

**RE: STATEMENT OF SOCIETY OF AMERICAN LAW TEACHERS REGARDING THE  
NOMINATION OF JUDGE CHARLES PICKERING TO THE UNITED STATES COURT OF  
APPEALS  
FOR THE FIFTH CIRCUIT**

**2005**

On behalf of the Board of Governors of the Society of American Law Teachers (SALT) – the largest membership organization of law professors in the nation – we write to express our grave concerns regarding the nomination of Charles Pickering to the United States Court of Appeals for the Fifth Circuit.

Since its founding thirty years ago, SALT has sought to make the legal profession more inclusive and responsive to under-served individuals and communities. These goals have particular meaning in the states of Texas, Louisiana and Mississippi, which comprise the Fifth Circuit. The Fifth Circuit also is home to the largest percentage of racial and ethnic minorities in any of the eleven circuits. [1] For residents of these states who must turn to the courts to vindicate their rights, the Fifth Circuit is, as a practical matter, the court of last resort. In light of these concerns and after careful review of Judge Pickering's record, the Society of American Law Teachers (SALT) urges the Senate Judiciary Committee to reject his nomination to the United States Court of Appeals for the Fifth Circuit.

The available public record raises troubling questions about Judge Pickering's ability to enforce federal law guaranteeing civil and reproductive rights, as discussed below.

- In his opinion in *Fairley v. Forrest County, Miss.*, 814 F.Supp. 1327 (S.D. Miss. 1993), rejecting a challenge to a county supervisory districting plan under the "one-person, one-vote" principle of the Fourteenth Amendment, Judge Pickering repeatedly described the courts' role in such cases as "obtrusive." [2] Much of Judge Pickering's opinion was devoted to explaining his conclusion that – contrary to the United States Supreme Court's precedents – a total deviation of 16.4% among election districts "is really de minimis variation in actual voter influence." [3] He then complained of the costs of enforcing this constitutional right:

[I]t is submitted that no one can know or assimilate information as to the tremendous amount of taxpayer money that has been spent on apportioning and reapportioning political bodies to comply with court rulings or to comply with what lawmakers perceive to be judicial requirements. No one can calculate the number of hours devoted by public officials to resolving reapportionment issues, trying to live by court mandates. Oftentimes, other government problems are ignored because legislative bodies are trying to solve reapportionment according to what they think the courts will require . . . It is submitted that most voters care less about such mathematical precision when it changes their actual influence so little, than they desire to save tax dollars, avoid disruption and the breaking of so many political subdivision lines. [4]

Judge Pickering has made clear his preferred methodology for deciding civil rights and constitutional claims: if Judge Pickering believes the asserted right is of little value, and the cost of protecting such rights is too burdensome, the right should not be protected.

- Judge Pickering's opposition to enforcement of the Voting Rights Act also was evinced earlier during his term as a Mississippi state senator. In 1975, he co-sponsored a Mississippi Senate resolution calling on Congress to repeal the Voting Rights Act or apply it

to all states, regardless of whether a state shared Mississippi's extensive history of blatant violations of voting rights of African Americans.[\[5\]](#)

- Judge Pickering's comments when denying the appeal of death row prisoner Howard Monteville Neal also raise questions about his willingness to carefully consider the claims of those before his court. Neal, a defendant with mental retardation with an IQ of between 54 and 60,[\[6\]](#) was sentenced to death for the rape and murder of his thirteen-year-old niece in 1982. Mr. Neal's petition for writ of habeas corpus was denied by Judge Pickering, who stated that ordering a review after nearly 18 years "undermines the finality, certainty and integrity of the judicial process. . . ."[\[7\]](#)

Mr. Neal's petition for a writ of habeas corpus is currently pending before the en banc Fifth Circuit.[\[8\]](#) A Fifth Circuit panel last year rejected Mr. Neal's petition, but only after exploring the nature of Mr. Neal's claims in a detailed 14-page opinion. The Fifth Circuit panel found that the additional evidence presented in the petition "does, indeed, make disturbing reading."[\[9\]](#) The Fifth Circuit panel also found that Mr. Neal's "trial counsel was deficient in failing to investigate, gather, and consider [available evidence] for purposes of presentation at Neal's sentencing hearing,"[\[10\]](#) and that "there is a reasonable probability that a jury would not have been able to agree unanimously to impose the death penalty if the additional evidence had been effectively presented and explained to the sentencing jury."[\[11\]](#)

Judge Pickering, on the other hand, had not found it necessary to examine Mr. Neal's petition in such detail. For Judge Pickering, finality is more important than the rights of a man with mental retardation who, the Fifth Circuit panel found, was not provided the fundamental constitutional right of effective assistance of counsel. Given the widespread use of the death penalty in the three states comprising the Fifth Circuit, that court demands judges who are sensitive to the legal claims raised by death row inmates and who will impose this ultimate sanction only after rigorous assurance that all fundamental rights have been provided to the accused. We believe that Judge Pickering is not such a judge.

- Judge Pickering's opposition to enforcement of basic civil rights was demonstrated early in his legal career, extending back to his work as a law student at the University of Mississippi Law School. Judge Pickering published a casenote on the Mississippi Supreme Court's decision in *Ratliff v. State*, 107 So.2d 738 (Miss. 1958), which reversed a criminal conviction for a violation of Mississippi's miscegenation statute. Judge Pickering's analysis conceded the correctness of the decision, but suggested an alternative interpretation that would have upheld the conviction. In addition, he then suggested a statutory amendment that would allow the Mississippi state courts to enforce the state's prohibition on interracial marriages.[\[12\]](#) The Mississippi state legislature enacted the amendment the following year.[\[13\]](#)

While this episode might be dismissed as a distant reflection of mainstream views in Mississippi in 1959, Mississippi law students of that period were hardly universal in their acceptance of racial segregation.[\[14\]](#) Moreover, while Judge Pickering asserted at his 2001 confirmation hearing that "who one marries is a personal choice and that there should not be legislation on that,"[\[15\]](#) this indirect repudiation occurred on the eve of his confirmation. This only reinforces the conclusion that his unwillingness as a judge to enforce civil rights statutes is deeply rooted.

- Finally, Judge Pickering has failed to meet the burden of demonstrating the candor required of all judges. At his 1990 confirmation hearing before this Committee,

Judge Pickering testified that he “never had any contact” with the Mississippi Sovereignty Commission, a state-funded agency created to resist desegregation and used to spy on civil rights and labor organizations in Mississippi. However, the subsequent release of the Sovereignty Commission’s records indicates that Judge Pickering did have contact with the Commission: he wrote a letter in 1972 to a Commission investigator asking to be “advised” about a group trying to organize pulpwood workers.<sup>[16]</sup>

Throughout his legal career, Judge Pickering has demonstrated a marked insensitivity regarding the need to protect those individuals in our society most in need of the federal courts’ protection. Such protection is especially critical in the Fifth Circuit. SALT therefore urges the Judiciary Committee to deny recommendation of Judge Pickering’s nomination.

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<sup>[1]</sup> U.S. Census Bureau, Table 1, Population by Race and Hispanic or Latino Origin, for the United States, Regions, Divisions, and States, and for Puerto Rico: 2000, available at <[http:// www.census.gov/population/cen2000/phc-t6/tab01.pdf](http://www.census.gov/population/cen2000/phc-t6/tab01.pdf)>

<sup>[2]</sup> 814 F. Supp. at 1330 (“obtrusive”); *id.* at 1336 (“obtrusion”); and *id.* at 1344 (“obtrusive”).

<sup>[3]</sup> *Id.* at 1331.

<sup>[4]</sup> *Id.* at 1337 - 38.

<sup>[5]</sup> Journal of the Senate of the State of Mississippi (1975) at 124 (S.C.R. 549).

<sup>[6]</sup> *Neal v. Puckett*, 239 F.3d 683, 685, & 696 (5<sup>th</sup> Cir. 2001).

<sup>[7]</sup> *Judge rejects appeal of death row inmate convicted of killing family*, Associated Press Newswires (Jan. 12, 1999).

<sup>[8]</sup> *Neal v. Puckett*, 264 F.3d 1149 (5<sup>th</sup> Cir. en banc) (granting rehearing en banc).

<sup>[9]</sup> *Neal*, 239 F.3d at 689.

<sup>[10]</sup> *Id.* at 691.

<sup>[11]</sup> *Id.* at 694. Ultimately, however, the Fifth Circuit panel declined to order relief for Mr. Neal because it did not find the Mississippi Supreme Court’s judgment involved an “unreasonable application of . . . clearly established Federal law,” as required by the Antiterrorism and Effective Death Penalty Act. *Id.* at 696.

<sup>[12]</sup> *Id.* at 329, n.16.

[13] 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.

[14] See, e.g., Alfred E. Moreton, *Constitutional Law - Power of State Legislature to Exclude Negroes from Municipal Corporations*, 31 Miss. L. J. 176, 177 (1960) (describing the Fifth Circuit's decision in *Gomillion v. Lightfoot*, 270 F.2d 594 (5<sup>th</sup> Cir. 1959), and noting, "There appears to be great force in the argument of Judge Wisdom that the color of the parties is no valid distinction . . .").

[15] Transcript of Nominations Hearings, Senate Committee on the Judiciary, Oct. 18, 2001, at 64.

[16] Ana Radelat, *Pickering lied about contacts to anti-segregation commission, groups say*, Gannett News Service (Jan. 25, 2002), available at 2002 WL 5255700.