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LEGAL TIMES * WEEK OF AUGUST 2, 1999

PAGE: 16

HEADLINE: The Public Lawyer: John Pickering Looks Back

BYLINE: By Siobhan Roth

When lawyers talk about the good old days, they're talking about John Pickering.

With his bow tie, his old-fashioned watch fob, and his gentlemanly manners, Pickering seems like he could have been sent by Central Casting.

The 83-year-old founding member of Wilmer, Cutler & Pickering has gained renown for his appellate practice, as well as for his advocacy on behalf of the disenfranchised, his support of progressive causes, and his commitment to the justice system. Admirers--and there are many--say that Pickering exemplifies the best of what lawyers can do to improve everyone's access to the courts.

Pickering has lent his efforts to the Legal Services Corp., the NAACP, the National Women's Law Center, and the National Center for State Courts, to name a few of the best known. In 1979 and 1980, he served as president of the D.C. Bar.

And his decades of service are now being recognized: At the American Bar Association's annual meeting Aug. 5-11 in Atlanta, Pickering will receive a kind of lifetime achievement award--the ABA Medal for Conspicuous Service to American Jurisprudence.

In the past decade, Pickering has worked extensively on the legal needs of the elderly. He currently serves as the Senior Lawyers Division delegate to the ABA.

Pickering was born in Harrisburg, Ill. He graduated from the University of Michigan in 1938 and from its law school in 1940, then clerked for Supreme Court Justice Frank Murphy. It was Murphy, Pickering says, who instilled in him his liberal activism and commitment to service.

"Before I clerked for him, I had in my head an idea of being something called a corporate lawyer in New York," Pickering recalls. "I would have made a lot more money, but I would have had a lot less fun."

After the war, he and his first wife, Elsa, decided to make Washington their permanent home. Thirty-seven years ago, he teamed up with a group of lawyers that included Lloyd Cutler to found Wilmer, Cutler & Pickering, where he is now senior counsel.

Pickering was widowed in 1988. In 1990, he and Helen Wright, whose husband, U.S. Circuit Chief Judge J. Skelly Wright, had passed away, made their friends happy when they married.

Pickering's friend and partner Lloyd Cutler praises him: "Dean Acheson wrote that when George Marshall retired and Henry Stimson conferred a medal on him, he said to Marshall, 'I've known many soldiers in my life and you, sir, are the finest soldier I've ever known.' And I would say that of John. I've known many lawyers in my life, and John is the best lawyer I've ever known."

Legal Times sat down with Pickering recently to talk about some of the highlights of a half-century career in Washington law.

Welcoming Tradition

Every fall, John Pickering has a word or two with the newcomers at Wilmer, Cutler & Pickering.

It's a Wilmer, Cutler tradition: Pickering, now in his 38th year at the firm he helped found, has been addressing each fresh crop of associates for years. He presents the history of the firm and exhorts the young lawyers to make room for public service.

It's fitting that Pickering serves as the welcoming committee. Pickering is the soul of the firm, his partners say.

Pickering recalls the founding of Wilmer, Cutler & Pickering in 1962.

"We wanted to do interesting and challenging legal work of the highest caliber," Pickering says. "We wanted to try to be as noncompetitive as is humanly possible, and, above all, we started with a notion that we wanted to give back."

Then, as now, approximately 10 percent of firm's hours are devoted to the public interest, he says.

Throughout his 50-year career, Pickering has fostered pro bono work at the firm by example. His pro bono clients say universally that he takes a hands-on approach to their efforts.

Wilmer, Cutler has grown since the early '60s: There were 13 partners then; there are 93 shareholders now.

Like many other D.C. firms, Wilmer, Cutler grew from New York roots.

Before World War II, Dick Wilmer had led the D.C. outpost of Cravath, de Gersdorff, Swaine & Wood--which today, of course, is 334-lawyer Cravath, Swaine & Moore. When Wilmer returned after being mustered out as a full Army colonel, he and E. Fontaine Broun opened for business as Wilmer & Broun in 1946.

Wilmer & Broun retained its status as Cravath's regular D.C. corresponding firm. Dick Wilmer, who was born in 1892, would later become the father figure at Wilmer, Cutler & Pickering.

Meanwhile, Pickering and Lloyd Cutler, who had become friends while working as Cravath associates in New York, returned to Washington to resume their legal careers after serving in World War II.

Pickering went to Wilmer & Broun that first year as the firm's first permanent associate. Cutler helped found Cox, Langford, Stoddard & Cutler.

Joining Forces

Both firms found moderate success in the postwar boom. But neither enjoyed the rapid expansion seen by firms like Covington & Burling and Steptoe & Johnson. By the early 1960s, the time seemed ripe to do what Pickering and Cutler had been discussing for years: combine portions of their respective practices into a brand new firm. Broun declined to join the new firm and went his own way.

The start-up 20-lawyer Wilmer, Cutler & Pickering got a boost from the connections that the founding partners brought from their former firms. They had ready-made clients. Cutler and the attorneys from Cox, Langford had Kaiser--as in Kaiser Steel, Kaiser Coal, Kaiser Permanente. Another Wilmer, Cutler founding partner, J. Roger Wollenberg, now senior counsel, brought with him the broadcast communications contacts he had made at his former firm, Haley, Wollenberg & Bader.

And many of the partners' good friends were settling in as corporate counsel ready to dispense legal work. Early on, the firm established a reputation for its regulatory practice. Among other clients, they represented car manufacturers on safety and emissions issues--a move that would later make Wilmer, Cutler & Pickering the first law firm Ralph Nader ever picketed.

Despite a fast start, the partners didn't see paychecks for several months. Six associates and one counsel had to be paid first. Vacations were out of the question.

"If you had told any of us then that we would be a firm with 250 lawyers, with offices in London, Brussels, and Berlin, and offices in Baltimore and New York, we would have said, 'Huh! Get off the pipe!' " says Pickering.

The firm was founded with deeply entrenched notions of public service and collegiality. Cutler, Wollenberg, and Pickering all cite them as a key to the firm's success--and its avoidance of the associate hemorrhaging experienced by many law firms.

Toadying, apparently, is not part of the Wilmer, Cutler tradition.

"If they've got moxie, the youngest lawyer can argue with Lloyd or me as an equal, " Pickering says. "We may say, 'I've heard enough. Shut up.' But it's give and take. That's one of the reasons they've been happy to stay."

From the beginning of their time with the firm--and from Pickering's introductory remarks--new associates get the hint that pro bono is part of the required program. Wilmer, Cutler regularly ranks among the top three of The American Lawyer's Top 100 firms when ranked by pro bono hours.

"This is simply something in which you have to put your money where your mouth is, " says Pickering. "When young associates see that Lloyd or I have taken on a major project pro bono, they think, well geez, maybe it won't hurt."

Man of Steel

It was the spring of 1952, and the nation's postwar anti-Communist paranoia was in full bloom. Mao was a few years into his dominion over China. The Korean War was in full motion. And across the United States, steelworkers were threatening to walk off the job.

The nation's capital was on edge.

Fearing that a strike could cripple the war effort, President Harry Truman seized control of the steel mills. On April 8, 1952, the president issued an executive order that pronounced manufacturing executives agents of the federal government. With this action, the heads of the country's steel mills were told essentially to begin reporting to Secretary of Commerce Charles Sawyer.

The industry wasted no time in defending itself.

John Pickering was then a 36-year-old attorney at Wilmer & Broun, which represented Bethlehem Steel, one of seven companies that immediately filed a lawsuit.

For the next five weeks Pickering worked with a coalition of lawyers challenging Truman's unorthodox use of executive power.

The suit, *Youngstown Sheet & Tube Co. v. Sawyer*, is remembered still for its remarkable speed. From complaint on April 9, to injunction on April 30, to Supreme Court arguments on May 12, the case was a whirlwind.

"That was breakneck litigation," Pickering says.

Lawyers for the steel industry argued in U.S. District Court here that Truman's seizure was unconstitutional because it lacked the authorization of Congress. U.S. District Judge David Pine held against the government and issued a preliminary injunction restraining Sawyer from continuing the seizure. That same day, the U.S. Court of Appeals for the D.C. Circuit stayed the injunction with one condition: that the government file a petition for certiorari to the Supreme Court by the next day.

Pickering and his co-counsel immediately started plotting their next move. He was working closely with, among others, his friend Stanley Temko of Covington & Burling.

"We went to the Carlton Hotel, where U.S. Steel had a suite, and we sat around saying what are we going to do?" Pickering recalls. "I'm not sure if it was Stanley or I who said, 'Well, we can file our own petition for certiorari.' And [Bruce] Bromley [of Cravath], who was the senior officer present for the steel company lawyers, said, 'You're smart young fellas, having an idea like that, why don't you go back to the Covington office and start to write it?'"

And they did. Finishing around six in the morning, they revived themselves at the Carlton with a shave and hot towels and arrived at the Court to file their petition by nine. They beat the government's lawyers by about an hour. Under Court rules then in place, by filing first, the industry had the right to open and close the arguments.

The industry won in a 6-3 decision. The Court ruled that Truman had overstepped presidential authority.

"The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times," Justice Hugo Black wrote for the court. Today the ruling stands as an important precedent on the limits of executive power.

Pickering recalls he got high praise in Justice Black's opinion. Black had lifted, almost verbatim, language from a section of the industry's brief that Pickering had penned.

"I had a terrible time," Pickering says, trying to write one portion that implored the high court to decide the case even though it was at an early stage. So he wrote it plainly.

"And Black, bless his heart, " says Pickering, used Pickering's words: "Although this case has proceeded no further than the preliminary injunction stage, it is ripe for determination of the constitutional validity of the Executive Order on the record presented."

Looking back, Pickering says, the case also proved the folly of trying to predict the Supreme Court's decisions.

He and co-counsel--some of whom, like Pickering, had clerked at the Court--organized a pool to guess what the outcome of the case would be and who would write what. "Nobody came within hooting distance, " he says.

Suicide Mission

John Pickering's introduction to the difficult legal and ethical questions surrounding physician-assisted suicide came in 1985 when he took over the chairmanship of the ABA Commission on Legal Problems for the Elderly.

"When he came to chair the commission, John said he didn't know anything about law and aging issues, " says Nancy Coleman, director of the commission. "But in his inimitable way, John not only learned the issues, but mastered them, " she says.

Pickering headed the commission for a decade, a time that coincided with the blossoming of health care and elder law issues in the courts and the legislatures. Pickering found himself involved in the big court battles over end-of-life issues: Cruzan v. Director, Missouri Department of Health in 1990, and the combined cases of Vacco v. Quill and Washington v. Glucksberg in 1996.

In Cruzan in 1990, Pickering wrote the amicus brief for the American Academy of Neurology, arguing that there is a constitutional right to refuse life-sustaining care. In Vacco, Pickering was co-author of the amicus brief submitted by the American Geriatrics Society. There, he urged the reversal of the lower courts' decisions and argued that the elderly would be at risk for abuse if physician-assisted suicide were legalized.

Pickering contends that while physician-assisted suicide is a dangerous prospect, patients should have the right to refuse care. His views on the subject have been shaped by his legal work and his time on the commission, but also by his personal history. His first wife, Elsa Pickering, died in 1988 of cardiovascular ailments. He also says he has seen friends struggle with Alzheimer's disease and other debilitating illnesses.

During his time on the ABA commission, Pickering was involved in heated debates about physician-assisted suicide.

In 1989, the Beverly Hills Bar Association submitted a resolution to the ABA supporting state legislation to legalize physician-assisted suicide. It wasn't debated by the House of Delegates until 1992. And by then, the commission had decided to oppose the resolution.

Pickering spoke on the commission's behalf against physician-assisted suicide and brought in a trustee of the American Medical Association, which was also opposed.

"My position is basically that the so-called safeguards don't work until we have universal affordable health care. Until then, there's always compulsion, " Pickering says.

The resolution in support of physician-assisted suicide finally made it to a vote in August 1996, two months after the Supreme Court handed down its decision in *Vacco* finding no constitutional right to die and essentially deferring the issue to the state legislatures. The ABA's House of Delegates voted to replace the Beverly Hills measure with a recommendation co-sponsored by Pickering's commission that also left the question to the states to decide.

Critics accused the Supreme Court and the ABA of dodging the issue.

"They criticized us for taking sort of a weasel, waffle position," Pickering says. But he disagrees with that assessment. "I think the Supreme Court got it just right," he says. "It leaves it up to the states. That was the tenor of our brief and several others. It's more the old Brandeis idea of using the states as laboratories."

Pickering says the focus should shift from death to quality of life and palliative care.

"We're talking about the wrong thing," Pickering says. "We're talking about death. We ought to be talking about how to preserve the best parts of life."

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