Aug. 13, 1976.

[38] See Journal of the Senate of the State of Mississippi, Regular Session 1979, at 436 (vote on H.C.R. No. 3). See also, "Proposal on Abortion Approved," *The Clarion-Ledger*, Feb. 8,

when Pickering was President of the Mississippi Baptist Convention, the Convention unanimously passed a resolution resolving to work for legislation prohibiting all abortions except to save the life of the woman,[39] as well as directing the Convention "to continue dealing with the issue of abortion by upholding the Christian views on human life."[40]

The Fifth Circuit has decided a number of cases restricting women's reproductive rights, and state legislatures within that jurisdiction continue to enact legislation seeking to limit reproductive freedom. See, e.g., Barnes v. State of Mississippi, 992 F.2d 1335 (5th Cir. 1993) (2-1 decision upholding state law requiring consent of both parents for a minor to receive an abortion). Especially for this reason, the proposed addition to that court of a judge with the views that Pickering has in opposition to women's reproductive freedom raises serious concerns.

CONCLUSION

The courts of appeal play a critical role in our federal judicial system, second in importance only to the Supreme Court. Particularly because the Supreme Court hears so few cases, the protection of civil and constitutional rights by the judiciary depends in large measure on the appellate courts. The public record concerning Judge Pickering as documented above does not support Pickering's elevation to the court of appeals. Far from meeting the burden to demonstrate a record of commitment to civil and constitutional rights, his record shows insensitivity and hostility toward key principles protecting the civil and constitutional rights of minorities, women, and all Americans. Especially in the Fifth Circuit, which has already issued a number of troubling decisions on civil and constitutional rights, adding another judge like Judge Pickering poses a grave danger to our rights and liberties. His nomination should be rejected.

1979.

[39] Michael Culbreth, "Baptists End Annual Session With Resolution Approvals," *The Clarion-Ledger*, Nov. 13, 1984.

[40] Michael Culbreth, "Baptists Avoid Fight Over Bible Interpretation," *The Clarion-Ledger*, Nov. 15, 1984.