

Pickering's record as a district judge stem from the gross distortion of that record by the liberal special interest groups. For example, one often-cited area of concern is Judge Pickering's record on Voting Rights Act cases, but the bottom line is that Judge Pickering has decided a total of three of those cases on the merits: Fairley, Bryant, and Morgan. None of these cases was appealed, a step that one can reasonably expect a party to take if it is dissatisfied with the court's ruling.

Moreover, the plaintiffs in the Fairley case, including Ken Fairley, former head of the Forrester County NAACP, have written letters in support of Judge Pickering's nomination. Judge Pickering's qualifications are also reflected in his ABA rating, which some members of the committee have referred to as the "gold standard" in evaluating judicial nominees. The ABA, of course, rated Judge Pickering well qualified for the Fifth Circuit.

I also find it ironic that many of the complaints Judge Pickering's opponents have lodged against him pertain to events that occurred before he became a Federal district court judge, a position for which he was unanimously confirmed by both this committee and the full Senate.

The way liberal special interest groups are working and have worked to change the ground rules on judicial confirmations is evident in the nomination of Charles Pickering for the Fifth Circuit Court of Appeals. This is a gentleman who had overwhelming support in his home State of Mississippi from Democrats and Republicans alike, from the Democrat attorney general of the State, and from prominent members of the African-American community.

Those who know Judge Pickering well know he has worked to improve race relations in Mississippi. For example, he testified against the Imperial Wizard of the KKK for firebombing a civil rights activist in Mississippi in 1967, at great risk to both himself and his family. He hired the first African-American Republican political worker in Mississippi in 1976; represented a black man falsely accused of robbing a 16-year-old white girl in 1981 and won the case for him; chaired a race relations committee for Jones County, Mississippi, in 1988; served on the board of the Institute of Racial Reconciliation at the University of Mississippi since 1999; and worked with at-risk African-American youth in Laurel, Mississippi, in 2000.

I have to say I was pleased that my colleagues on the other side said they do not believe he is a racist and they do not believe that such a case can be made, and they were disappointed that some tried to make it.

I say, in addition, Judge Pickering has compiled an impressive record as a Federal district court judge. During his more than 11 years on the bench, he has disposed of an estimated 4,000 to 4,500 cases, but he has been reversed

only 26 times. This means his reversal rate is roughly one-half of 1 percentage point and is lower than the average reversal rate for Federal district court judges in this country.

Despite this impressive career, Judge Pickering had become the target of a smear campaign instigated and perpetrated by liberal Washington interest groups and lobbyists with their own political agenda, some of whom called him, in essence, a racist. These groups painted a caricature of a man that bears little resemblance to reality, all in the name of attempting to change the ground rules for the judicial confirmation process and impose their political litmus test for all of President Bush's judicial nominees.

We are now seeing the same thing starting with another circuit court of appeals nominee, D. Brooks Smith, with the same type of approaches they have used against Judge Pickering.

We had a number of Senators say they voted against Judge Pickering because of his 26 reversals, some of which they considered questionable in the areas of voting rights, in the area of civil rights, in the area of prisoners' rights, and in the area of employment rights. We blew those arguments away today because we cited nearly every case about which they are complaining. They claim Judge Pickering did not follow settled law, and we showed that there was not settled law in many of those cases.

We did not hear those cases really argued today from the principal people who argued them before. They could not. So what did we hear an argument on? The Swan case. Now what was the Swan case? The Swan case the case of a cross burning on the lawn of an African-American family.

I might mention that is a vicious, rotten, lousy thing for anybody to do.

Of the three boys who did it, one of them was a vicious racist who had shot into the house with a gun. Because two of them cooperated, the Justice Department prosecutors gave them basically a giveaway, easy sentence. The third was absolutely drunk at the time. He had not shot into the home, he had not issued any racist comments, but he was with them. He did not think he did anything wrong. He contested the case, lost, and under the mandatory minimum he had to be sentenced to 7 years.

The judge did not think that was right, that the other two really were as or more culpable, and when he looked and found out that this young man had never made a racist comment and he was drunk at the time, he thought it was a tremendous injustice. So what he did was he complained to one of his friends, Frank Hunger, who was with the Justice Department at the time, but not at the Civil Rights Division at the Civil Division. Swan still got a sentence of 27 months, a fairly long time when his two co-defendants got only home confinement and probation.

Because he talked to Frank Hunger, who was with the Civil Division, not

the Civil Rights Division, we had efforts to paint that as a tremendous violation of ethics. Hardly. Hunger does not even remember the conversation and is one of the strongest supporters of Judge Pickering, a Democrat from the Clinton Administration Justice Department. He is very disappointed with what happened to Judge Pickering's nomination.

There are other things I would like to say, but I know my colleague would like to speak. I will close with this: I am sorely disappointed with the vote on Judge Pickering's nomination. I am sorely disappointed with the way these outside groups tried to paint Mississippi as the old South, prejudiced, rotten, acting in ways that fly in the face of civil rights, when there have been so many strides made, part of them made because of the efforts of Judge Charles Pickering.

I do not understand this type of thing. In each case in which a nominee was stopped in Committee, I have wondered why they were stopped.

I do not live in Mississippi, but I feel for the people of Mississippi because this action today, it seems to me, is a condemnation of a State that does not deserve it, and a condemnation of a Federal judge who went through the Senate the first time unanimously, who has served well for nearly 12 solid years, and who now has a reputation besmirched because of what I consider to be phony allegations which should never have been accepted.

I am disappointed. But unfortunately, that is the way it is around here. I hope we do not have to put up with much more of this in the future.

I notice my colleagues want to speak, so I yield the floor.

**THE PRESIDING OFFICER.** The Senator from Nevada.

**Mr. REID.** Madam President, it is my understanding the Senate is still on S. 517; is that right?

**THE PRESIDING OFFICER.** The Senator is correct.

**Mr. REID.** The Senator from Arizona is still present. It is my understanding he is not going to offer his amendment tonight. Is that right?

**Mr. KYL.** Yes.

#### MORNING BUSINESS

**Mr. REID.** Madam President, I ask unanimous consent that the Senate now proceed to a period for morning business with Senators allowed to speak therein for a period not to exceed 10 minutes.

**THE PRESIDING OFFICER.** Without objection, it is so ordered.

#### NOMINATION OF CHARLES PICKERING

**THE PRESIDING OFFICER.** The Senator from Alabama.

**Mr. SESSIONS.** Madam President, one of our colleagues earlier, in talking about the Pickering nomination, talked about the difficulty of making judgments. Of course, that is what they

pay us to do. It is sometimes difficult. But what is really important for us to be sure of is that the judgment we make is our own, independent judgment, made with integrity, and not influenced by unfair charges or pressure from groups outside the Senate.

I think a nominee is entitled to that. If charges are made against a nominee, we ought to hear about them. We ought to find out if they are correct. Maybe delay the vote and have another hearing, if that is what is required, so be it. But when the nominee can show that the charges against him in case after case after case are not justified charges, and there are perfectly good and sound reasons for the actions he has taken, that his words are being taken out of context, outside the normal bounds of any kind of fair criticism, when he can explain that in matter after matter after matter that the charges are untrue, I believe the members of the Senate Judiciary Committee ought to listen to that. Senators should not allow friends from the outside, who have an agenda and a commitment to defeating a nominee who they have picked as the person they want to go after, to control the situation and, in effect, cast a vote in these matters. That is what I am concerned about.

Judge Pickering came before our committee. He was a superb witness. He testified with integrity, with skill, with understanding. He is a man I believe the committee related to well. I was very impressed with his testimony, his whole history as a lawyer and as a judge and as a human being. I thought, what a wonderful presentation he made. But it seemed not to have changed a single vote.

When point A was knocked down, we would go to point B, and when that was knocked down, to point C. Finally, we ended up with the most weak excuses, weak reasons that I do not believe rise to the level, in any way, that would justify rejecting this fine man.

He finished No. 1 in his law class at the University of Mississippi School of Law, an excellent school of law. He decided to go back home where his family were farmers, in the dairy business, in Laurel, MS.

Some suggested he did a lot of things in the past, in the 1960s, of which he wasn't proud. They said over and over again, with great unctuousness: We don't think he's a racist. We are not saying he's a racist. But he is a southerner, you know, from Laurel. We have some complaints up here in Washington about him.

What did his record look like? In the 1960s, things were not easy in Laurel, MS. Having grown up in the rural South, I know that. I know a lot of people made choices they are very greatly disappointed that they made, many years ago. A lot of us should have been more alert to fighting more aggressively for civil rights than we were. I was in high school in those years and I remember the debates that came

about. I know how deeply the passions and feelings were running.

In Laurel, there was a trial of a Klansman who was involved in a murder. Judge Pickering, in the 1960s, signed a warrant for his arrest in that murder.

Another case involved a head of the Ku Klux Klan in that area. It was a tense case in a tough time. Something needed to be done to send a signal to that jury that good men and women, in Laurel, MS, knew that he ought to be convicted of the crimes he committed.

Judge Pickering volunteered and testified as a character witness against that defendant, saying that he had a bad reputation for violence in the community. Nobody, I am sure, relished having to do that task at that time. Sure enough, the next election, he lost that election. And the Klan bragged that was the reason, that they got the man who went against them.

That is his background. He has a superb legal mind. He finished at the top of his class at the University of Mississippi. A man, faced with difficult times, was on the right side of the issue.

We had Charles Evers, the brother of Medgar Evers, the slain civil rights worker in Mississippi visit members of the Judiciary Committee. He came up here on Judge Pickering's behalf and spoke strongly and passionately for him. As did an African-American judge. As did others who came. By the way, I think 26 out of 26 living Presidents of the Mississippi Bar Association endorsed Judge Pickering. But this group came here. I asked them, each one of them: During the 1960s and into the 1970s, when civil rights was really a matter of some courage in the South, was Judge Pickering on the good guys' side or the bad guys' side? They all said he was on the right side. He was on the good guys' side. He took actions to reach out and to build harmony and he believed that is important.

He, in fact, serves now as co-chairman—or did until recently—with former Governor Winter, a Democrat of Mississippi, on the Ole Miss Commission to Promote Racial Harmony. He was chosen to be co-chairman of that commission.

Oh, but they say we didn't accuse him of being a racist. He is hostile to employment cases. So Senators HATCH and DEWINE went through all the employment cases that he dealt with, delineated the two, I believe, that were reversed on matters unrelated to the merits, really, of employment cases. I also point out in the state of Mississippi, there are a group of lawyers who specialize in employment cases representing plaintiffs who sue to get their jobs back or for damages for mistreatment. The top plaintiffs' lawyer in Mississippi, who practiced before Judge Pickering many times, wrote an op-ed in the Mississippi paper. Not just a letter, he wrote an op-ed in the paper with his name on it, saying Judge Pickering should be confirmed; the plaintiffs'

lawyer said that Judge Pickering is a fair man and that Judge Pickering treated employment cases fairly in court.

Why would we want to even continue to talk about that issue after that matter is raised? But still people do.

There were other complaints. They said he had asked lawyers to write letters on his behalf and that this somehow violated ethics. We had a professor who said this was ambiguous at best, and cited histories going back to Learned Hand, where judges got letters written on behalf of nominees. So I don't think that was the matter.

They said he had them given to him. The Department of Justice asked him to collect the letters and have them sent up. The U.S. Department of Justice asked him to collect those letters and send them forward. It was during the time of the anthrax scare, when the mail was shut down. They wanted him to be sure to collect them all so they could be sent straight to the Department of Justice so they could be disseminated to those of us in the Senate who needed to know about it.

I am, frankly, concerned for about the suggestion that there is an unfairness, or an excessive conservative bent on the Fifth Circuit Court of Appeals. The Fifth Circuit is one of the great circuits in America. It has consistently had some of the great judges in America. I just had the honor to participate in the swearing in of Ginny Granade, the granddaughter of Judge Richard Reeves on the old Fifth Circuit to a Federal judgeship in my hometown of Mobile. She worked for me for 12 years when I was U.S. attorney there. She is one of the finest people I know. She has never been political in any way. She was confirmed and is now serving there. But the old Fifth Circuit and the Fifth Circuit today is a great circuit. It has a good record of being affirmed by the U.S. Supreme Court.

We have had some concerns about the Ninth Circuit Court of Appeals, I will admit. I have raised that issue on occasion. One year the Ninth Circuit had 27 out of 28 cases that went to the Supreme Court of the United States reversed. Year after year—one year it was 13 out of 15. The Ninth Circuit has the highest record of reversals of any circuit in America by far. The Fifth Circuit is nowhere close.

I opposed, I will admit, two nominees to the Ninth Circuit. But they were confirmed.

I would have to add, however, that my concerns have been a bit validated in that Judges Paez and Berzon, the two I did vote against, those two judges on separate occasions have eviscerated and declared unconstitutional the "three strikes and you are out" law in the State of California which the State supreme court, which is not a conservative court had previously upheld.

I will just note that was discretion. Perhaps there was a legal basis for those reversals of the important California habitual offender law. Maybe the

law needs to be changed by the legislature. But judges ought to be reluctant to be whacking out long-established State law of this kind. I am interested in studying those cases.

At any rate, I believe we had a good process in the last 8 years of President Clinton. In 8 years, 1 judge was voted down—1 judge was voted down in 8 years—and 377 judges were confirmed.

When President Clinton left office, there were only 41 judges nominated and pending unconfirmed.

When former President Bush left office, on the other hand, in 1992, there were 54 judges nominated and unconfirmed.

It is clear that at least 13 fewer judges were pending when Senator HATCH chaired the committee and the Republicans left office than when the Democrats controlled the Senate and President Bush left office—a very similar circumstance. I think it is impossible to say that President Clinton's judges were abused.

With regard to the historic right of Senators to refuse to submit the blue slip, giving home State Senators, in effect, an ability to block nominees in their home States, that did slow down some of the nominees and keep them from being confirmed. Whether those Senators were right or not, I don't know. But it is a power we have always held.

Let me say this: Do the Democrats in the Senate say this is an abuse of power and ought to be reduced, and it is something that ought not be allowed to go forward? No, they do not. They are now pushing to expand the power of the home State Senators beyond what we have had in the past to block nominees.

I am very sad for the Pickering family, and the young CHIP PICKERING, the Congressman from Mississippi. He is one of the very finest Members of the House of Representatives. He loves his father. It was painful for me to see him have to sit through all of that today. But he is a strong young man. His father has a great record. He has served well. I am sure he too will bounce back from this.

I yield the floor.

The PRESIDING OFFICER (Mr. DAYTON). The Senator from Arizona is recognized.

Mr. KYL. Mr. President, I would like to address the Senate in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### THE NOMINATION OF JUDGE THOMAS PICKERING

Mr. KYL. Mr. President, I heard the distinguished minority leader speak a couple of hours ago on behalf of the resolution which he submitted to the Senate for its consideration, and hopefully a vote perhaps Tuesday of next week, in which he called for moving forward in a way that was less politicized with respect to judicial nomina-

tions. He had just witnessed the defeat in the Senate Judiciary Committee of his candidate for the Fifth Circuit Court of Appeals from his State of Mississippi. The President had nominated this fine man, Judge Thomas Pickering. The judge currently sits on the Federal district court. President Bush nominated him to serve on the Fifth Circuit.

The minority leader had witnessed his defeat in the committee just a few moments before and expressed himself, I thought, quite eloquently, without anger but with a great deal of sadness. I share that sadness tonight because I think a very fine man has been ill treated.

Some of my colleagues have said the process was fair. And I don't argue that the process was unfair. But what I argue was unfair was the characterization of the man. It was done so that there would be a reason to vote against him.

As I will point out in a moment, I think the real reason there were objections to Judge Pickering was that he was a conservative from Mississippi nominated by President Bush. There were too many groups on the outside. Yes, I do think they had some influence with Members of the Senate and characterized him as an extremist, as out of the mainstream, and therefore it became difficult for some Senators to vote for him.

I wish to make it clear that this was not a vote by the Senate. For those who might be watching, what happened today was the Senate Judiciary Committee voted along party lines to defeat his nomination. The majority would not agree to send him to the Senate, as has been done in a few cases, without a recommendation, or even with a negative recommendation. The reason is that had he come to the full Senate for consideration, because of the expressions of support by some members of the majority party, it is clear he would have been confirmed. They were unwilling to let the full Senate vote on him so that he could be confirmed.

There is a question about the advice and consent clause of the Constitution which speaks to the advice and consent of the Senate being exercised by just 10 members of the Judiciary Committee. I think that perhaps is the right of the majority on the Judiciary Committee. But I am not necessarily certain—at least certain in some cases—that it is the right thing to do. It was not a full Senate vote that defeated Judge Pickering; it was just the committee.

The unfair characterization of Judge Pickering was designed to find some reason or some rationale for voting against him.

Why do I say that?

There were a lot of different charges: One, that he was a racist. No Senator was ever willing to stand up to make that charge. There were cases cited. But nobody was ever willing to make that charge.

There was a suggestion that he had collected some letters to support him and that it was unethical. There is no ethics provision that says that one way or the other. As a matter of fact, none of us can stand up and say, yes, or, no, it wasn't. But I think had a decision been made on that basis alone, it would have been extraordinarily unfair.

The American Bar Association, which rated Judge Pickering well qualified, considered all of these matters, obviously. Certainly, the American Bar Association's imprimatur of qualification has been one of the standards most of the members on the majority side have held up as justifying a vote for or against a nominee. When the ABA says this candidate is qualified, it is a little hard for me to justify an assertion that somehow he was unethical because he collected letters of support on his behalf and presented them to the full Senate.

There was an argument made that he had done a lot of reversals. I heard that for several weeks. This morning before the committee, Senator HATCH debunked that totally. The reversal rate is good by any standard. If you take the total number of cases, it is far below the average judge. If you take the number of appeals, it is below the average judge.

If you are going to say how his record stands up against all other judges, he is much better than the average Federal judge.

The reversal rate—25 out of some 5,000 cases—is hardly a reason to vote against him. That was debunked.

This morning, I heard that the reason one Senator was voting against him was that the nomination was so controversial that it was polarizing.

I must say, it is a little like saying, don't you stick your chin out at me or I will hit you, and you will have started a fight. It is hard for me to figure this one out because some outside groups object to a candidate, create a fuss and a stir about the candidate, and the candidate, therefore, becomes controversial. We are supposed to vote against him? There have been a lot of controversial people in history.

I cited this morning people such as Martin Luther King, Jr., Sir Thomas More, and Justice Hugo Black. History is replete with great people who were indeed controversial. In fact, it took courage to stand up for them at the time that they were controversial. But they were right. And the people who stood with them at the time have been validated in their view of what was right, and in their courage.

It seems to me as constitutional officers we have an obligation to follow our constitutional duty and make our decision based on whether a person is qualified or not, not based upon whether that person is controversial.

There is also a very significant undercurrent of retribution. Hardly any conversation about Judge Pickering could occur without members of the majority party saying: And let us remind you of all of the judges who were