

NELA STRONGLY OPPOSES THE NOMINATION OF PETER KEISLER TO THE D.C. COURT OF APPEALS

The National Employment Lawyers Association (NELA) is **strongly opposed** to the nomination of Peter Douglas Keisler to the D.C. Court of Appeals. After reviewing Mr. Keisler's background and legal experience, we believe he is not qualified to be appointed to the federal bench.

Despite having been nominated to one of the most influential federal appeals courts in the country, Mr. Keisler has no judicial experience and no published writings which may indicate his judicial philosophy. Instead, the strongest indicator of his judicial philosophy is his long association, involvement and leadership in the conservative legal movement. That association shortly began after his graduation from Yale Law School, when he clerked for Judge Robert H. Bork on the D.C. Court of Appeals. Mr. Keisler worked closely with Judge Bork on his nomination to the Supreme Court of the United States and steadfastly defended him amidst the controversy during the confirmation hearings. At Judge Bork's Senate confirmation hearings, Mr. Keisler expressed his admiration for Judge Bork and stated that he considered the judge's views to be "mainstream." Judge Bork has said that Mr. Keisler is "one of my favorites."

Even more troubling, however, is Mr. Keisler's founding of the Federalist Society for Law & Public Policy Studies. The organization, which he founded with other Yale Law students such as noted conservative scholar Steven Calabresi, "has created a conservative and libertarian intellectual network that extends to all levels of the legal community."¹ Mr. Keisler was a Director and Secretary of the Society from 1983 to 2000 and, therefore, presumptively an active figure in shaping the Society's policy during that time. Although there is little record of the Society's position during that period on workers' rights issues, it can be safely intuited that the Society's position was, and is, decidedly anti-employee given that its recommended reading list includes scholarly writings such as *In Defense of the Contract at Will* by Richard A. Epstein, 51 U. Chi. L. Rev. 947 (1984) (advocates that "intrinsic fairness" and "effects on utility and wealth" "point strongly to the maintenance of the at will rule"²), and *The Efficiency and Efficacy of Title VII* by Richard A. Posner, 136 U. Pa. L. Rev. 513 (1987) (argues that employment discrimination laws are economically inefficient, because they disallow employers from making rational economic decisions about hiring and firing employees³).

Although these legal writings were not authored by Mr. Keisler, they are the best indicators of his judicial philosophy, in light of the fact that there is no legal writing from Mr. Keisler available for review. Indeed, NELA is troubled that the Senate Judiciary Committee has been unable to obtain a large number of documents he drafted while serving as the Assistant/Associate Counsel to President Regan from 1986 to 1988. Such documents may shed light on Mr. Keisler's position on various legal issues, including employee rights. Without such

¹ See <http://www.fed-soc.org/AboutUs/ourpurpose.htm>.

² See <http://www.fed-soc.org/Publications/biblio/biblio.htm#labor>.

³ *Id*

documents, it is difficult to assess where Mr. Keisler may stand on issues important to American workers.

In November 2003, as an Assistant Attorney General, Mr. Keisler told a Senate committee that more rights for whistleblowers could jeopardize national security. Among other things, he said that whistleblowers should check with higher-ups before giving freewheeling testimony to Congress. According to Mr. Keisler, “The prudent thing would be for them to go back and find out whether that’s appropriate.” His argument directly contradicts the whistleblower provisions of several federal statutes.⁴ If his position is indicative of his commitment to employee rights, then American workers are in trouble.

Finally, NELA is concerned about the speed with which Mr. Keisler’s nomination has progressed. In an unusual move, the Senate Judiciary Committee held a hearing within one month of his nomination. Mr. Keisler’s hearing was held before that of four other federal appellate court nominees and several federal district court nominees who had been nominated much earlier and whose seats had been designated “judicial emergencies.” Indeed, the appellate seat to which Mr. Keisler has been nominated is not considered a “judicial emergency;” there has been, instead, great conflict over whether another D.C. Court of Appeals seat should even be filled. Given the dispute as to whether there is even a need for a new seat on that appellate court, there is additional reason not to proceed with Mr. Keisler’s nomination.

Based on his lack of judicial experience and the lack of any scholarly writing that can illuminate his judicial philosophy, combined with his strong and close connections to radical conservative activism, NELA believes that Mr. Keisler would be in the mold of conservative activists who have never been friendly to employee rights. Given that the D.C. Court of Appeals is the second most powerful court in the nation, and that many nominees to the Supreme Court of the United States come from that court, NELA is strongly opposed to Mr. Keisler’s nomination to the D.C. Court of Appeals and believes he should not be confirmed by the Senate.

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The National Employment Lawyers Association advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. It is the country's only professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 67 state and local affiliates have more than 3,000 members.

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⁴ The first major law protecting whistleblowers in the federal service was the Lloyd-Lafollette Act passed in 1912. It was passed in response to “gag rules” contained in Executive Orders issued by Presidents Theodore Roosevelt and Taft which prohibited federal employees from communicating with Congress without permission of supervisors. The Act was later placed in the Civil Service Reform Act of 1978 and codified in 5 U.S.C. § 7211 (“The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.”). See also 5 U.S.C. § 2302(b) (8) (b) (protects federal employees who disclose information and documents to Congress unless such disclosure is prohibited by law or classified (in which case federal employees may go to the Office of Special Counsel or the Office of Inspector General)).