Prepared Floor Statement of Senator Chuck Grassley of Iowa

Ranking Member, Senate Judiciary Committee

On the Motion to Invoke Cloture on the Nomination of

Cornelia Pillard, to be U.S. Circuit Judge for the District of Columbia Circuit

Tuesday, November 12, 2013

Mr. President,

I'm speaking in opposition to the motion to invoke cloture on the nominee for the D.C. Circuit, Cornelia Pillard. Although her record makes clear her views are well outside the mainstream on a host of issues, I'm not going to focus on those concerns today.

I'm going to focus instead on the standard the Democrats established in 2006. Based on that standard, the court's caseload makes clear that the workload simply doesn't justify adding judges, particularly when those additional judges cost approximately $1 million per year, per judge.

I have walked through the statistics several times now.

The bottom line is this: the data overwhelmingly supports the conclusion that the D.C. Circuit is underworked. Everyone knows this is true. That circuit does not need any more judges.

Take for instance, the appeals filed and appeals terminated.

In both categories, the D.C. Circuit ranks last. And in both categories the D.C. Circuit is less th an
half
the national average.

To provide some perspective on this, compare the D.C. Circuit to the 11th. After another judge took senior status last week, both courts now have eight active judges.

If we don't confirm any more judges to either court, and the numbers remain the same as last year, the 11th Circuit will have 875 appeals filed per active judge. Compare that to the 149 appeals filed per active judge in D.C., which also has eight active judges. Again, that's 875 for the 11 th Circuit, compared to 149 for D.C. Circuit.

Now, some might argue we shouldn't look only at "active judges" because those averages will change if and when we confirm more judges to the 11th Circuit.

Suppose we fill each judgeship on the 11th Circuit and each judge on the D.C. Circuit as the Democrats want to do. If we fill them all, there would be 583 Appeals filed per judge for the

11th Circuit, and only 108 for D.C.

The 11th Circuit has over five times the caseload.

This is why everyone who has looked at this objectively understands the caseload for the D.C. Circuit is stunningly low.

This is why the current judges on the court have written to me and said things like: “If any more judges were added now, there wouldn’t be enough work to go around
.”

Now, some of my friends on the other side recognize that the D.C. Circuit’s caseload is low, but they claim that the caseload numbers don’t take into account the “complexity” of the court’s docket.

They argue the D.C. Circuit hears more “administrative appeals” than other circuits. And they

claim these administrative appeals are more complex.

This argument is nonsense. Here is why.

I've heard my colleagues argue repeatedly that the D.C. Circuit's docket is complex because "43%" of its docket is made up of "administrative appeals."

But of course, that is a high percentage, *of a very small number*.

When you look at the actual number of these so-called "complex" cases per judge, the Second Circuit has almost twice as many as the D.C. Circuit.

In 2012, there were 512 "administrative appeals" filed in D.C.

In the Second Circuit, there were 1,493.

Stated differently, in D.C., there were only 64 administrative appeals per active judge.

The Second Circuit has nearly twice as many with 115.

Again, that's 64 administrative appeals per active judge in DC.

As opposed to the Second Circuit which has almost twice as many, with 115.

So, this entire argument about "complexity" is nonsense, and the other side knows it.

Now, let me raise another question regarding caseload.

If these cases were really that hard –

If these cases were really so “complex” –

Then why in the world would the D.C. Circuit take the entire summer off?

And I’m not talking about just a couple weeks in August. They don’t hear any cases for the entire summer
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The D.C. Circuit has so few cases on their docket, that they don’t hear any cases from the middle of May until the second week of September.

This past term, the last case they heard before taking the summer off was on May 16th. The

court didn't hear another case until September 9th, **almost four months later**.

The bottom line is this: everyone knows this court doesn't have enough cases as it is. Let alone if we were to add more judges.

This is why when you ask the current judges for their candid assessment, they write:

"if any more judges were confirmed now, there wouldn't be enough work to go around."

Now, while I'm discussing this caseload issue, I want to remind my colleagues of a little bit history.

In 2006, the Democrats on the Judiciary Committee blocked Peter Keisler's nomination to the D.C. Circuit.

They blocked Mr. Keisler's nomination based on the court's caseload. Since that time, *by the standard the other side established*
, the court's caseload has declined sharply.

We didn't set this standard. The Democrats did.

I recognize that the other side wants to rewrite history. They try to compare John Robert's second nomination to the circuit, which passed fairly easily, with the current nomination. What they conveniently forget, in a misleading way, is that they blocked Keisler's nomination *after* the Roberts' nomination.

I recognize the other side hopes we forget that they established these rules and precedents.

I recognize the other side finds those rules inconvenient today.

But these are not reasons to ignore the rules and standards they established.

There is simply no legitimate reason that the other side should not embrace today the very

standard they established in 2006.

So, under the standard established by the Democrats in 2006, these nominations aren't needed.

According to the current judges themselves, these judges aren't needed.

And according to the Chief Judge of the D.C. Circuit – a Clinton appointee – the senior judges are contributing the equivalent of an *additional* 3.25 judges. As a result, the court already has the equivalent of 11.25 judges –
more than the authorized number
.

So it seems pretty clear that the other side has run out of legitimate arguments in support of these nominations. Perhaps that is why they are resorting to such cheap tactics.

Over the last couple of days, I've heard my colleagues on the other side actually come to the floor and argue that Republicans are opposing this nominee because of her gender.

That argument is offensive, but predictable. We've seen this before. When the other side runs out of legitimate arguments, their last line of defense is to accuse Republicans of opposing nominees based on gender or race. It's an old and well-worn card. And they play it every time. The fact of the matter is that I've voted for 75 women nominated to the bench by President Obama, as well as a host other nominees of diverse backgrounds.

Those are the facts. But the other side isn't concerned with facts. They are more interested in demagoguery and coarse rhetoric.

It's unfortunate. Those types of personal attacks on members of the Senate are beneath this institution.

Now, given that there is no legitimate reason to fill these seats, why is the other side pushing these nominations so aggressively? Why waste $3 million a year in taxpayer dollars?

Unfortunately, we don't have to guess. We know the reason.

We've all heard the President pledge repeatedly, "If Congress won't act, I will."

What he means, of course, is that he will rule by *Executive Fiat*.

He won't go to Congress.

He won't negotiate.

He'll go around Congress.

He doesn't need legislators to enact legislation.

He'll just issue an Executive Order or issue new Agency rules.

Why bother with those pesky Senators and members of the House, when you can make law with the stroke of a pen?

In effect, the President is saying:

'If the Senate won't confirm who I want, when I want them, then I'll recess appoint them when the Senate isn't even in session';

'If Congress won't pass Cap and Trade fee increases, then I'll go around them and do the same thing through administrative action at the Environmental Protection Agency';

‘If Congress won’t pass gun control legislation, then I’ll issue a series of Executive Orders’;

That is what the President means when he says, “if Congress won’t act, I will.”

But remember, we have a system of checks and balances.

Under our system, when the President issues Orders by Executive Fiat, it’s the courts that provide a check on his power.

It’s the courts that decide whether the President is acting unconstitutionally.

So, the only way the President’s plan works is if he stacks the deck in his favor.

The only way the President can successfully bypass Congress is if he stacks the court with ideological allies who will rubberstamp his Executive Orders.

There is no big secret here. The other side hasn't been shy about this strategy.

Here is how the Washington Post described the strategy:

"Giving liberals a greater say on the D.C. Circuit is important for Obama as he looks for ways to circumvent
the Republican-led House and a polarized Senate on a number of policy fronts through executive order and other administrative procedures."

Here is how another high profile administration ally put it:

“There are few things more vital on the president’s second-term agenda. With legislative priorities gridlocked in Congress, the president’s best hope for advancing his agenda is through executive action, and that runs through the D.C. Circuit.”

So the President is willing to waste $3 million in taxpayer dollars a year, every year, in order to bypass congress and make sure his Executive Orders don’t lose in court.

Every member of this body should find that troubling.

Finally, I want to mention a couple points on the so-called “gang of 14” agreement.

First, by the very terms of that agreement, it applied only to those fourteen Senators for that specific Congress, the 109th.

Second, even though that agreement – by its own terms – expired at the end of the 109th Congress, just last week one of the members who was actually in the Senate back in 2005, determined that these nominations, in his judgment, constituted "extraordinary circumstances."

And third, in 2006, **after** the so-called "gang of 14" agreement, Senate Democrats created the Keisler Standard.

They blocked Peter Keisler based on caseload, *after the so-called "gang of 14" agreement*. Peter Keisler waited in committee for over 900 days for a vote that never came.

These are the rules the other side established. And now, when they are on the receiving end of those same rules, they want them changed.

Mr. President, we don't intend to play by two sets of rules around here.

And that brings me the constant threat from the Majority about changing the rules on the filibuster.

I've been in the Minority for a number of years. I've also had the privilege of serving in the Majority for a number of years.

Many of those on other side who are clamoring for a rules change – and almost falling over themselves for it – have never served a single day in the Minority.

All I can say is this: be careful what you wish for.

I've come to the conclusion that that if the rules are changed, at least we Republicans will get to use them when we're back in the Majority.

Republicans had the chance seven or eight years ago to change the rules and we didn't. And, I'd imagine we wouldn't be the first to change them in the future.

Remember, it was the Democrats who first used the filibuster to defeat circuit judges. It was the Democrats who first used caseloads to defeat circuit judges.

So, if the Democrats are bent on changing the rules. Go ahead.

There are a lot more Scalias and Thomases out there we'd love to put on the bench.

The nominees we'd nominate and confirm with 51 votes will interpret the Constitution **as it was written** .
They are not the type who would invent constitutional rights out of thin air.

I urge my colleagues to oppose cloture on the Pillard nomination.

I yield the floor.

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