



PRELIMINARY REPORT ON THE NOMINATION OF PETER D. KEISLER TO THE D.C. CIRCUIT COURT OF APPEALS

President Bush nominated Peter Douglas Keisler, the former head of the Department of Justice's Civil Division, to the United States Court of Appeals for the District of Columbia Circuit on June 29, 2006. The Senate returned the nomination to President Bush twice. President Bush re-nominated Mr. Keisler on November 15, 2006, and January 9, 2007, but the Senate has not acted on the nomination. On September 17, 2007, President Bush appointed Mr. Keisler as Acting Attorney General of the United States while also nominating Judge Michael Mukasey to replace Alberto Gonzales as Attorney General. Mr. Keisler's appointment came as a surprise, as President Bush had indicated at the time of Mr. Gonzales' resignation that Solicitor General Paul Clement would be serving as Acting Attorney General until a new Attorney General was confirmed. Further, Mr. Keisler had just announced on September 6, 2007, that he was resigning from the Justice Department to "spend time with his family."¹ Mr. Keisler's term as Acting Attorney General ended when Attorney General Mukasey was confirmed on November 9, 2007. On March 18, 2008, it was announced that Mr. Keisler would rejoin his previous firm, Sidley Austin Brown & Wood, as a partner.²

The limited amount of information presently available through public databases and Mr. Keisler's Judiciary Committee questionnaire shows that Mr. Keisler possesses the professional credentials to serve as a federal appellate judge. It also clearly reveals Mr. Keisler's *bona fides* as an extremely well-connected partisan conservative, particularly during the early part of his career in the 1980s. Yet the few documents currently available do little to inform the Senate Judiciary Committee's consideration of an important subject: Mr. Keisler's views on the law.

BACKGROUND ON THE NOMINATION

The D.C. Circuit is widely viewed as second only to the Supreme Court in influence over law and policy in the United States. It enjoys this unique standing among the appellate courts because it possesses exclusive or concurrent appellate jurisdiction to interpret and enforce many important federal statutes and review the validity of regulations of many federal agencies. As a result, it establishes precedent in many vital areas, including labor and environmental law, energy regulation and presidential decisions regarding the designation of terrorist organizations and so-called enemy

¹ Assistant Attorney General Peter D. Keisler Announces Departure From Justice Department's Civil Division, Office of Public Affairs, United States Department of Justice, Sept. 6, 2007, available at http://www.usdoj.gov/opa/pr/2007/September/07_civ_692.html.

² Website of Sidley Austin LLP, *Peter Keisler Rejoins Sidley Austin LLP as Partner*, Mar. 18, 2008, available at <http://www.sidley.com/newsresources/newsandpress/Detail.aspx?news=3520>.

combatants. Recently, the court has served as a stepping stone to the United States Supreme Court: four of the current Justices sat on the D.C. Circuit before their elevation. The D.C. Circuit has tilted increasingly to the right during the Bush administration. There are now seven Republican-appointed judges and three judges appointed by Democrats. Confirmation of Mr. Keisler would further skew the balance.

The Administration previously considered Mr. Keisler as a possible nominee for one of the Maryland seats on the Fourth Circuit but declined to nominate him after Maryland Senators Sarbanes and Mikulski opposed his nomination because, although he was a Maryland resident, he had never regularly practiced law in the state.³

Prior to Mr. Keisler's nomination, the White House was apparently poised to nominate Debra Livingston to the D.C. Circuit. But, recognizing the importance of the court, conservative activists quietly clamored for someone with stronger conservative credentials. As a result, the White House nominated Professor Livingston to a seat on the Second Circuit, to which she was confirmed in May of 2007, and tapped Mr. Keisler, a favorite among movement conservatives, for the D.C. Circuit seat.⁴

Mr. Keisler was scheduled for a hearing before the Judiciary Committee on August 1, a mere 32 days after his nomination. In recognition of the D.C. Circuit's important stature among federal courts of appeal, senators typically afford significantly more time for investigation of a nomination to the court. For the last seven D.C. Circuit nominees, the shortest period of time between nomination and Senate hearing was 71 days.⁵ The need for additional time for background investigation was especially compelling in Mr. Keisler's case. Mr. Keisler spent much of his career as a practicing litigator. There are few, if any, documents from this part of his career that reveal anything of substance about his legal views. There are, however, literally hundreds of yet-to-be-disclosed files from the Reagan Library dating to Mr. Keisler's tenure in the Reagan White House, some of which may well provide relevant information.⁶ Similarly, Mr. Keisler's mostly yet-to-be-disclosed involvement in the policy decisions of the current administration's Justice Department – including, possibly, certain controversial decisions – may also shed light on his views on the law.

At the time of his nomination, there were no exigent circumstances that justified rushing forward with Mr. Keisler's confirmation hearing. In fact, the Judiciary Committee originally scheduled Mr. Keisler's confirmation hearing ahead of hearings on four other appellate court nominees and several district court nominees who had been tapped for seats that the Judicial Conference has declared "judicial emergencies." The D.C. Circuit, to which Mr. Keisler has been nominated, is not a judicial emergency. Consequently, the Senate did not act on Mr. Keisler's nomination and returned it to the

³ See Eric M. Weiss, *Bush Picks Official at Justice for D.C. Circuit*, WASH. POST, June 30, 2006, at A10.

⁴ See Robert D. Novak, *Republicans inexplicably losing momentum on judicial choices*, UNION LEADER (N.H.), July 27, 2006.

⁵ 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.

⁶ A list of the files is available at <http://www.reagan.utexas.edu/resource/findaid/Keisler.htm>.

President on September 29, 2006. President Bush renominated Keisler on November 15, 2006, but the Senate again failed to act and the nomination was returned to Bush on December 9, 2006, when the 109th Congress adjourned. President Bush again renominated Keisler on January 9, 2007, for consideration by the Senate during the 110th Congress. The Senate has not yet acted on the nomination.

EARLY TIES TO CONSERVATIVE CAUSES AND THE REPUBLICAN PARTY

Mr. Keisler's early history suggests that he possessed a deep affinity for the values of the political right. By allying himself with ascendant conservative leaders and institutions during the 1980s, he achieved an enviable conservative pedigree for one still quite young.

While an editor at a conservative undergraduate newspaper at Yale, where he viewed himself as part of a conservative beachhead in what he saw as a traditionally liberal educational establishment, he wrote in reference to the slow process by which conservative college publications were establishing themselves that "lasting ideologies do not come overnight."⁷ From 1981-82, just after he graduated college and prior to law school, Mr. Keisler became Executive Vice President at the Leadership Institute, a training ground for young conservative Republican leaders. During law school, Mr. Keisler became one of several founding members of the conservative Federalist Society. He served on its board of directors from 1983-2000.

By 1984, at age 24, and while still in law school, Mr. Keisler had sufficiently impressed the Reagan Administration to merit a presidential nomination to the National Advisory Council on Women's Educational Programs (NACWEP),⁸ an organization that investigated and advised government officials on issues of gender equity in education. Mr. Keisler's nomination came at a time when the Administration was accused of "reject[ing] the bipartisan, independent nature of the council" and of instead "select[ing] a number of individuals to serve on the council whose only known involvement in educational equity is their participation in efforts to oppose that equity which has been attained."⁹ Mr. Keisler was apparently held in such high regard by the White House that, when the Labor Committee failed to approve his nomination, President Reagan gave him a recess appointment and later renominated him, in spite of the lack of Senate support.¹⁰

In 1985, having recently graduated from law school, Mr. Keisler resigned from NACWEP and began clerking for a well-known, arch-conservative jurist, then-D.C. Circuit Judge Robert Bork. In 1986, following his clerkship, he joined the Office of the Counsel to the President. There, in 1987, he worked on the unsuccessful effort get his

⁷ William A. Henry III, *Conservative Rebels on Campus; Student editors and their papers are ready on the right*, TIME, Nov. 8, 1982, at 80.

⁸ Abolished by Act of Congress in 1988.

⁹ *Women's Unit Assailed On Educational Policy*, N.Y. TIMES, Sept. 18, 1982, at 1-10.

¹⁰ Thomas Riehle and Deborah Galembo, *Washington's Movers and Shakers; They Didn't Make the Team*, NAT'L J., Oct. 13, 1984, at 1950 (noting Mr. Keisler was not voted out of committee); *Tuesday AM Cycle Washington News*, U.P.I. (WIRE REPORT), Nov. 27, 1984 (noting recess appointment); Public Papers of the Presidents, Pub. Paper 16, Jan. 3, 1985 (showing Mr. Keisler renominated in January 1985).

former boss, Robert Bork, confirmed to the Supreme Court. During the confirmation process, Mr. Keisler defended Judge Bork's nomination against charges that he was more conservative than other Reagan nominees: "It's just a bunch of hot air I think Bork is in the mainstream. He has been in the majority in 94 percent of the cases he's heard."¹¹ Mr. Keisler later expressed concern over the Senate's rejection of Judge Bork based on his conservative views: "It was unpleasant, the kind of thing that makes you hit the wall some nights.... It was extremely frustrating to see ideas that had previously been considered part of a reasonable debate excommunicated and defined as extreme by the Senate."¹² Mr. Keisler also worked on the successful nomination of Anthony Kennedy and, soon after Justice Kennedy's confirmation, was hired on as his law clerk in 1988.

Mr. Keisler authored several scholarly and editorial pieces in the 1980s. His public writings suggest he was a partisan defender of conservative institutions and positions, although one finds little trace of his own independent views in these writings. In a 1981 article in *Human Events*, Mr. Keisler pilloried then-Yale President, the late A. Bartlett Giamatti, for what Mr. Keisler saw as his exaggerated criticisms of the Moral Majority. In response, for instance, to Giamatti's attack on the Moral Majority for "presuming" to know when life begins, Mr. Keisler asked, "Can no one determine when life begins? Can we not assemble medical evidence, moral values, historical tradition, logic, and see where we are led?"¹³

In 1982, in another article in *Human Events*, Mr. Keisler highlighted previously published data showing that, in Mr. Keisler's words, "many Big Business [PAC] contributions, unfortunately, went exactly where Big labor contributions go – to liberal Democrats," even though, according to Mr. Keisler, these companies benefited from conservative policies. Mr. Keisler urged conservative consumers and stockholders to use their influence to get these pro-Democrat corporate PACs to stop "funding the regulators and the taxers[.]"¹⁴ In a third article in *Human Events*, also in 1982, he urged the United States to reject the Law of the Sea Treaty because, in his view, it placed undue tax and administrative burdens on companies wishing to exploit mineral resources on the ocean floor.¹⁵

In 1984, Mr. Keisler wrote a monograph for the Institute of Government and Politics entitled *Solidarity and Dissent: Union Member Attitudes and the Political Process*. In the piece, he analyzed the results of an Institute survey of union member attitudes, concluding that, although there was no clear consensus among union members on political ideology, union members often held views that diverged from the union's official position and were often distrustful of their union leadership. Mr. Keisler concluded that union members were independent political thinkers and that "[t]he test

¹¹ *Bork the Conservative*, NAT'L J., Aug. 1, 1987, at 1998.

¹² Phillip Longman, *Reagan's Disappearing Bureaucrats*, N.Y. TIMES, Feb. 14 1988, at 6-42.

¹³ Peter Keisler, *Yale's Giamatti and the Moral Majority*, HUMAN EVENTS, Nov. 28, 1981, at 1049.

¹⁴ Peter Keisler, *Corporate PACs: How to Distinguish Friends from Foes*, HUMAN EVENTS, Apr. 17, 1982, at 4.

¹⁵ Peter Keisler, *U.S. Interests Jeopardized by Law of Sea Treaty*, HUMAN EVENTS, Jan. 23, 1982.

over the next several years will be over which party – and which philosophy – can win the allegiance of those that refuse to be led.”¹⁶

In a 1985 *Washington Times* commentary, Mr. Keisler, along with David Wagner, criticized Yale University for its lawsuit to stop the *Yale Literary Magazine* from using Yale in its title, following the take-over of the periodical by a staunch conservative.¹⁷ Also in 1985, Mr. Keisler was a speaker at a \$100-a-plate roast for outgoing White House public liaison Faith Whittlesey, the highest ranking woman on the White House staff, during which he told the audience that a conservative movement was taking hold on college campuses.¹⁸

PRIVATE PRACTICE

Following his clerkship with Justice Kennedy, Mr. Keisler joined the law firm of Sidley & Austin, where he worked for approximately 13 years, from 1989-2002. Mr. Keisler primarily handled appellate cases involving telecommunications law. In 1996, Mr. Keisler co-authored a *Legal Times* piece with Daniel Meron entitled “The Need for National Rules to Foster Local Competition in Telecommunication.”¹⁹ In 2001, on behalf of the National Cable & Telecommunications Association, he successfully argued before the Supreme Court that cable companies did not lose their right, under the Pole Attachment Act, to have access on reasonable terms to utility poles simply because they also provided high-speed internet access using cable equipment.²⁰

In his questionnaire, Mr. Keisler described five *pro bono* cases in which he was involved. He spent 200 hours successfully representing a Sudanese official, Dr. Elhadi Omer Abdelhalim, in asylum proceedings. He also represented two indigent immigrants challenging their deportations before the Eleventh Circuit.

The *Washington Post* reported that, “[a]s a partner in the Washington office of Sidley Austin Brown & Wood, Mr. Keisler was instrumental in getting the firm to offer health benefits to the same-sex partners of employees, and his colleagues praise his efforts to improve the recruiting of minorities, women and gays.”²¹

¹⁶ Peter Keisler, *Solidarity and Dissent: Union Member Attitudes and the Political Process*, INSTITUTE FOR GOVERNMENT AND POLITICS (1984).

¹⁷ Peter Keisler and David Wagner, *Yale Lit: Literary, Legal Flap*, WASH. TIMES, Jan. 3, 1984.

¹⁸ Betty Cuniberti, *Farewell Roast Done the Right Way; Conservatives Hail Whittlesey as She Leaves the White House*, L.A. TIMES, May 29, 1985, at 5-3.

¹⁹ Peter Keisler and Daniel Meron, *The Need for National Rules to Foster Local Competition in Telecommunications*, LEGAL TIMES, Nov. 11, 1996.

²⁰ *National Cable & Telecommunications Association v. Gulf Power*, 534 U.S. 327 (2002).

²¹ Brooke A. Masters, *Judgeship Hinges on Politics, Practice; Md. Liberals Keep Bush Pick Off List*, WASH. POST, May 13, 2001, at C05.

On March 18, 2008, after a six year absence, Sidley & Austin announced that Mr. Keisler would be rejoining the firm as a partner and global coordinator of the firm's appellate practice.²²

DEPARTMENT OF JUSTICE

In 2002, shortly after a new conservative administration assumed power, Mr. Keisler returned to public service as a political appointee. At first, he served as Principal Deputy Associate Attorney General and then as Acting Associate Attorney General, helping to oversee the work of the Justice Department's Civil, Antitrust, Environment and Natural Resources and Civil Rights Divisions, among others. A year later, in 2003, he became Assistant Attorney General in charge of the Civil Division. The Civil Division is generally charged with defending acts of Congress and executive branch policies and actions. Accordingly, the legal positions Mr. Keisler advanced in cases defending the government do not necessarily reflect his own views. By contrast, where he helped formulate government policy, including decisions in connection with affirmative enforcement litigation on the front end, the Committee may well want to explore whether the government's position reflected Mr. Keisler's own views.

There is some evidence to suggest that Mr. Keisler exercised discretion in helping to determine strategy in the Department's affirmative suit against tobacco companies, which alleged that the companies conspired to conceal the dangers of smoking from the public. Mr. Keisler, among others, drew criticism for the government's decision to scale back its remedy demand mid-trial in that case. The decision took place following a May 2005 D.C. Circuit ruling, which held that the government's \$280 billion disgorgement claim against the tobacco industry was not permitted by the RICO statute. Following the ruling, Mr. Keisler was among several Department lawyers who signed a brief in district court arguing that the government's demand for a \$130 billion smoking cessation program remained proper under the D.C. Circuit opinion because it was designed to constrain the industry's future conduct. But one month later, Mr. Keisler and other Justice Department officials changed course, deciding that the demand for the \$130 billion program was improper. They dramatically scaled back the government's request, seeking a \$10 billion program instead. Frustrated by what she viewed as improper political influence over the course of the litigation, Sharon Eubanks, one of the top career attorneys on the case, subsequently left the Justice Department, where she had worked for years. She stated that "my current supervisors, in particular Dan Meron, Pete Keisler and Robert McCallum, have been somewhat less than supportive of the [tobacco litigation] team's efforts."²³

At the urging of several members of Congress, the Justice Department's Inspector General's Office tapped the Department's Office of Professional Responsibility to conduct an internal investigation into whether political appointees had exerted improper

²² Website of Sidley Austin LLP, *Peter Keisler Rejoins Sidley Austin LLP as Partner*, Mar. 18, 2008, available at <http://www.sidley.com/newsresources/newsandpress/Detail.aspx?news=3520>.

²³ Carol D. Leonnig, *In Retiring, Lead Attorney in Tobacco Suit Cites Bosses*, WASH. POST, Dec. 1, 2005, at A10.

influence on the conduct of the litigation. In a June 2006 report, OPR, which focused primarily on the role of Associate Attorney General Robert McCallum, found no wrongdoing. Yet members of Congress remained unsatisfied. Senator Tom Harkin (D-Iowa) called the OPR's report insufficient, saying that it "ignored too many key questions and doesn't even begin to scratch the surface."²⁴

In March, 2007, Sharon Eubanks also became the first government lawyer from the case to speak out publicly at length about what she believed to be the high-level interference by Mr. Keisler and two other political appointees, then-Associate Attorney General Robert D. McCallum and Keisler's deputy at the time, Dan Meron.²⁵ Eubanks stated that Keisler, McCallum, and Meron told her to approach government witnesses about softening their testimony, ordered the penalty cut to \$10 billion, and ordered her to read word for word a closing argument they had rewritten. "The political people were pushing the buttons and ordering us to say what we said," Eubanks said. "And because of that, we failed to zealously represent the interests of the American people."²⁶

McCallum denied Eubanks' accusations, stating that, "Her claims are totally false in terms of [us] trying to weaken the case. Her claims were looked into by the Office of Professional Responsibility and were found to be groundless." It remains unclear how actively involved Mr. Keisler was in making decisions in the litigation, though Eubanks pointed to Keisler as one of the three political appointees "responsible for the last-minute shifts in the government's tobacco case."²⁷

Mr. Keisler also participated recently in affirmative litigation aimed at preserving the secrecy of the Bush administration's NSA wiretapping program. As lead attorney in the government's suit in the District of New Jersey, he sought to enjoin the New Jersey State Attorney General from subpoenaing records from phone companies to determine whether, by cooperating with the NSA's program, the companies had violated the law. Mr. Keisler argued that forcing the companies to confirm or deny sensitive, subpoenaed information would jeopardize national security.²⁸ Citing the purported threat of divulging state secrets, Mr. Keisler also argued on behalf of the government that a federal district court in California should dismiss a lawsuit alleging that AT&T unlawfully cooperated with the NSA's program.²⁹ As with the tobacco suit, the extent to which Mr. Keisler may have weighed in on the decision to initiate and press forward with these cases is unclear.

Most of Mr. Keisler's work in the Civil Division was more clearly dictated by his role as head of a component obligated to defend government policies and statutes.

²⁴ Press Release, Senator Tom Harkin, Still Too Many Unanswered Questions in DOJ Case Against Big Tobacco (June 7, 2006) (available at <http://harkin.senate.gov/news.cfm?id=256608>).

²⁵ Carol D. Leonnig, *Prosecutor Says Bush Appointees Interfered With Tobacco Case*, WASH. POST, Mar. 22, 2007, at A01.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Complaint of the United States, *United States v. Farber* (D.N.J. June 14, 2006) (available at http://www.techlawjournal.com/courts/2006/doj_farber/complaint.pdf).

²⁹ Bob Egelko, *U.S. plays terror card in hearing on AT&T wiretap lawsuit; Government wants case tossed to avoid telling 'state secret'*, S.F. CHRON., June 24, 2006, at A3.

Consistent with this role, Mr. Keisler was involved in defending some of the Bush Administration's most troubling policies in the war on terror. By the same token, he represented the government in defense of laws protecting access to abortion clinics and imposing requirements on telemarketing companies.

In probably the most well-known case he handled, Mr. Keisler argued on behalf of the government in *Hamdan v. Rumsfeld* in the D.C. Circuit, and he participated in both the appellate and Supreme Court briefs.³⁰ The government argued, among other things, that the courts should abstain from ruling on the lawfulness of military commissions established solely by the President until the commission issued a final decision regarding whether Salim Hamdan committed war crimes; that claims that the Geneva Conventions should control the trial procedures for an enemy combatant were not judicially enforceable; that the procedural protections set forth in the Geneva Convention and the Uniform Code of Military Justice (UCMJ) did not constrain the President's use of military commissions to try prisoners accused of being al Qaeda operatives; and that the President possessed inherent authority to independently establish military commissions to try al Qaeda operatives. The government prevailed before the D.C. Circuit, but the Supreme Court reversed that decision, holding that the commissions must comply with the Geneva Conventions and the UCMJ.³¹

In addition, Mr. Keisler represented the government in the Federal Trade Commission's successful appeal of the pro-consumer "do-not-call" regulations, persuading the Tenth Circuit to uphold the regulations in the face of a challenge by phone marketing businesses.³² Also, in *United States v. Bird*, Mr. Keisler argued that the Freedom of Access to Clinic Entrances (FACE) Act, which forbids interference with access to reproductive health services, was constitutional. A divided Fifth Circuit panel agreed with the government and upheld the statute, finding that it fell within Congress's Commerce Clause powers.³³

On September 6, 2007, Mr. Keisler announced his resignation from the Department of Justice in order to "spend time with his family."³⁴ His resignation was to be effective on September 21, 2007, Attorney General Alberto Gonzales' last day in office. However, on September 17, 2007, President Bush appointed Mr. Keisler Acting Attorney General.³⁵ The announcement of Mr. Keisler's appointment came as President Bush announced his nomination of Michael Mukasey to replace Mr. Gonzales as Attorney General. President Bush had indicated at the time of Gonzales' resignation that

³⁰ *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

³¹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

³² *Mainstream Marketing v. Federal Trade Commission*, 358 F.3d 1228 (10th Cir. 2004).

³³ *United States v. Bird*, 401 F.3d 633 (5th Cir. 2005).

³⁴ *Assistant Attorney General Peter D. Keisler Announces Departure From Justice Department's Civil Division*, Office of Public Affairs, United States Department of Justice, Sept. 6, 2007, available at http://www.usdoj.gov/opa/pr/2007/September/07_civ_692.html.

³⁵ *President Bush Announces Judge Michael Mukasey as Nominee for Attorney General*, Transcript, The White House, Sept. 17, 2007, available at <http://www.whitehouse.gov/news/releases/2007/09/20070917-4.html>

Paul Clement would be serving as Acting Attorney General until a new Attorney General was confirmed.³⁶

Mr. Keisler remained Acting Attorney General until November 9, 2007, when Attorney General Mukasey was confirmed. On March 18, 2008, Sidley & Austin announced that Mr. Keisler would be rejoining the firm as a partner and global coordinator of the firm's appellate practice.³⁷

CONCLUSION

Because there are still many critical aspects of Mr. Keisler's record that are not available to the Senate or the public, Alliance for Justice strongly opposes efforts to move forward on Mr. Keisler's nomination. In the time that has elapsed since his initial nomination, Mr. Keisler's record has not been fleshed out, and further questions have now been raised about his involvement in the development of controversial Bush administration policies. Without full access to documents he authored in the Bush Justice Department and the Reagan administration, the Senate cannot meaningfully fulfill its advice and consent responsibility.

³⁶ Robert Barnes and Amy Goldstein, *A Conservative Insider More at Home in the Law Than in Policy*, WASH. POST, Aug. 28, 2007, at A05.

³⁷ Website of Sidley Austin LLP, *Peter Keisler Rejoins Sidley Austin LLP as Partner*, Mar. 18, 2008, available at <http://www.sidley.com/newsresources/newsandpress/Detail.aspx?news=3520>.