



June 1, 2018

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and Committee Members:

On behalf of the hundreds of thousands of members of People For the American Way, we write in opposition to the nomination of David Porter of Pittsburgh to the Third Circuit Court of Appeals. Nominated over the objections of a home state senator and with a disturbing ideological record, Porter should not have a hearing, let alone be confirmed.

When President Trump made the nomination in April, Sen. Bob Casey immediately announced his objection.ⁱ In the past, the opposition of a home state senator would have stopped the nomination. In fact, that is exactly what happened with this same court just two years ago, when President Obama nominated Rebecca Haywood to the Third Circuit.

In that case, Sen. Pat Toomey immediately announced his opposition,ⁱⁱ and Chairman Grassley applied his apparent Blue Slip Policy for Democratic Presidents, to which he never made an exception: Without the support of both home state senators, the judicial nominee of a Democratic president would not receive either a hearing or a committee vote.ⁱⁱⁱ As a result, Haywood's nomination joined those of every other one of President Obama's circuit court nominees who did not have the support of both home state senators while Sen. Grassley chaired the Judiciary Committee: Lisabeth Hughes (Sixth Circuit), Abdul Kallon (Eleventh Circuit), and Myra Selby (Seventh Circuit).

Now, as with Rebecca Haywood, the president has nominated someone to the Third Circuit who is opposed by the Pennsylvania senator who is not of the president's party. But this time, the president is a Republican, like the chairman. Although that should not make a difference, the committee under its current chairman has—without exception—processed all circuit court nominations regardless of the support or opposition of the home state senators: Ryan Bounds (Ninth Circuit), Michael Brennan (Seventh Circuit), David Stras (Eighth Circuit)—and now, David Porter (Third Circuit).

Having separate policies based on whether the chairman and president are of the same party is inconsistent with a democracy operating under the rule of law. It damages not only the Senate, but also the judiciary that these nominees are seeking to become part of. Seeing a confirmation system so lacking in integrity, the American people could not be blamed for increasingly regarding the courts as yet another partisan branch of government. That undercuts the legitimacy of our judicial system at a time we can least afford it, when we need independent courts to be a check on the abuse of executive power.

Our opposition is also based on the extreme constitutional ideology of this particular nominee. As Sen. Casey stated, Porter “has advocated legal theories that stack the deck against workers, deny Pennsylvanians access to health care and undermine the equal protection of our laws for all Americans.”^{iv}

For instance, Porter has criticized Supreme Court rulings upholding the New Deal and recognizing congressional authority to protect workers or regulate mining, writing that they “stretch ... the Framers’ structural design that for 225 years has preserved individual liberty and served as a check on unlimited federal power.”^v This is a view pushed by the moneyed elite of our nation, who would strip Americans of our ability to impose reasonable nationwide limits on corporate power over us in every aspect of our lives. But we should not return to a time when ultra-conservative courts abused the Constitution to enable gross abuses of the rights of working people, consumers, and children.

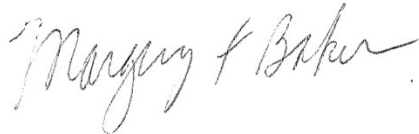
Porter is a contributor to the Center for Vision and Values, which is part of Grove City College, a private religious school that has Porter as a trustee. The Center’s extremism is reflected in the articles it publishes on constitutional interpretation, including articles that claim that: the minimum wage is unconstitutional because it violates the freedom of contract of employer and employee;^{vi} governments can and should prohibit same-sex couples from marrying;^{vii} requiring fair-share fees for public employees violates the First Amendment;^{viii} and that the Senate should not consider Merrick Garland’s nomination to the Supreme Court.^{ix} These are, in fact, interpretations of the United States Constitution (or, in one case, a position on who should be on the Supreme Court) and, as a result, are directly relevant to the Senate’s consideration of the nominee’s qualifications.

Porter’s affiliation with the Center is deeply disturbing, because it strongly suggests that he shares its extreme right-wing interpretations of the Constitution. A nominee who believes judges should rule in these ways should not be confirmed. That the Center states that its mission is based on religion^x does not make its constitutional interpretations immune from criticism, nor would it lessen the damage its trustee would do if confirmed to be a United States circuit judge.

Given Porter’s far-right views, it is little surprise that he leads the Federalist Society’s Pittsburgh Lawyers Chapter. In fact, he has filled this role for nearly a quarter century, and it sheds more light on what kind of judge he would be. For instance, he invited Roger Clegg to address the conservative group. Clegg helped lead the far right opposition to George W. Bush’s nomination of Harriet Miers to the Supreme Court because she was not a movement conservative.^{xi} Clegg’s extreme views include the belief that “[t]he notion that there are ‘educational benefits’ from racial and ethnic diversity is unpersuasive.”^{xii}

It is no wonder that Sen. Casey urged the White House not to nominate Porter. Due to Casey’s opposition and the substantive basis for it, the Judiciary Committee should not even consider this nomination.

Sincerely,



Marge Baker
Executive Vice President for Policy and Program

ⁱ “White House Nominates Extreme Judicial Candidate Despite Casey Objections,” Sen. Bob Casey press release, April 10, 2018, <https://www.casey.senate.gov/newsroom/releases/white-house-nominates-extreme-judicial-candidate-despite-casey-objections>.

ⁱⁱ “Toomey’s Statement on the Nomination of Rebecca Haywood to the Third Circuit,” Sen. Pat Toomey press release, March 16, 2016, <https://www.toomey.senate.gov/?p=news&id=1702>.

ⁱⁱⁱ “Working to secure Iowa’s judicial legacy,” Chuck Grassley, *Des Moines Register*, April 14, 2015, <http://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowas-judicial-legacy/25801515> (“For nearly a century, the chairman of the Senate Judiciary Committee has brought nominees up for committee consideration only after both home-state senators have signed and returned what’s known as a ‘blue slip.’ This tradition is designed to encourage outstanding nominees and consensus between the White House and home-state senators. Over the years, Judiciary Committee chairs of both parties have upheld a blue-slip process, including Sen. Patrick Leahy of Vermont, my immediate predecessor in chairing the committee, who steadfastly honored the tradition even as some in his own party called for its demise. I appreciate the value of the blue-slip process and also intend to honor it.”)

^{iv} Casey press release.

^v David Porter, “A Whirlwind Tour of the Supreme Court’s Commerce Clause Jurisprudence,” The Center for Vision and Values, April 2, 2012, <https://www.visionandvalues.org/2012/04/a-whirlwind-tour-of-the-supreme-courts-commerce-clause-jurisprudence>.

^{vi} Mark W. Hendrickson, “Is the Federal Minimum Wage Unconstitutional?” The Center for Vision and Values, February 9, 2016, <http://www.visionandvalues.org/2016/02/is-the-federal-minimum-wage-unconstitutional>.

^{vii} T. David Gordon, “Gay marriage, bigotry and the public interest,” The Center for Vision and Values, August 7, 2013, <http://www.visionandvalues.org/2013/08/gay-marriage-bigotry-and-the-public-interest>.

^{viii} John A. Sparks, “Freedom of Speech and Forced Union Payments: Janus v. AFSCME,” The Center for Vision and Values, December 14, 2017, <https://www.visionandvalues.org/2017/12/freedom-of-speech-and-forced-union-payments-janus-v-afscme>.

^{ix} John A. Sparks, “No Need to Consider Judge Garland—An Eight-Member Court Can Work,” The Center for Vision and Values, <https://www.visionandvalues.org/2016/03/no-need-to-consider-judge-garland-an-eight-member-court-can-work>.

^x <http://www.visionandvalues.org/about/center>.

^{xi} “Note to Lafferty: It Was Conservatives Who Took Out Harriet Miers,” Right Wing Watch, July 20, 2010, <http://www.rightwingwatch.org/post/note-to-lafferty-it-was-conservatives-who-took-out-harriet-miers>.

^{xiii} Roger Clegg, “Diversity Myths,” Center for Equal Opportunity, March 28, 2017, <http://www.ceousa.org/affirmative-action/1092-diversity-myths>.