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A Note to Senator Grassley: Ten < Eleven

By admin

– March 11, 2011 **Posted in:** [Judicial Nominations](#), [SS](#)

By Judith E. Schaeffer, Vice President

On Thursday, Senator Charles Grassley (R-IA), Ranking Member of the Senate Judiciary Committee, and all of his Republican colleagues on the Committee, voted in partisan lockstep against the confirmation of Caitlin Halligan to the D.C. Circuit. (Halligan’s nomination was approved by the Committee, 10-8.) During the Committee’s Business Meeting on March 10, Senator Grassley was the only member of his party to identify his objections to this well-qualified nominee. And while it wasn’t terribly surprising to learn that a conservative Senator professed to have concerns about the “judicial philosophy” of an Obama appellate court nominee (despite the support for Halligan’s confirmation from such conservative luminaries as Miguel Estrada), it was surprising that Senator Grassley apparently objects to filling this D.C. Circuit vacancy, period.

In fact, Senator Grassley began his speech in opposition to Halligan’s confirmation by noting that the seat to which she has been nominated has been vacant since September 2005, that President George W. Bush had tried to fill it with Peter Keisler, but that Keisler never received a vote. Senator Grassley asserted that some Democrats at that time had expressed concerns about the need to fill the vacancy, given the D.C. Circuit’s workload. So now, tit for tat, apparently.

However, there are two significant problems with the Keisler reference. First, and unmentioned by Senator Grassley, there were procedural issues with the Keisler nomination (see, e.g., [here](#) and [here](#)). Second, and most important given the numbers game, Senator Grassley failed to note that Keisler would have been the 11th active judge on the D.C. Circuit, whereas there are now only 9 active judges on that court. The Senator also failed to note that in 2005, he and every other Republican Senator who cast a vote on the Senate floor voted to confirm Bush nominee Thomas Griffith to what was the 11th seat on the D.C. Circuit.

In response to Senator Grassley’s apparent numerical amnesia on Thursday, Committee Chair Patrick Leahy stated that the D.C. Circuit’s caseload is similar now to what it was during the G.W. Bush Administration, and that the Senate during that Administration had *twice* filled what was then the 10th seat on the Circuit (with Janice Rogers Brown and later with Brett Kavanaugh), as well as the 11th seat once (with Griffith). As Senator Leahy further noted, to the extent there have been workload concerns about the D.C. Circuit, Congress addressed them in 2007 by eliminating the 12th seat on the court, leaving 11 authorized judgeships. Caitlin Halligan, if confirmed, would fill the 10th seat.

Whatever Senator Grassley may think about Ms. Halligan’s substantive qualifications to be a federal judge, he should at least get the numbers right, and be consistent about them.

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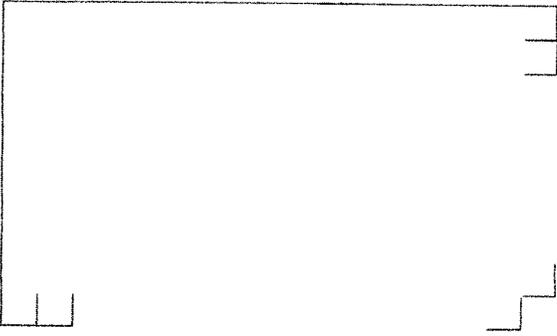
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COALITION *for a* FAIR *and* INDEPENDENT JUDICIARY

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

July 31, 2006

Dear Chairman Specter:

We are writing to express our strong opposition to the Senate Judiciary Committee's decision to move forward with the August 1 hearing on the nomination of Peter D. Keisler to a lifetime position on the U.S. Court of Appeals for the D.C. Circuit. Mr. Keisler's nomination must not receive a hearing until his record is fully assembled and the Senate Judiciary Committee can meaningfully exercise its advice-and-consent function.

Of the nation's thirteen federal circuit courts, the U.S. Court of Appeals for the D.C. Circuit holds a uniquely important place because of its exclusive or concurrent jurisdiction under many statutes. The D.C. Circuit is either the one stop, or the most influential stop, for judicial review of a broad range of federal policies covering environmental protection, workplace safety, energy regulation, consumer protection, telecommunications, and enemy combatant and terrorist organization designations.¹ And because the Supreme Court reviews the D.C. Circuit's rulings so infrequently, it often has the final word on all of these enormously significant statutory and administrative matters. The importance of the D.C. Circuit cannot be overstated.

Mr. Keisler was nominated to the D.C. Circuit on June 29th, just one month ago. He submitted his Judiciary Questionnaire on July 17th. The American Bar Association, which has rated every nominee for the past half century, has not yet provided its peer-review rating of his nomination. The speed at which this nomination is proceeding alone is reason for serious concern. Of the last seven confirmed nominees to the D.C. Circuit, the least amount of time between an initial nomination and a Senate hearing was 71

¹ The D.C. Circuit has exclusive jurisdiction over sections of many of our nation's most important federal laws, including: the Federal Communications Commission, (47 U.S.C. §402(b)), the Resource Conservation and Recovery Act (42 U.S.C. §6976(a)(1)), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) (42 U.S.C. §9613(a)), national primary drinking water regulations (42 U.S.C. §300j-7(a)(1)), Clean Air Act (42 U.S.C. §7607(b)(1)), designations of "foreign terrorist organizations" (8 U.S.C. §1189(c)(1)), the Federal Energy Regulatory Commission (15 U.S.C. §766(c)), Federal Election Commission determinations as to which presidential candidates are eligible for Federal money (26 U.S.C. §9011(a) and §9041(a)), to name a few.

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days.² The length of time between nomination and Senate hearing reflects the importance of the D.C. Circuit and the need for the Senate to conduct a thorough investigation when considering nominations to this critical court. It is proposed that Mr. Keisler's hearing take place a mere 33 days from the time of his initial nomination, less than half of the shortest investigation period for any recent D.C. Circuit nominee.

Even more importantly, however, there are critical aspects of Mr. Keisler's record that are not currently available to the Senate for review. In the last several years, Mr. Keisler has served in several high ranking positions at the Department of Justice, including Acting Associate Attorney General. During his tenure, the Department has played a central role in developing controversial Administration positions on a number of issues. Mr. Keisler's role in these matters must be documented and explored. In addition, the Reagan Library index lists hundreds of files containing an unknowable quantity of apparently relevant documents related to Mr. Keisler's three-year tenure in the Reagan White House Counsel's office.³ The vast majority of these documents are not currently available for scrutiny by senators or anyone else interested in this important nomination. To fulfill its advice-and-consent function in a meaningful fashion, the Committee ought to examine what might be some of the information most relevant to a lifetime appointment to the second most important court in the country.

Rushing a hearing on Mr. Keisler's nomination now, before his record is completely assembled, is particularly inappropriate given the greater workload on other courts where there are pending vacancies. The day before Mr. Keisler was nominated, four other nominees were announced, each to seats designated by the Judicial Conference of the United States as Judicial Emergencies.⁴ The seat to which Mr. Keisler has been nominated is not such an emergency. It seems only logical to attend to the *emergencies* first. Indeed, the D.C. Circuit has the lightest caseload of the federal circuit courts. The national average of cases terminated on the merits per judge in 2004 was 432,⁵ compared with only 156 cases for the D.C. Circuit.⁶

Mr. Keisler has an extensive and complex record that must be collected and reviewed before a hearing goes forward. Should this hearing proceed at this premature stage, a second hearing may well be required. We therefore strongly oppose any hearing on Mr. Keisler's nomination before his record is assembled and thoroughly reviewed.

² Judith W. Rogers was nominated to the D.C. Circuit on November 17, 1993. A hearing was held on her nomination by the Senate Committee on the Judiciary on January 27, 1994.

³ <http://www.reagan.utexas.edu/resource/findaid/keisler.htm>

⁴ <http://rpc.senate.gov/files/July25JudNomRptSD.pdf>

⁵ <http://www.uscourts.gov/cgi-bin/cmsa2004.pl>.

⁶ <http://www.uscourts.gov/cgi-bin/cmsa2004.pl>.

COALITION *for a* **FAIR** *and* **INDEPENDENT JUDICIARY**

If you have any questions or need further information, please contact Doug Kendall, Community Rights Counsel Executive Director at (202) 296-6889 or Nancy Zirkin, Leadership Conference on Civil Rights (LCCR) Deputy Director at (202) 263-2880.

Sincerely,

ADA Watch/National Coalition for Disability Rights
Alliance for Justice
American Association of University Women
American Federation of Labor - Congress of Industrial Organizations
American Federation of State County and Municipal Employees
(AFSCME)
Americans for Democratic Action
Community Rights Counsel
Defenders of Wildlife
Earthjustice
Feminist Majority
Friends of the Earth
Leadership Conference on Civil Rights
Legal Momentum
NAACP Legal Defense & Educational Fund, Inc.
National Council of Jewish Women
National Council on Independent Living
National Employment Lawyers Association
National Gay and Lesbian Task Force
National Partnership for Women & Families
National Senior Citizens Law Center
National Women's Law Center
Olympic Forest Coalition
People For the American Way
Sierra Club

cc: Members of the Senate Judiciary Committee

The Coalition for a Fair and Independent Judiciary represents our
nation's leading public interest and civil rights organizations



April 21, 2008

Hon. Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Hon. Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Peter Keisler

Dear Senator Leahy and Senator Specter:

I am writing on behalf of People For the American Way and our hundreds of thousands of members nationwide regarding the highly controversial nomination of Peter Keisler to fill the 11th seat on the D.C. Circuit. Given the public pressure being placed on this Committee by supporters of President Bush to confirm Mr. Keisler, we believe it important to reiterate why Mr. Keisler's nomination should not be, and indeed cannot properly be, considered at this time.

For the reasons we discussed in our letter to the Committee of April 3, 2008, longstanding Senate policy warrants invocation of the Thurmond Rule and an end to the processing of controversial judicial nominees at this point in a presidential election year. There can be no question that Mr. Keisler is such a nominee.

In fact, with respect to this specific nomination, nothing has changed since July 2006, when Democratic members of the Committee (then in the minority) in a letter to then-Committee Chair Specter identified significant reasons why the Committee could not then properly consider Mr. Keisler.¹ As stated in that letter, Senate Republicans during the Clinton Administration had objected to filling the 11th seat on the D.C. Circuit, claiming that its caseload was insufficient to justify 11 active judges. As the letter noted, the court's caseload had *decreased* in the interim.

¹ A copy of the letter is available at:
<<http://media.pfaw.org/pdf/Judiciary/KeislerLetterToSenSpecter%207-27-06.pdf>>.

In addition, as the letter observed, the Committee could not properly consider Mr. Keisler's nomination without the records from Mr. Keisler's service as an attorney in the Reagan White House, records that would shed light on Mr. Keisler's legal views. To our knowledge, those records still have not been provided.

Indeed, our affiliate, People For the American Way Foundation, on July 20, 2006 submitted jointly with the Alliance for Justice a FOIA request to the Reagan Library seeking disclosure of the records pertaining to Mr. Keisler's work as Associate Counsel to President Reagan in the Office of the Counsel to the President between 1986 and 1988. During that period, Mr. Keisler reportedly worked on AIDS policy, Robert Bork's nomination to the Supreme Court, and other controversial matters.

The Reagan Library notified PFAWF in September 2006 and January 2007 that it had processed the Keisler records for release, and pursuant to the Presidential Records Act and Executive Order 13233 had submitted them for pre-disclosure review to the representatives of the Reagan Administration and the current Bush Administration. But in all of this time, apart from a small number of documents that had been processed for public disclosure prior to the FOIA request, not one page of the Keisler documents has been released. The Bush Administration cannot be permitted to demand action on Mr. Keisler's nomination at the same time that it continues to block public scrutiny of his record.

And Mr. Keisler's record, which includes having co-founded the Federalist Society and serving as a law clerk to then-Circuit Court Judge Robert Bork, raises serious concerns about his legal philosophy and qualifications to serve for life on what is generally considered to be our nation's second highest court. Moreover, in the time since Mr. Keisler's nomination, certain troubling information about his work in the Bush Department of Justice has come to light, specifically including allegations that Mr. Keisler was involved in applying inappropriate political influence in the government's case against the tobacco industry.²

There is no question that without the records from Mr. Keisler's tenure in the Reagan White House and the Bush Department of Justice, and adequate time to examine them, this Committee has no adequate basis on which to carry out its constitutional responsibilities to scrutinize carefully all nominees to our federal courts. A *hearing* could not even properly be held on Mr. Keisler's nomination at this point. The notion that he should be *confirmed*, as the President and his supporters urge, is completely meritless.

² See, e.g., Carol D. Leonnig, "Prosecutor Says Bush Appointees Interfered with Tobacco Case," *Washington Post*, March 22, 2007, page A01.

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For all these reasons, we strongly urge the Committee not to proceed with Mr. Keisler's nomination.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kathryn Kolbert', with a long horizontal flourish extending to the right.

Kathryn Kolbert
President

cc: All Members, Senate Judiciary Committee