

Statement of
The Honorable Patrick Leahy

United States Senator
Vermont
September 19, 2006

Statement of Senator Patrick Leahy

Ranking Member, Judiciary Committee

Executive Business Meeting

September 19, 2006

When the Chairman discussed holding this special meeting with me, I indicated my willingness to do so in the spirit of cooperation on non-controversial matters. With the support of the senior Senator from Delaware and the Chairman, I believe that the elevation of Judge Jordan to the Third Circuit can be such a consensus nomination.

From the beginning I have urged the President to work with us on consensus nominations and I have worked to proceed. I do so now even at this late date in the session and in spite of the pocket filibusters employed by Republicans to stall more than 60 of President Clinton's qualified judicial nominees

The nomination to the D.C. Circuit is quite different, however. This is a most important Circuit with jurisdiction over environmental, regulatory, labor and other national issues. Republicans refused to proceed on highly-qualified nominees sent by President Clinton for years in order to maintain vacancies. President Bush has packed this important court and with the help of a rubberstamp Republican Senate has appointed Brett Kavanaugh, Janice Rogers Brown, and Thomas Griffith to that Court. Republican appointees now outnumber those of Democratic Presidents by more than two-to-one. Republicans used to argue that its workload did not justify an 11th or 12th judge. Well, its workload is lower than it was and Mr. Keisler is nominated to fill the 11th seat. I have yet to decide how I will vote, if there is a vote on the Keisler nomination. I am considering his hearing and responsiveness to our questions about his involvement in the Administration's legal arguments excusing the Guantanamo military commissions that the Supreme Court held were illegal. I do know this: This nomination to fill yet another D.C. Circuit judgeship with an Administration insider is not non-controversial. Before his August 1 hearing all Democratic Senators serving on the Judiciary Committee joined in a letter to the Chairman

objecting. The Coalition for a Fair and Independent Judiciary, which is comprised of a broad range of organizations representing millions of Americans and includes unions, civil rights organizations, environmental organizations and others, likewise has written the Committee expressing strong opposition to proceeding with the Keisler nomination before the record is assembled.

The District of Columbia Circuit is an especially important court in our nation=s judicial system. Congress has vested the D.C. Circuit in particular with exclusive or special jurisdiction over cases involving many environmental, civil rights, consumer protection, and workplace statutes. For example, the D.C. Circuit has exclusive or concurrent jurisdiction in cases involving the National Labor Relations Board, the Occupational Safety and Health Administration, the Federal Energy Regulatory Commission, the Federal Election Commission, and the Federal Communications Commission. The D.C. Circuit is entrusted with interpreting the Americans with Disability Act, the Endangered Species Act, and the Environmental Protection Agency, and has primary responsibility for ruling on the Resource Conservation and Recovery Act, Superfund, the Clean Water Act, and the Clean Air Act. This court must retain its independence. That underscores the concerns of the many organizations that constitute the Coalition for a Fair and Independent Judiciary.

Regrettably, this Administration=s approach to nominations to the D.C. Circuit has threatened this court's judicial independence. Earlier this year, the Republican leadership in the Senate catered to the desire of the extreme right-wing interest groups to force through the nomination of Brett Kavanaugh to the 10th seat on the D.C. Circuit. At his hearing, Judge Kavanaugh demonstrated his commitment to President Bush's Administration, as opposed to the independence needed to judge this Administration's actions. When pressed at his confirmation hearing to provide answers about his qualifications for this lifetime appointment and how he would fulfill his responsibilities as a judge, Mr. Kavanaugh sounded like a spokesman for the Bush-Cheney Administration. Over and over he answered our questions by alluding to what the President would want and what the President would want him to do.

When President Clinton nominated highly-qualified moderates to vacancies on the D.C. Circuit, Republicans refused to proceed. Now, in a total reversal of their practice with President Clinton, they are rushing to proceed with a Bush-Cheney Administration insider to the 11th seat on that same court.

Mr. Keisler's nomination is a culmination of the Republicans' decades-long attempt to pack the D.C. Circuit. Dating back to President Clinton's first term, the Republicans have played politics with the D.C. Circuit, blocking President Clinton's nominees to preserve a majority of Republican appointees on that court. Their plan has succeeded. This is not a court that needs

another rubberstamp for this President's extraordinary exertions of Executive power. We need accountability, the rule of law and independence on that court.

The last of two Clinton nominees to the D.C. Circuit was confirmed in 1997, after being nominated in 1995 and stalled through the 1996 session when not a single circuit nominee was confirmed. When the Republican Senate majority stalled the nomination of Merrick Garland to the D.C. Circuit beyond the 1996 election, even Senator Hatch became frustrated and in March 1997 he proclaimed that the way that Republicans were opposing judicial nominees was "playing politics with judges," was "unfair" and that he was "sick of it." Regrettably, he did not follow through. That was the last nominee of President Clinton's that Senator Hatch and the Republican Senate were willing to consider to this important Circuit. Two highly-qualified nominees, Elena Kagan, now Dean of the Harvard Law School, and Allen Snyder, who had served as a clerk to Justice Rehnquist and was an experienced and respected litigator, were left without consideration for years. No questions were raised about their qualifications, as there have been for so many of President Bush's nominations. The fact is that for the rest of President Clinton's second term, Senate Republicans would not consider another nominee to the D.C. Circuit. They were just blocked, pocket filibustered with impunity.

Despite the unwillingness of Senate Republicans to act on President Clinton's nominees to the D.C. Circuit for years, Senate Democrats cooperated in the consideration of the nomination of now-Chief Justice John Roberts to the D.C. Circuit. At the time, John Roberts was Mr. Snyder's junior and his partner at Hogan and Hartson. He was the first judge confirmed to the circuit in six years. The Senate has since confirmed three more. Today, judges appointed by Republican Presidents outnumber those appointed by Democratic Presidents seven to three on this pivotal Circuit, even before Mr. Keisler's nomination.

The speed with which the Committee has turned to this hearing on Mr. Keisler's nomination stands in stark contrast to treatment applied by the Republican-controlled Senate to President Clinton's nominees to the D.C. Circuit. Before we allow this President to pack the D.C. Circuit further, we should at least make a careful and deliberate effort to review this nomination to a lifetime appointment.

The Federal Law Enforcement Officers Association has written to me to express "concerns" about Mr. Keisler's nomination based on his involvement in the case of *Adams v. United States* in the Court of Federal Claims. That case was brought by thousands of federal law enforcement officers seeking substantial back pay and has been stuck in the courts since at least 1990. Federal law enforcement officers and their attorneys say that Mr. Keisler, as Assistant Attorney General in charge of the Justice Department's Civil Division, has strung along a group of officers seeking a settlement after a judge's decision favorable to those officers. They say his office refused to

meet with attorneys for the officers and ultimately rejected a proposed settlement that had been approved by the career attorney handling the case and by five federal law enforcement agencies.

My biggest concern with this nomination is that Mr. Keisler, like Brett Kavanaugh before him, will become a rubber stamp for this President's expansive views of Executive power. He has apparently earned this nomination by being a loyal, high-level official in this Administration supporting the Administration's view of the "unitary executive" and virtually unlimited presidential power. He seems to have played a central role in invoking the state secrets doctrine in cases against AT&T and other companies for their role in the government's warrantless wiretapping of American citizens. In doing so, he contributed to this Administration's focus on secrecy and efforts to avoid accountability.

Mr. Keisler, in an unusual move for an Assistant Attorney General for the Civil Division, argued the Administration's case in *Hamdan v. Rumsfeld* at the Circuit Court level. He apparently went out of his way to argue a case in which he could defend the Administration's detainee policies and its over-expansive view of presidential power. Ultimately, the Supreme Court rejected the Administration's claims and held its practices "illegal." The Supreme Court recognized that even in a time of war, the President does not have the power to disregard the law. No one is above the law. I am concerned that this nominee has been on the wrong side of those fundamental issues and will continue to be as a judge.

This Administration has taken unprecedented steps to expand Executive power. This Republican-led Congress has largely abdicated its responsibilities to act as a check on Executive power. It is particularly important, then, that the courts act to preserve our system of checks and balances and to serve as a check on a runaway Executive. Rushing this hearing before a full record can be assembled only adds to that perception of a rubberstamp Republican Congress rushing to confirm rubberstamp judges for this President.