

Statement of
The Honorable Charles E. Schumer

United States Senator
New York
August 1, 2006

CES Opening Statement on Peter Keisler, Nominee to D.C. Circuit
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I want to welcome each of the nominees and their families here today. Appointment to a lifetime post as a federal judge is perhaps the greatest honor that can be bestowed on any lawyer. So I congratulate each of you on your achievement.

Ordinarily, I begin statements like these by thanking the Chairman for holding the hearing.

With respect to the nomination of Peter Keisler, however, I believe this hearing is premature.

Mr. Keisler is, by all accounts, a smart and accomplished lawyer; he has impeccable academic and professional credentials.

But, I must say, we may be putting the cart before the horse here.

It appears we are trying to break the land-speed record for confirming a nominee to the second highest court in the land, for a seat that may not even need filling - when there are other identified "judicial emergencies" that deserve our more immediate attention.

To that effect, all 8 Democrats sent a letter to Chairman Specter last Thursday, urging that we first address some critical threshold issues before holding a hearing on the Keisler nomination. First things first, in other words.

To my knowledge, that letter received no response. So, let me reiterate some of the concerns we expressed about proceeding so hastily on this nomination.

First, we have barely had time to consider this nominee's record. Mr. Keisler was named to this seat only 33 days ago, so we are having this hearing with astonishing - and inexplicable - speed. The average time from nomination to hearing for the last seven nominees to that court is at least several times that long.

Second, we have been hearing for years from our friends across the aisle - in strident and emphatic tones -- that we simply don't need to fill the seat to which Mr. Keisler has been nominated - the 11th seat on the D.C. Circuit.

We have been told repeatedly that to fill this seat would be a waste of taxpayer money and a shameful triumph of big government. Why then are we speeding towards confirmation here?

Here are just some of the statements made by those who in years past have decried the need to fill the 11th seat.

? Senator Sessions: "[The eleventh] judgeship, more than any other judgeship in America, is not needed." (1997)

? Senator Grassley: "I can confidently conclude that the D.C. Circuit does not need 12 judges or even 11 judges." (1997)

? Senator Kyl: "If . . . another vacancy occurs, thereby opening up the 11th seat again, I plan to vote against filling the seat -- and, of course, the 12th seat -- unless there is a significant increase in the caseload or some other extraordinary circumstance." (1997)

? More recently, at a hearing on the D.C. Circuit, Senator Sessions, citing the Chief Judge of the D.C. Circuit, reaffirmed his view: "I thought ten was too many. . . I will oppose going above ten unless the caseload is up." (2002)

In making their case, Senators expressed alarm at the thought of spending an estimated \$1 million per year in taxpayer funds to finance an unneeded judgeship. Indeed, my friend from Alabama suggested that filling the 11th seat would be "an unjust burden on the taxpayers of America."

At the time, Senators Lott, Ashcroft, Thurmond, Hatch, and Faircloth made similar declarations.

Since these emphatic objections were raised in 1997, the caseload for the D.C. Circuit is down even further. That is true no matter how you slice it.

Here are some statistics from the Administrative Office of the United States Courts:

? as measured by written decisions per active judge, the workload has declined by 17 percent since 1997;

? as measured by number of appeals resolved on the merits per active judge, it has declined by 21 percent;

? as measured by total number of appeals filed, it has declined by 10 percent;

? and as measured by total number of appeals resolved, the caseload has declined by a whopping 37 percent.

So, Mr. Chairman, given the strident statements of my colleagues and the undeniable data from the Administrative Office, I am more than a little surprised that we are rushing so fast here.

I am especially surprised that we are pushing forward, given that the Mr. Keisler is now leapfrogging ahead of several nominees for seats that the non-partisan Judicial Conference has identified as bona fide "judicial emergencies."

Indeed, every other Circuit Court nominee awaiting a hearing in the Committee -- save one -- has been selected for a vacancy that has been deemed a "judicial emergency." Shouldn't they come first?

If and when we determine that there is actually a need to fill the 11th seat; if and when we deal with the identified "judicial emergencies"; and if and when we have had time to receive and review materials relevant to Mr. Keisler, then we can have a proper examination of this nominee's record.

Even at this early stage, though, there are a number of important and legitimate questions that we all should be asking, before we rubber stamp a nominee to the second highest court in the land.

They are legitimate enough and substantial enough to require some time for exploration. And we should not rush such a nominee through, especially one to such a singularly important court.

For example:

? There are legitimate questions about your judicial philosophy. As Bob Novak reported last week, your nomination became possible only after conservatives blocked a more moderate lawyer - Professor Debra Livingston of New York - from becoming the nominee for this seat. As I understand it, she was all set to go, but was pulled back at the last instant. If true, such maneuvering on the part of the hard right and such capitulation on the part of the President is reminiscent of the treatment Harriet Miers received.

o These circumstances naturally lead us to ask questions about the reasons Ms. Livingston was replaced with you and what this says about your judicial philosophy.

? In the same vein, you once said to the National Journal, "I think [Judge] Bork is in the mainstream." That was in 1987, not long after you clerked for him and not long after you co-founded the Federalist Society. But Judge Bork, in the view of many, is so far outside the mainstream that he can barely see the shoreline. Among other things, he has said, "I don't think that in the field, of constitutional law, precedent is all that important." That's why he was rejected on a bipartisan basis in the Senate.

o Your statements naturally lead us to ask whether you still believe Judge Bork to be in the judicial mainstream. And it leads us to ask what your own definition of judicial mainstream is.

? There are legitimate questions about your activities at the Justice Department. There are questions, for example, about your role in a landmark case where the Government's own experts testified that tobacco companies should pay \$130 billion in damages for smoke cessation programs. DOJ political appointees reportedly overruled career lawyers and contradicted their own experts, changing the demand to \$10 billion in damages - a fraction of the amount recommended.

One of the lead career attorneys on the tobacco case told the Washington Post that you were among those who were "somewhat less supportive of the [DOJ] team's efforts."

o These reports naturally lead us to ask whether politics trumped the neutral administration of justice in that case.

? Similarly, the Federal Law Enforcement Officers Association has written to the Committee expressing "concerns" about your nomination based on your rejection of a back-pay settlement apparently reached with the career attorney handling the case.

o That letter, too, naturally leads us to ask why a career lawyer was overruled by a political appointee.

? There are legitimate questions about your views of Executive power. You successfully argued the Hamdan case before the D.C. Circuit Court of appeals, whose decision of course was reversed by the Supreme Court a few weeks ago in a rebuke of the Administration's expansive views of executive power.

o That experience naturally leads us to ask about your views of executive power and Congressional power. And it leads us to ask what role you had in determining the Administration's policy in this area, which many of us believe reflects an unprecedented arrogance.

In sum, Mr. Chairman, Mr. Keisler may very well be a moderate, mainstream, non-ideological, and well-qualified nominee.

But before we can come to that conclusion, there are many, many questions that need answering.

At this particular moment, however, I seem to have more questions for the Committee than I have for the nominee:

? Why are we proceeding so fast here?

? Is there a genuine need to fill this seat?

? Has the workload of the D.C. Circuit gone down?

? Should taxpayers be burdened with the cost of filling that seat?

? Doesn't it make sense - given the passion with which arguments were made only a few years ago - to examine these issues before we proceed?

I sincerely hope, Mr. Chairman, that we can address these vital threshold questions first - and that we will be able to recall Mr. Keisler to answer additional questions about his record if and when we determine that it even makes sense to go forward.