Statement of

The Honorable Chuck Grassley

United States Senator
Iowa
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Prepared Statement of Ranking Member Chuck Grassley
Senate Committee on the Judiciary
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Nominations to the D.C. Circuit, James Cole, to be Deputy Attorney General, and Edward Chen to be U.S. District Judge for the Northern District of California

Sunshine Week

Thursday, March 17, 2011

Setting the Record Straight on D.C. Circuit Nominations
Today I want to lay out the record regarding President Bush's nominations for United States Circuit Judge for the District of Columbia Circuit.

President Bush nominated six individuals to the United States Court of Appeals for the District of Columbia. None of those individuals had a closed hearing. I think that when references to closed hearings are made, as they were last week, it can be harmful to the process. That is why, for nominees to the Supreme Court, we automatically hold a closed hearing - whether one is required or not. That way, there can be no inference that there is troublesome information in a nominee's background. When a closed hearing is required for a nominee to a lower court, it must be handled carefully. To do otherwise can unfairly damage professional reputations. Furthermore, potential nominees may be hesitant to allow their names to be submitted if they are concerned that unsubstantiated and unfair insinuations will be made. I have pledged to treat nominees fairly and with respect. I hope all Senators will do likewise - whether in hearings, markups, or during floor debate.

With regard to the hearing record of the six nominees, I would like to go through the factual record. Those nominated to the D.C. Circuit by President Bush were Miguel Estrada, John Roberts, Janice Brown, Thomas Griffith, Brett Kavanaugh, and Peter Keisler. I would note that John Roberts had been nominated to this same Court in 1992, but no action was taken on that nomination.

On May 9, 2001, President Bush announced his first set of judicial nominations. These included the nominations of Miguel Estrada and John Roberts. Following the nominations, the then Chairman of the Judiciary Committee, Senator Hatch, planned hearings for these nominees. However, just over two weeks later, before those hearings could take place, Senator Jeffords announced his decision to leave the Republican Party, become an Independent and caucus with the Democrats in the Senate. That took place on May 24, 2001. The result was that hearings

contemplated by Senator Hatch were not able to go forward. This was not the choice of Republicans. Once the Democrats took the majority, Mr. Roberts had no hearing during the 107th Congress. Mr. Estrada's hearing came more than a year later, late in the session on September 26, 2002. These nominations were returned to the President on November 20, when the Congress adjourned. In fact, both nominations were returned on more than one occasion during that Congress.

John Roberts was renominated at the beginning of the 108th Congress on January 7, 2003. A hearing was held on January 29, 2003 and he was reported favorably on February 27, 2003. The nomination was recommitted to the Committee on April 30, when a second hearing was held. He was reported out of Committee and confirmed by voice vote on May 8, 2003. This was a full two years after his nomination.

Miguel Estrada's renomination in the 108th Congress was not as successful. Reported out of Committee on January 30, 2003, his nomination was considered by the Senate from February through July, 2003. During that time, seven cloture motions were presented to the Senate, each one failing. His nomination was withdrawn on September 4, 2003.

Janice Brown was nominated to fill a vacancy on the Court on July 25, 2003. Hearings were held on October 22 and she was favorably reported on November 6. Like the nomination of Mr. Estrada, Justice Brown was subjected to a filibuster. A cloture motion failed on November 14, 2003. Her nomination was returned to the President on December 8, 2003, upon the sine die adjournment of the 108th Congress.

A similar fate befell other D.C. Circuit nominees in the 108th Congress. Brett Kavanaugh was also nominated on July 25, 2003. His hearing was in April 2004 and then stalled. The nomination was returned to the President in December 2004. Thomas Griffith was nominated May 10, 2004. He had a hearing on November 16, 2004 and the nomination was returned to the President in December. So with four nominations during that Congress, the Senate confirmed only one nominee.

At the beginning of the 109th Congress the President resubmitted the nominations of Janice Brown, Brett Kavanaugh and Thomas Griffith on February 14, 2005. Justice Brown was reported out of Committee on April 21, 2005. After a successful cloture vote to end the filibuster on her nomination, she was confirmed on June 8, 2005. This was more than 22 months after her original nomination.

Thomas Griffith had a second hearing on March 8, 2005, was reported out of committee on April 14, 2005 and waited two months for a floor vote. He was confirmed on June 14, 2005, thirteen months after his nomination.

Brett Kavanaugh's nomination saw no action during the first session of the 109th Congress and was returned to the President on December 21, 2005. Renominated a month later, his second hearing was held on May 9, 2006. He was reported out of committee on May 11, 2006. After a successful cloture vote to end the filibuster on his nomination, he was confirmed on May 26, 2006. This was more than two years and nine months after his original nomination.

Peter Keisler's nomination was another case of delay and obstruction, and inaction. He was first nominated on June 29, 2006. That nomination was returned to the President in September 2006 with no action. He was renominated in November; that nomination was returned to the President in December. At the beginning of the 110th Congress he was renominated on January 9, 2007. No action was taken on the nomination and it was returned to the President two years later when the 110th Congress adjourned. Mr. Keisler was eminently qualified to serve on that Court. He had a distinguished academic and professional record. His public service included serving as Acting Attorney General. Despite his qualifications, Mr. Keisler waited 918 days for some committee action, which never came. Again, no hearing was held for Mr. Keisler - not an open hearing, not a closed hearing.

Mr. Chairman, those are the facts regarding these nominations. Compare those nominations to that of Caitlin Halligan. She was nominated September of last year. Her hearing came a little more than four months later, and she has since been reported out of Committee. I think that is a remarkable contrast.

James Cole, to be Deputy Attorney General
I have serious concerns with the nomination of James Cole to be the Deputy Attorney General at the Department of Justice. The Deputy Attorney General is the second in command at the Justice Department and responsible for overseeing the day to day operations of the Department. Managing this vast bureaucracy is a difficult task that requires a serious commitment to protecting our national security, enforcing our criminal laws, and safeguarding taxpayer dollars. We need a qualified individual to fill this slot, an individual who possesses the ability to not only provide leadership for the Department, but also an individual who has the smarts, capability and willingness to manage Department programs and root out inefficiencies and abuses in those programs. After reviewing all his responses and his hearing testimony, I concluded that I could not support Mr. Cole's nomination to be the Deputy Attorney General.

In particular, I'm seriously concerned about Mr. Cole's views on national security and terrorism. Back in 2002, Mr. Cole was the author of an opinion piece in the Legal Times. In that piece, he stated, "For all the rhetoric about war, the Sept. 11 attacks were criminal acts of terrorism against a civilian population, much like the terrorist acts of Timothy McVeigh in blowing up the federal building in Oklahoma City, or of Omar Abdel-Rahman in the first effort to blow up the World Trade Center. The criminals responsible for these horrible acts were successfully tried and convicted under our criminal justice system, without the need for special procedures that altered traditional due process rights."

He added, "The acts of Sept. 11 were horrible, but so are...other things." The other things he referred to were the drug trade, organized crime, rape, child abuse and murder. Mr. Cole's opinion piece argued that notwithstanding the involvement of foreign organizations, such as al Qaeda, we have never treated criminal acts influenced by foreign nationals or governments as a basis for "ignoring the core constitutional protections ingrained in our criminal justice system."

Mr. Cole concludes his opinion piece by arguing that in addition to stopping future terrorist attacks, the Attorney General is a criminal prosecutor and that he has a special duty to apply constitutional protections engrained in our criminal justice system to everyone, including terrorists captured on a foreign battlefield.

Mr. Cole wrote this opinion piece two days short of the first anniversary of the September 11 attacks. Given the close proximity in time to the September 11 attacks, we must understand this opinion piece to be Mr. Cole's true beliefs about the application of the civilian criminal justice system to terrorism cases, including those who masterminded the 9/11 attacks.

From the opinion piece and his responses to our inquiries, it appears that if given a choice of prosecuting high ranking terrorists in civilian courts or military commissions, Mr. Cole would likely favor civilian courts based upon his longstanding belief in the role the Attorney General plays in protecting the principles of the criminal justice system. Absent a clear statement from Mr. Cole about what factors would warrant selecting a civilian or a military forum, it is hard to look at his entire record of past opinions, his testimony, and responses to our questions and reach a different conclusion.

Military tribunals have many advantages to civilian criminal courts and are better equipped to deal with dangerous terrorists and classified evidence while preserving due process. I'm troubled that Mr. Cole does not appear to share this belief. Based upon his responses and testimony, I have serious concerns about Mr. Cole's support for civilian trials for terrorists captured on a foreign battlefield given that the Deputy Attorney General oversees the National Security Branch at the Justice Department.

Second, I have concerns about Mr. Cole's abilities relative to oversight of government programs. First, in his responses about oversight of DOJ grant programs, Mr. Cole failed to commit to a top to bottom review of the programs. We've had enough examples of the tremendous inefficiencies, duplication and waste in these programs. I'm disappointed that Mr. Cole has failed to recognize that there is a need for a comprehensive review of DOJ's grant programs - not only for the sake of saving taxpayer dollars, but also to ensure that grant objectives are being met in the most efficient and effective manner possible.

Third, I have concerns about Mr. Cole's abilities based on his performance as an Independent Consultant tasked with overseeing AIG. By way of background, the Justice Department provided copies of the reports Mr. Cole issued when he was overseeing AIG, but they were labeled "Committee Confidential". Consequently, I cannot discuss with specificity the contents of those documents publicly.

Nevertheless, when taken into context with the public responses provided by Mr. Cole to my questions, a troubling picture develops about Mr. Cole's performance in his Independent Consultant responsibilities. The responses and reports do not dispel the serious questions raised about Mr. Cole's independence and completeness. Further, they reveal what appears to be a level of deference to AIG management one would not expect to see from someone tasked as an "independent" monitor.

In order to clarify a number of questions on this matter, Senator Coburn and I sent a follow-up letter seeking additional answers from Mr. Cole. Mr. Cole's reply clarified that DOJ, SEC, and New York Attorney General's Office were aware of his practice of seeking input from AIG and making modifications to the reports. He indicated that the changes AIG made were often factual changes such as AIG employee names, dates of materials, and events. He also indicated that some of the changes requested by AIG were included in a section of the reports entitled "AIG

Response." However, he added that "on a few occasions" AIG would "suggest a stylistic change of phrasing in the analytical section of the report." He stated that while he included the edits made by AIG, he "did not believe that a detailed presentation of this factual review process was necessary to an understanding of each party's position."

As a result, the reports did not necessarily show which edits AIG made that were incorporated. Instead, he said that those changes were available in working papers that were "available to the SEC, the DOJ, the New York Attorney General's Office." Unfortunately, he added, "the agencies--which were aware of this practice--did not request such documents."

While I appreciate Mr. Cole's responses to these clarifying questions, they raise concerns about how independent his monitoring was, what changes were ultimately requested by AIG, what changes were included, and how much the SEC and DOJ really knew about edits AIG was making to the "independent" reports.

Finally, I have serious concerns about Mr. Cole's decision to suspend the compliance review at AIG's Financial Products division, following the government bailout. In his testimony, Mr. Cole acknowledged that following the government bailout of AIG, he scaled back his efforts until the future of AIG as a corporation was determined. After Mr. Cole suspended his monitoring, AIG restructured its compliance office and terminated a number of staff overseeing the company's compliance with SEC regulations. Mr. Cole said that after it was determined that AIG's Financial Products division would not be dissolved, the compliance and monitoring were "revived and are being reviewed and implemented where applicable." Under Mr. Cole's watch, AIG not only got $182 billion of taxpayer money, it was able to talk the Independent Consultant--Mr. Cole--out of monitoring what the company was doing.

Based upon these factors, I'm concerned about Mr. Cole's ability to perform the duties required of the Deputy Attorney General. In the position, he would be in a position to potentially influence future compliance monitors appointed under settlements between the Justice Department, SEC, and other corporations that have violated the law. Independent monitors need to be truly independent and completely transparent. They are selected and appointed to ensure that the interests of the American people are protected.

Besides my concerns regarding Mr. Cole's qualifications, I am troubled by President Obama's recess appointment of Mr. Cole to this position. I have been consistent in my opposition to recess appointments. When the President bypasses the Senate, then such nominees will not receive my support.

Based on these factors, which I have summarized here, but discussed in greater detail on prior occasions, I cannot support the nomination of Mr. Cole to be Deputy Attorney General.

Edward Chen to be U.S. District Judge for the Northern District of California

I have a brief comment to make regarding the nomination of Edward Chen, to be United States District Judge for the Northern District of California. We have discussed our concerns regarding Judge Chen in previous markups, so I will not reiterate those today. I expect, should his nomination be brought up on the floor, there will be considerable debate. At that time we will lay

out to the full Senate our case in opposition to his nomination. For today, we will allow a vote on reporting the nomination to proceed. Mr. Chairman, we do request roll call votes on both Mr. Cole and for Judge Chen.

Sunshine Week

Mr. Chairman, I also wanted to say a few words about Sunshine Week. Sunshine Week coincides with and commemorates the anniversary of James Madison's birthday, who is considered the father of open government. As Madison rightly believed, knowledge is the key to self-government. Therefore, our laws, which seek to preserve the freedom of knowledge and transparency in our system of government, are in honor of his championing vision. We call these "Sunshine Laws."

Making our government more transparent, accessible, efficient and accountable only strengthens our system of self-government. Transparency breeds accountability. And our federal government could use a lot more of both.

Mr. Chairman, throughout our tenure in the Senate, we have both made a point to bring more sunshine into the federal government.

The Sunshine in the Courtroom Act, on this week's agenda, is a bipartisan bill that we both believe in. We won't be debating it today, but I wanted to take a few minutes to talk about it during Sunshine Week. The Judiciary Committee has marked-up this legislation a number of times and has passed it with bi-partisan support. The bill goes to the heart of an open, transparent government and is based upon the core beliefs of our Constitution's Founding Fathers.

Allowing cameras in federal courtrooms is consistent with the Founders intent that trials be held in front of as many people as choose to attend. The First Amendment supports the notion that court proceedings be open to the public and, by extension, the news media and broadcast coverage. Openness is the heart of our government, and by providing sunshine into the courtroom, we open up the courts the same way CSPAN opened the Congress to the public.

Our bill will help the public become better informed about the federal judiciary and the judicial process. The bill will increase public scrutiny of our federal judiciary and bring greater accountability to a system that includes Judges with lifetime tenure.

I also want to say a few words about the oversight hearing we held this past Tuesday on the Freedom of Information Act.

Two years ago, on his first full day in office, President Obama issued a memorandum on the Freedom of Information Act and declared that his administration would usher in a new era of open government.

Yet, last year, experts gave the Obama administration a grade of "C" or lower on its Freedom of Information Act performance during its first year.

Our oversight hearing gave us an opportunity to review the administration's performance during its second year. I'm sorry to report that contrary to the President's hopeful pronouncements when he took office, the sun still isn't shining in Washington DC.

It's not just a matter of disappointment in poor performance. And it's not even bureaucratic business as usual. It's more, and it's far worse.

The Associated Press uncovered that for nearly a year, President Obama's political appointees at the Department of Homeland Security screened Freedom of Information Act requests and delayed responses. There is also a recent article by a former Justice Department attorney on the political screening of information requests at the Justice Department.

It appears that as part of the process at Homeland Security, career employees were required to analyze information requests under a political criteria. They were then to pass the results of the analysis onto Secretary Napolitano's political staff.

The reports of a politicized compliance with the Freedom of Information Act reveal that there is a disturbing disconnect between President Obama's words and the actions of his political appointees.

Open government is not a Republican or a Democrat issue. It has to be a bipartisan issue. We all know that.

I was troubled by the testimony from our hearing. In particular, I was struck by the contradiction between the testimony of the outside witnesses and the testimony of the witnesses from the administration.

The Associated Press report came out seven months ago and was based on Homeland Security emails. Either the emails say what they say, or they don't. I would've hoped that the administration would've determined this by now. But based on our hearing, I don't know if the administration has even investigated what has been going on at Homeland Security.

So, I strongly believe we should be conducting significant and bipartisan oversight.

With a $14 trillion debt, unsustainable entitlement programs, rising energy prices, and a tenuous economic recovery, it's more important than ever to let the sun shine on our federal government and give confidence to the American people. It's a year-long effort, not just a week's effort around James Madison's birthday.

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