

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

treated unfairly when Republicans were in power in the Senate and President Clinton was the President.

Only one judge was defeated on the floor of the Senate, and I do not think any were defeated in the committee, as Judge Pickering was today. But there were some judges who did not get a hearing. Maybe there were too many. But I think that it is quite unfair to try to dream up reasons to vote against somebody if the real reason is that you do not like what happened to some of President Clinton's nominees. That is not right.

We talk about the cycle of violence in the Middle East and say we have to stop it. Yet some people apparently are willing to maintain a different kind of cycle of retribution in the Senate.

I think what it boils down to is a matter of philosophy. I think, if people are honest with themselves, a lot of this boils down to the fact that some members of the majority are uncomfortable supporting a conservative nominated by President Bush. And some on the committee have been courageous enough to, in fact, say that.

One of the Senators from the majority this morning said: Look, I think that he's out of the mainstream. I think that President Bush is nominating waves of conservative ideologues, and that offends my sense of what is proper, and, therefore, I am going to vote against that kind of nominee.

That is an honest statement, at least, even though I think it is very wrong. But I think that really is the reason why a lot of people decided not to support this nominee. And the question is, A, are they right? And, B, is that right?

Well, are they right? I do not doubt that Judge Pickering may be characterized as a conservative, but he has been on the Federal bench for a long time, and I have not seen anybody say that his decisions reflected some kind of conservative bias. Moreover, one man's conservative is another man's mainstreamer, or however you want to characterize it.

I think we get on a slippery slope when a Senator from New York says, for example: Why, those candidates are outside the mainstream. They are conservative ideologues. I say: Gosh, they look pretty good to me. Of course, I am a conservative from Arizona. So it is all in the eye of the beholder. The question is, Who got elected as President of the United States?

I remember when Al Gore said in one of the debates with George Bush: You don't want to elect George Bush because, if he gets elected, he will nominate conservatives to the bench. Everybody in the country knows that whoever is elected President is going to nominate people they like to the bench.

President Clinton nominated a lot of people I thought were pretty liberal. I did not vote for all of them, but I voted for a lot of them because they were qualified, I had to admit. But I thought

they were liberal. They were liberal. And I did not like that. And they have added to liberal courts. But, again, he was elected President, not me. I am a conservative from Arizona.

You can characterize President Clinton however you want to characterize him. He had the right to nominate candidates of his choice because he got elected by the whole country. And so did George Bush.

I daresay that George Bush probably is a better representative of the mainstream of America than a lot of individual Senators in this body who are answerable to specific constituencies in Arizona or New York or New Jersey or Minnesota or whatever State it might be. Therefore, I think it is wrong for any of us to have a litmus test of politics determining our vote for judges on the courts. I think if they are qualified, if the ABA says they are qualified, if we acknowledge they are qualified, then we should not be voting against them just because of their judicial philosophy.

That brings me to the conclusion here.

When I saw the distinguished minority leader express himself tonight, after his fellow Mississippian had been defeated in the Senate committee, and he offered his sense of the Senate, I admired Senator LOTT because what he was saying, in effect, was: I am not going to forget this personally. But it is time to move on and stop this business of retribution, this business of saying Clinton judges were treated unfairly, so, therefore, we are justified in doing the same to President Bush's nominations.

What TRENT LOTT was saying was let's move on. Let's stop this nonsense. And the way we can do it is to begin to deal with the backlog of circuit court nominees that we face today. And he pointed out the statistics. Only one of the nine nominees of just about a year ago—on May 9—have even had a hearing. There is no excuse for that. There is absolutely no reason that all nine of these candidates could not have had a hearing.

Judge Pickering is only one. The other eight have not had hearings. Miguel Estrada, for example: No hearing. He is right here. There is no problem. He can have a hearing. But it is going to be a year before he can even conceivably have a hearing now. There is clearly something wrong when that is the situation.

So what Senator LOTT said was let's have a sense of the Senate and agree as a Senate that at least those eight nominees of May 9, 2001, should have a hearing by May 9, 2002; that is not too much to ask; and it isn't. So I hope all of my colleagues will join us in supporting it.

Now, that does not guarantee it, but it expresses the sense of the Senate that we ought to do it. I think that is a good way for us to begin to put some of this acrimony behind us.

I remain disappointed about Judge Pickering. I am resigned to the fact

that he is not going to be, at least for now, confirmed to the circuit court. But I do think we can learn from this exercise, adopt Senator LOTT's resolution, agree to hold hearings on these judges, and then, of course, follow through with action by the committee and then action by the full Senate.

The statistics are such that in order for this Senate to confirm the same number of judges that were confirmed for President Reagan, the first President Bush, and President Clinton, in their first 2 years of office—the measure for the end of this current year—we would have to hold a hearing every single week—we, the Senate Judiciary Committee, of which I am a member—that we are in session until the end of this year, with five district court judges and one circuit court judge per hearing.

We would have to do that every single week. And the committee would have to vote on five district court nominees and one circuit court nominee. The full Senate would have to vote on five district court nominees and one circuit court nominee every single week. That is just for us to confirm the same number of judges for President Bush, the second, as we confirmed for his father and for President Clinton and for President Reagan.

Obviously, we have dug ourselves a big hole. We have to start to get out of this hole. An old rancher friend of mine once said: If you're in a hole and want to get out, the first thing you want to do is stop digging.

We have to stop the delay and the re-creation and get on to confirming qualified judges. The best way to do that is to commit to holding hearings and having the Judiciary Committee vote on those nominees. If they vote a nominee down, all right, but let's make sure it is on the qualifications and not some excuse. Then bring those nominees who are supported to the floor so the full Senate can act on them as a body.

I support Senator LOTT's resolution. I hope my colleagues will do so when we have a chance to vote on it, perhaps Tuesday, so we can move beyond the kind of actions that I believe characterize Judge Pickering's rejection today. I hope this is the last time we will have to have a conversation such as this.

I appreciate the Presiding Officer's patience.

APPEAL IN THE LOCKERBIE CASE

Mr. KENNEDY. Mr. President, today justice was shining as the Scottish court in the Netherlands upheld the conviction of Libyan intelligence officer Abdel Basset al-Megrahi for the terrorist bombing of Pan Am flight 103 over Lockerbie, Scotland on December 21, 1988.

In this heinous crime, Libyan terrorists blew up Pan Am flight 103, ruthlessly murdering 270 innocent people, including 189 Americans. Until the September 11 terrorist attack, the Pan Am