

# United States Senate

WASHINGTON, DC 20510

July 27, 2006

The Honorable Arlen Specter  
Chairman  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Specter:

We write to request that you postpone next week's proposed confirmation hearing for Peter Keisler, only recently nominated to the D.C. Circuit Court of Appeals. For the reasons set forth below, we believe that Mr. Keisler should under no circumstances be considered – much less confirmed – by this Committee before we first address the very need for that judgeship, receive and review necessary information about the nominee, and deal with the genuine judicial emergencies identified by the Judicial Conference.

First, the Committee should, before turning to the nomination itself, hold a hearing on the necessity of filling the 11<sup>th</sup> seat on the D.C. Circuit, to which Mr. Keisler has been nominated. There has long been concern – much of it expressed by Republican Members – that the D.C. Circuit's workload does not warrant more than 10 active judges. As you may recall, in years past, a number of Senators, including several who still sit on this Committee, have vehemently opposed the filling of the 11<sup>th</sup> and 12<sup>th</sup> seats on that court:

- 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 11<sup>th</sup> seat again, I plan to vote against filling the seat -- and, of course, the 12<sup>th</sup> 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 that there was no need to fill the 11<sup>th</sup> seat: “I thought ten was too many. . . I will oppose going above ten unless the caseload is up.” (2002)
- In addition, these and other Senators expressed great reluctance to spend the estimated \$1 million per year in taxpayer funds to finance a judgeship that could not be justified based on the workload. Indeed, Senator Sessions even suggested that filling the 11<sup>th</sup> seat would be “an unjust burden on the taxpayers of America.”

Since these emphatic objections were raised in 1997, by every relevant benchmark, the caseload for that circuit has only dropped further. According to the

Administrative Office of the United States Courts, the Circuit's caseload, as measured by written decisions per active judge, has declined **17 percent** since 1997; as measured by number of appeals resolved on the merits per active judge, it declined by **21 percent**; and as measured by total number of appeals filed, it declined by **10 percent**. Accordingly, before we rush to consider Mr. Keisler's nomination, we should look closely -- as we did in 2002 -- at whether there is even a need for this seat to be filled and at what expense to the taxpayer.

Second, given how quickly the Keisler hearing was scheduled (he was nominated only 28 days ago), the American Bar Association has not yet even completed its evaluation of this nominee. We should not be scheduling hearings for nominees before the Committee has received their ABA ratings. Moreover, in connection with the most recent judicial nominees who, like Mr. Keisler, served in past administrations, Senators appropriately sought and received publicly available documents relevant to their government service. Everyone, we believe, benefited from the review of that material, which assisted Senators in fulfilling their responsibilities of advice and consent. Similarly, the Committee should have the benefit of publicly available information relevant to Mr. Keisler's tenure in the Reagan Administration, some of which may take some time to procure from, among other places, the Reagan Library. As Senator Frist said in an interview on Tuesday, "[T]he DC Circuit. . . after the Supreme Court is the next court in terms of hierarchy, in terms of responsibility, interpretation, and in terms of prioritization." We should therefore perform our due diligence before awarding a lifetime appointment to this uniquely important court.

Finally, given the questionable need to fill the 11<sup>th</sup> seat, we believe that Mr. Keisler should not jump ahead of those who have been nominated for vacant seats identified as judicial emergencies by the non-partisan Judicial Conference. 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." We should turn to those nominees first; emergency vacancies should clearly take priority over a possibly superfluous one.

Given the singular importance of the D.C. Circuit, we should not proceed hastily and without full information. Only after we reassess the need to fill this seat, perform reasonable due diligence on the nominee, and tend to actual judicial emergencies, should we hold a hearing on Mr. Keisler's nomination.

We thank you for your consideration of this unanimous request of Democratic Senators.

Sincerely,

Patrick Leahy Chuck Schumer

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W. Kennedy

Johanne Christian

John Dantin

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