

**AMERICAN PLANNING ASSOCIATION
COMMUNITY RIGHTS COUNSEL
DEFENDERS OF WILDLIFE
EARTHJUSTICE
ENDANGERED SPECIES COALITION
FRIENDS OF THE EARTH**

October 1, 2003

The Honorable Orrin Hatch
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Opposition to Judge Charles W. Pickering, Sr.'s Fifth Circuit Re-nomination

Dear Chairman Hatch and Ranking Member Leahy:

In spite of the very serious concerns that environmental and other groups expressed with regard to Federal District Judge Charles W. Pickering, Sr.'s judicial record and ethical conduct—concerns that led to the Senate Judiciary Committee's defeat of his prior nomination to the United States Court of Appeals for the Fifth Circuit on March 14, 2002—Judge Pickering has been re-nominated to this important court.

On behalf of our organizations and their members, we strongly urge that you exercise independent judgment pursuant to the Senate's constitutional advise-and-consent responsibility and decline to confirm Judge Pickering to a lifetime seat on an appeals court that is critical to the fate of federal environmental safeguards in Texas, Louisiana, and Mississippi. Our opposition is based upon Judge Pickering's judicial record and ethics. He repeatedly denied citizens access to justice in violation of controlling precedent; favored powerful interests at the expense of the rights of ordinary Americans and the environment; and breached legal standards to implement his personal agenda. Three preeminent judicial ethics experts have submitted letters to the Judiciary Committee that raise extraordinarily serious concerns about Judge Pickering's abuse of his office, both in the case of *United States v. Swan* and in soliciting and reviewing supporter letters to the Committee on behalf of his nomination. Given his rulings in environmental cases coupled with these ethical improprieties, Judge Pickering is simply not an appropriate choice for the Fifth Circuit.

JUDGE PICKERING HAS A RECORD OF IMPROPERLY DENYING ACCESS TO JUSTICE

Access to the courts is essential to ensure that citizens have a meaningful right to prevent and redress the environmental harms they would otherwise suffer. Citizens' access to the courts also ensures that environmental and other laws that protect the health and safety of all Americans, including a wide range of safeguards for clean air, clean water, and wetlands, are enforced. Without access to the courts, Americans would lose critical protections for endangered species, wild and special places.

Unfortunately, Judge Pickering has repeatedly violated established controlling precedent and improperly denied access to justice by preventing citizens from bringing claims against polluters and developers. As explained in detail below, Judge Pickering:

- issued an injunction that restrained prospective environmental and citizen challenges to a proposed casino, including challenges to an Army Corps of Engineers' permit, and applied his injunction universally to "all persons having knowledge of this Order." He acted without holding a necessary hearing, making legally required findings, or considering his court's jurisdiction, which the enjoined parties had challenged, and then improperly extended his Order.
- was reversed repeatedly by the Fifth Circuit for improperly dismissing claims filed by victims in toxic tort cases concerning an EPA Superfund site.

Judge Pickering's Improper Injunction Against the Exercise of First Amendment Rights by Environmental Organizations

Corporate and developer Strategic Lawsuit Against Public Participation ("SLAPP suits") are designed to intimidate or chill individuals and public interest groups from exercising their constitutional right to seek redress of grievances in court, including redress of threats to environmental and other safeguards. In *Pine Hills Development Partnership v. Gulf Island Conservancy*, Judge Pickering issued remarkable rulings in favor of a developer that had filed a preemptive SLAPP suit to forestall any challenges to a proposed major casino project in one of the most productive and important estuarine habitats of North America.

On the same day that the Army Corps of Engineers issued a wetlands permit for the casino, the developer sued citizens' groups that had expressed concerns about the environmental impacts of the project. The developer's anticipatory lawsuit sought to forestall potential challenges by seeking an advisory opinion that the permit was valid. The suit also sought to enjoin citizens' groups from challenging the Corps' issuance of the permit in any forum other than that of the developer's choosing (Judge Pickering's court), and in any action other than that initiated by the developer. The defendant

citizens' groups filed a Motion to Dismiss on November 10, 1997, and an Opposition to Motion for Preliminary Injunction on November 21, 1997.

Judge Pickering validated the developer's choice of forum by violating legal requirements and improperly issuing an extraordinarily sweeping preliminary injunction over the objections of the defendant citizens' groups. In a three-page Order devoid of any factual or legal discussion, Judge Pickering improperly restrained the citizens' groups from "pursuing any civil actions or proceedings for judicial review of the Permit . . . or in any other way seeking an order of a court to delay or block" the developer's project "in any district, state or forum other than this District and in any civil action other than this civil action." Order dated Nov. 25, 1997, *Pine Hills Dev. P'ship v. Gulf Island Conservancy*, No. 2:97cv333PG (S.D. Miss.).

Judge Pickering's Order violated the fundamental rule of civil procedure that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action." Fed. R. Civ. P. 52. He also ignored black-letter standards prohibiting the courts from entering such injunctions unless the moving party proves a "substantial likelihood" of success on the merits and a "substantial threat of irreparable injury." *Sierra Club v. City of San Antonio*, 112 F.3d 789 (5th Cir. 1997). The developer did not and could not establish this burden, but Judge Pickering nonetheless entered and extended this order with the stated intent to push the parties toward settlement of the claim. Order of Nov. 25, 1997.

Incredibly, Judge Pickering enjoined not only the Sierra Club and the four local citizens' groups that the developer had sued, but also improperly enjoined "all persons having knowledge of this Order." *Id.* at 2. In addition, Judge Pickering demonstrated his willingness to disregard the law by ignoring repeated challenges by these citizens to his court's jurisdiction over the case.

These actions by Judge Pickering unlawfully and improperly enjoined the protected constitutional rights of individuals to bring a claim for redress of grievances against the government. The "threatened injury" that the developer alleged stemmed from the Clean Water Act provision under which Congress authorized citizens to challenge the Corps' permitting decisions in court, and from the First Amendment right to petition the government. On the day he finally held a hearing, Judge Pickering again violated basic legal requirements by extending his injunctive Order for more than another month without explanation. Order dated Dec. 18, 1997, *id.*

The defendant citizens' groups were forced to appeal Judge Pickering's injunction to the U.S. Court of Appeals for the Fifth Circuit. *Pine Hills Dev. P'rship v. Gulf Island Conservancy*, No. 97-60854 (5th Cir.). Only after the defendant citizen groups filed an appeal brief on April 4, 1988 did Judge Pickering acknowledge that his court did not have jurisdiction over the case and dismiss the action, allowing the citizens to find redress elsewhere.

Judge Pickering Has Been Repeatedly Reversed for Improperly Dismissing Environmental Claims

In the *Abram v. Reichhold Chemicals* case, Judge Pickering applied the ultimate sanction—dismissal with prejudice, which prevents those who filed suit from ever re-filing a case—to the toxic-tort claims of eight individuals against a polluting chemical company. The reason Judge Pickering gave for the dismissal was an alleged failure by the plaintiffs' counsel to comply with a case-management order. Judge Pickering was reversed on appeal because he did not follow binding Fifth Circuit decisions that clearly prohibit dismissal with prejudice unless counsel's failure to comply was "the result of purposeful delay or contumaciousness" and unless the district court first "employed lesser sanctions before dismissing the action." The Fifth Circuit reversed Judge Pickering because the record did not reflect the "required prior recourse to lesser sanctions and we necessarily must conclude that the dismissal order was granted improvidently." *Abram v. Reichhold Chemicals*, No. 95-60784 (5th Cir. 1996).

Judge Pickering's decision in *Abram* is particularly troubling because it was issued three years after he had been reversed by the Fifth Circuit on the same legal principle in the case of *Heptinstall v. Blount*. In *Heptinstall*, the Fifth Circuit reversed Judge Pickering's summary dismissal of plaintiffs' case, holding 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. 92-7481, slip op. at 5 (5th Cir. 1993). Judge Pickering's unpublished Order in *Heptinstall* had cited no case law on sanctions, and referred to no special circumstances, but simply stated that he considered his sanction "appropriate." *Heptinstall v. Blount*, No. H90-0254(P)(N), slip op. at 4(S.D. Miss. 1992).

In his Statement opposing Judge Pickering's nomination to the Fifth Circuit, Senator Patrick Leahy explained that the legal basis for the Fifth Circuit's reversal of Judge Pickering's ruling in *Heptinstall* did not involve a novel question of law. Senator Leahy stated:

[In *Heptinstall*,] the 5th Circuit held that [Judge Pickering] had abused his discretion in dismissing a case with prejudice for a discovery violation without any indication that he had used this extreme measure as a remedy of last resort. And in its ruling in *Heptinstall*, the Court cited to another of its previous rulings which stated the same principle of law. Thus, [in *Abram*,] this was not a principle with which Judge Pickering was unfamiliar, he had been reversed on that basis once and committed the same error again. ***This was binding 5th Circuit authority of which he was aware but chose not to follow.***

At his hearing, I asked Judge Pickering to explain his ruling in *Abram*, especially in light of the prior reversal by the 5th Circuit on the same principle of law in another of his earlier cases. And while he offered his recollection of the facts of the case, ***he offered no satisfactory explanation of why he ruled in a way contrary to settled and binding precedent.***

Statement of Senator Patrick Leahy, Chair of Judiciary Committee, March 2, 2002, available at: http://www.judiciary.senate.gov/member_statement.cfm?id=191&wit_id=50 (emphasis added).

In a related case against Reichhold Chemicals reversing another access-to-justice ruling by Judge Pickering, the Fifth Circuit unanimously overturned his dismissal of the plaintiff's complaint based on what Judge Pickering held to be a violation of a court order requiring that all future suits against the defendant chemical company should be filed separately, with separate filing fees. *Applewhite v. Reichhold Chemicals, Inc.*, 67 F.3d 571 (5th Cir. 1995), *vacating and remanding on this issue*, No. 2:93-CV-190PR (S.D. Miss. July 7, 1994). The Fifth Circuit vacated and remanded Judge Pickering's ruling because he failed to follow the rule that district-court discretion to dismiss such an action was limited, and "should be exercised after an examination of the individual case." 67 F.3d at 574. Judge Pickering's decision in *Applewhite* further exemplifies his extreme position on limiting access to the courts.

JUDGE PICKERING'S ETHICAL IMPROPRIETIES

Judge Pickering's Unethical Conduct in *Swan v. United States*

Judge Pickering's conduct in *United States v. Swan* confirms his willingness to improperly wield the powers of his office to implement his desired result. Several leading legal ethics experts have concluded that in *Swan*, Judge Pickering violated clear and long-standing canons of judicial ethics when he departed from his proper role as neutral arbiter of the law to advocate for avoiding mandatory minimum federal sentencing requirements for a man convicted by a jury of burning a cross on the lawn of Whitehall County, Mississippi's only interracial couple.

In the *Swan* case, Judge Pickering embarked on a remarkable campaign to avoid his legal duty, abusing the powers of his office in order to implement his personal view that the term of Swan's sentence should be less the one required by federal law. NYU Vice Professor and Professor of Law Stephen Gillers, a judicial ethics expert, explained that in the wake of the jury verdict, "at this point, the Court had no choice but to sentence Mr. Swan according to law for the crimes of which he was convicted." Letter from Prof. Stephen Gillers to Sen. John Edwards, Feb. 25, 2002. Instead, in the words of another leading expert on judicial ethics (Northwestern U. Law Professor Steven Lubet), Pickering "took exceptional steps to circumvent or disregard the law, in many ways becoming an advocate for Swan more than a judge in the case." Letter from Prof. Steven Lubet to Sen. John Edwards, Feb. 25, 2002, at 2.

First, Judge Pickering called a private meeting with counsel in the case where he threatened "to write a nasty opinion" if the prosecutors did not agree to a new trial for Swan—at which time Swan could presumably accept a plea for a non-mandatory

sentence. *Id.* Next, he initiated a series of *ex parte* contacts with Justice Department attorneys in December 1994 and January 2, 1995 in an attempt to obtain their consent for a new trial, even though the defendant had not sought a new trial and the time for filing such a motion for a new trial had elapsed.¹ Federal Rule of Criminal Procedure 11(e)(1) provides that “[t]he Court shall not participate in any discussion between the parties concerning a plea agreement.” As stated by a third judicial ethics expert (Rutgers Professor of Law John Leubsdorf), “Although federal judges are forbidden to participate in plea discussions, Judge Pickering initiated and pressed an attempt to negotiate a bargain based on granting [the cross-burner] a new trial, to be followed by the withdrawal of the charge This was a plain violation of Federal Rule of Criminal Procedure 11(e)(1).” Letter from Prof. John Leubsdorf to Sen. John Edwards, Feb. 25, 2002, at 2. In Professor Leubsdorf’s opinion, “Here, the Judge did not simply participate in plea discussions but initiated them. . . . The Defendant has not sought a new trial. In effect, the Judge was acting as negotiator for the Defendant.” Leubsdorf Letter at 2.

Despite placing multiple calls to an assistant U.S. Attorney to advocate for a new trial, Judge Pickering was told “that the position of the Government [on granting a new trial] had not changed.” Order of Jan. 4, 1995, at 2. When the prosecutors refused to consent to an untimely new trial for Swan, Judge Pickering issued an order calling the mandatory sentence “absurd, illogical, and ridiculous” and stating that if the government “persists in its position” on the new trial motion, then the government would have to provide to him, within 15 days, a detailed and burdensome analysis of the underlying facts and sentences in cross burning prosecutions across the country. Order of Jan. 4, 1995. The government would not be required to complete this analysis if it acquiesced to Pickering’s proposal. This order also demanded that the prosecutors “specifically discuss this case and all of the contents of this Order with [then Attorney General Janet Reno]” and certify to the court that “this Order along with its contents has been personally discussed with the Attorney General.” *Id.*

Even more remarkably, Judge Pickering placed this order under seal, effectively hiding his actions from public scrutiny for seven years. Judge Pickering’s order maintains that the seal was appropriate because it “does not involve any matter that has not previously been testified about in open Court” and because one of the original defendants (not mentioned in the order) was a juvenile. Order at 7. Professor Gillers points out, however, that “contrary to what Judge Pickering wrote, the Order *does* ‘involve’ a matter ‘that has not previously been testified about in open Court.’ That ‘matter’ is the Judge’s own methods of seeking to cause the Justice Department to abandon its position and the Judge’s effort to avoid imposing the sentence mandated by Congress.” Gillers Letter at 5. The order was unsealed by another U.S. District Judge at the request of the Senate Judiciary Committee.

¹ An *ex parte* contact is a prohibited communication by a judge with fewer than all of the parties.

In the words of Professor Leubsdorf, "for a judge to seal an opinion when the primary consequence of doing so will be to conceal the judge's own inappropriate initiatives can only add to the seriousness that must be ascribed to those initiatives. That is what happened here." Leubsdorf Letter at 4. Professor Gillers concurs: "The primary beneficiary of the secrecy order appears to be the Judge himself. His order was not exposed to public scrutiny at the time it issued, despite the presumption that court records, especially in criminal cases, are to be public." Gillers Letter at 4.

Lastly, Judge Pickering placed yet another *ex parte* call to Assistant Attorney General Frank Hunger to express his "frustration about the fact that I had instructed the attorneys to get an answer, a response, from the Department of Justice in Washington." Hearing Transcript, Feb. 7, 2003, pg. 130, line 23. Ethics experts have confirmed that Judge Pickering's *ex parte* communication with Justice Department attorneys "was a manifest violation of Canon 3A(4)" of the Code of Conduct for United States Judges. Lubet Letter at 2. That provision states that judges shall "neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." As Professor Lubet points out, "*ex parte* communications are prohibited because they deprive the absent parties of the 'right to respond and be heard.' Additionally, they 'suggest bias or partiality on the part of the judge.'" Lubet Letter at 2.

Judge Pickering's extraordinary efforts ultimately paid off. The government agreed to a new trial, and Swan accepted a plea bargain to avoid another trial. Judge Pickering sentenced Swan to less than the minimum sentence required by federal guidelines. Judge Pickering's efforts to overturn a jury verdict and avoid a congressionally mandated sentence were improper in the first instance, but his attempt to conceal his conduct from the public on such untenable grounds is truly shocking. His abuse of power and penchant for secrecy in the conduct of judicial proceedings show a disdain for the transparency and impartiality that ensures the proper functioning of our judicial system. As Professor Leubsdorf concluded, "Judge Pickering departed from his role of impartially in the Swan case to become an advocate for the sentence he considered proper." Judge Pickering "behaved more like an unusually adversarial attorney than like a judge. His actions were inappropriate and violated rules governing judicial conduct." Leubsdorf Letter at 6.

Judge Pickering's Unethical Solicitation of Letters in Support of His Nomination

Additional, very serious ethical problems extend even to his efforts in furtherance of his own nomination to the court of appeals: Judge Pickering solicited letters of support, which he asked to be sent to him directly so that he could forward them personally to the Justice Department and the Senate. Professor Gillers has concluded:

It was improper for Judge Pickering to solicit letters in support of his nomination from lawyers who regularly appear before him. . . . [T]he Judge asked the lawyers to fax him the letters so that he could send them to the Justice Department for transmittal to the Senate. . . . Consequently, the Judge would know who submitted letters and what the letters said, as would be obvious to the lawyers.

Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. . . .

Judge Pickering's solicitation was "coercive" because a lawyer who regularly practices before him was not free to fail to provide a letter endorsing Judge Pickering's promotion. Given the risk to lawyers' (and their firms') clients—a risk they would readily perceive—lawyers would feel coerced to comply with the Judge's solicitation of letters and in fact to exaggerate their support for the Judge.

Letter from Professor Stephen Gillers to Sen. Russ Feingold, Feb. 20, 2002, at 1-2.

Professor Gillers stressed that "the impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited. Then the desire to please the judge would be immediately obvious and the coercive nature of the request even more apparent." *Id.* at 3. That is exactly what happened here. Judge Pickering's docket indicates that seven attorneys solicited to submit letters of recommendation on his behalf had matters pending before his court. *See, e.g., Byrne v. Glaxo Wellcome*, 00-cv-326, in which a motion to dismiss for lack of personal jurisdiction was pending from May 2001 until Judge Pickering granted it in January 2002. Attorney Michael McMahan, who wrote a letter supporting Judge Pickering in October 2001, was attorney for a class of defendants in that case.

Senator Leahy noted "that Judge Pickering's behavior in this matter is similar to that of a nominee from more than 20 years ago, Charles Winberry. Nominated to the U.S. District Court in North Carolina by Democratic President Jimmy Carter, Mr. Winberry's nomination was defeated in the Judiciary Committee in 1980. Among the grounds on which I opposed this nomination sent to the Senate by a President of my party, were my objections to Mr. Winberry's having solicited letters from lawyers who would be appearing before him, if confirmed, and asking for blind copies of those letters." Statement of Senator Patrick Leahy, Chair of Judiciary Committee, March 2, 2002. In fact, Judge Pickering's conduct in soliciting letters from attorneys with matters pending, personally reviewing them, and submitting them himself to the Committee appears to be far more egregious and deserves the Committee's serious scrutiny.

Conclusion

In light of Judge Pickering's record, we strongly urge that you exercise independent judgment pursuant to the Senate's constitutional advise-and-consent responsibility and decline to confirm Judge Pickering to a lifetime seat on the U.S. Court of Appeals for the Fifth Circuit.

Sincerely,

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cc: United States Senators