



June 4, 2018

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OPPOSE THE CONFIRMATION OF DAVID PORTER TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write in strong opposition to the confirmation of David Porter to the U.S. Court of Appeals for the Third Circuit.

Mr. Porter is a conservative ideologue who lacks the support of his home-state senator. In ordinary times – and for most of the past century – that opposition would have been sufficient to stop his nomination. But Senate Judiciary Committee Chairman Grassley has jettisoned Senate traditions in order to steamroll President Trump's extreme circuit court nominees through the confirmation process. Mr. Porter would be the fourth circuit court nominee advanced to a hearing by Chairman Grassley over the objection of a home-state senator. Both the pre-nomination process and the substance of his record demonstrate that Mr. Porter does not deserve a hearing or Senate confirmation.

Extreme Judicial Philosophy: Mr. Porter has argued for diminishing Congress's power to legislate under the Commerce Clause, and he praised the Supreme Court's ruling in *United States v. Morrison*, which struck down part of the Violence Against Women Act ("VAWA"). In a 2012 op-ed, Mr. Porter asserted: "Because the federal laws in *Lopez* and *Morrison* (prohibiting possession of a gun near a school and gender-motivated violence, respectively) regulated local activity having no effect on interstate commerce, they were really exercises of the general police power that belongs exclusively to the states."¹ Mr. Porter's position, which was shared by the five justices comprising the *Morrison* majority, drew a fierce rebuke from the *Morrison* dissenters, who concluded that VAWA was valid under the Commerce Clause. In his dissent on behalf of four members of the Court, Justice Souter referred to "the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce." Mr. Porter would have ignored the extensive findings of Congress about how women are affected by domestic and sexual violence.

Mr. Porter's cramped view of the Commerce Clause also led him to argue that the Affordable Care Act ("ACA") was unconstitutional. In a 2012 op-ed entitled "Is the health care law constitutional? No, strike it down," Mr. Porter argued that the ACA was "an unprecedented assertion of federal control that violates the framers' constitutional design," and could not be justified under the Commerce Clause, Necessary and Proper Clause, or

¹ <http://www.catholiclane.com/a-whirlwind-tour-of-the-supreme-courts-commerce-clause-jurisprudence/>.

Taxing Clause.² In *National Federation of Independent Business v. Sebelius*, the Supreme Court rejected his argument with respect to the taxing power and upheld the constitutionality of the ACA.

The Court in *National Federation of Independent Business v. Sebelius* did not issue a holding on the Commerce Clause, but Justice Ginsburg discussed the implications of the Commerce Clause argument made by the Court's right-wing members, echoed by Mr. Porter in his op-ed. Calling their reading of the Commerce Clause "stunningly retrogressive," Justice Ginsburg, on behalf of four members of the Court, wrote that "we owe a large measure of respect to Congress when it frames and enacts economic and social legislation,"³ and she cited as examples the Court's 1964 decisions in *Katzenbach v. McClung* and *Heart of Atlanta Motel, Inc. v. United States*, upholding Title II of the Civil Rights Act of 1964, which banned discrimination in public accommodations. Justice Ginsburg also cited several infamous decisions such as *Lochner v. New York* that struck down worker protection laws, and she wrote: "The Chief Justice's Commerce Clause opinion, and even more so the joint dissenters' reasoning, bear a disquieting resemblance to those long-overruled decisions."⁴ Justice Ginsburg's criticism applies to Mr. Porter's Commerce Clause argument as well.

In an op-ed he wrote after the Supreme Court handed down its decision in *National Federation of Independent Business v. Sebelius*, Mr. Porter belittled Chief Justice Roberts' opinion, stating: "Chief Justice Roberts has informed the country that its most controversial provisions are not, as everyone believed, a regulation of individuals and health care markets, but in fact a huge tax."⁵ Mr. Porter went on to declare: "In 1819, Chief Justice John Marshal famously warned that the power to tax is the power to destroy. It may therefore be cold comfort to those concerned about excessive federal power that Congress can reach through taxation what it may not regulate directly."⁶ Mr. Porter's deep skepticism of congressional power demonstrates he would not be a fair-minded jurist.

Anti-LGBT Views: Mr. Porter praised Senator Rick Santorum's 2005 book "It Takes a Family." Mr. Porter wrote: "Because, [Santorum] argues, 'the currency of social capital is trust' and that 'is first created and then nurtured by healthy families,' a prosperous society 'depends on healthy mom-and-dad families.'"⁷ Mr. Porter called the book "a thoughtful articulation of conservative vision and public policy."⁸ His praise for this view demonstrates an implicit bias against families that do not fit into his view of what is healthy or trustworthy. Mr. Porter is also a trustee of Grove City College, a private religious college that does not allow its students to accept federal financial aid in order to avoid complying with Title IX,⁹ a significant federal anti-discrimination law. Grove City College was recently ranked as the least LGBT-friendly college in the entire country.¹⁰

² <http://www.post-gazette.com/opinion/Op-Ed/2012/03/25/Is-the-health-care-law-constitutional-No-strike-it-down/stories/201203250223>.

³ 567 U.S. 519, 602 (Ginsburg, J., dissenting).

⁴ Id. at 623 (Ginsburg, J., dissenting).

⁵ <http://www.post-gazette.com/opinion/Op-Ed/2012/07/04/Supreme-Court-to-America-Surprise/stories/201207040120>.

⁶ Id.

⁷ <http://touchstonemag.com/merecomments/2007/09/page/5/>.

⁸ Id.

⁹ <https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/>.

¹⁰ <http://ceoworld.biz/2015/08/11/top-20-most-least-lgbt-friendly-colleges-and-universities-in-the-u-s-2015/>.

Sought to Undermine Environmental Protections: In 2013, Mr. Porter represented Republican state legislators who sought to defend an anti-environmental law they passed that would have permitted the leasing of state forest land for gas extraction.¹¹ The law was challenged in court by the Pennsylvania Environmental Defense Foundation, which alleged that the law violated an article of the Pennsylvania Constitution that states: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.” The court ruled in favor of the environmental group and against Mr. Porter.¹²

Ideological and Partisan Affiliations: Mr. Porter has a long record of affiliations with extreme, right-wing organizations and individuals.

- Mr. Porter was a co-founder of an organization – the Pennsylvania Judicial Network – that formed in 2009 to oppose the nomination of Sonia Sotomayor to the Supreme Court.¹³ A press release announcing the group’s formation and listing Mr. Porter as a co-founder quoted another co-founder as stating: “Judge Sotomayor is an example of the kind of judicial elitism that places judges above the law and the Constitution. That’s not the way the Framers designed our system.”¹⁴ This organization was a local affiliate of the Judicial Crisis Network, a far-right organization funded by the Koch Brothers that has spent millions of dollars to support President Trump’s most radical right judicial nominees.¹⁵
- In 2000, Mr. Porter wrote an op-ed defending President Bush’s controversial nomination of John Ashcroft to serve as Attorney General. Mr. Porter called him “a superb nominee” and criticized the “near-hysterical reaction” of “liberal Democrats and special-interest groups.”¹⁶
- Mr. Porter is a long-time member of the Federalist Society, joining this group in 1989 during his first year of law school, and serving as co-president of his law school chapter during all three years of law school and as president of the Federalist Society Pittsburgh lawyers chapter continuously for the past 23 years. This out-of-the-mainstream legal organization represents a sliver of America’s legal profession – just four percent – yet over 80 percent of President Trump’s circuit court nominees, and a significant number of his district court nominees, have been Federalist Society members. Mr. Porter’s local Federalist Society chapter has hosted many right-wing speakers over the years, including anti-affirmative action crusader Roger Clegg.
- Mr. Porter has been a partisan political operative and has contributed over \$14,000 to Republican politicians since 2000.¹⁷ He served as Counsel to the Republican State Committee of Pennsylvania in 2003, 2004, 2008, and 2012, and he was Counsel for the Bush-Cheney presidential campaign in 2004. In addition, he served as Assistant Solicitor of the Republican Committee of Allegheny County from 2003 to 2012, among other Republican affiliations.

¹¹ <https://www.law360.com/articles/450467/enviro-group-blasts-pa-gop-s-lawsuit-intervention-bid>.

¹² <http://www.pacourts.us/assets/opinions/Supreme/out/J-35-2016mo%20-%2010314240919600966.pdf?cb=1>.

¹³ <http://www.patownhall.com/pa-coalition-launches-to-focus-on-federal-courts-sotomayor/>.

¹⁴ Id.

¹⁵ https://www.huffingtonpost.com/entry/backed-by-10-million-in-dark-money-gorsuch-claims_us_58d6b3cce4b0c0980ac0e6b5.

¹⁶ <http://old.post-gazette.com/forum/20001231edporter9.asp>.

¹⁷ <http://dporterfiles.org/gopdonor/>.

- Mr. Porter is a member of the highly partisan Republican National Lawyers Association (“RNLA”). Mr. Porter indicated on his Senate questionnaire that he was only a member of this right-wing organization from 2004 to 2005, but the RNLA website lists him as a current member.¹⁸

Lack of Home-State Senator Support: Senator Casey, the senior senator from Pennsylvania, does not support Mr. Porter and has not returned his blue slip. When he was chair of the Senate Judiciary Committee during the Obama presidency, Chairman Grassley did not grant a hearing or committee vote to a single nominee unless they had support (reflected by two positive blue slips) from both home-state senators. Here is what Chairman Grassley promised three years ago, during the Obama presidency:

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.¹⁹

Chairman Grassley applied this principle without exception during the Obama presidency and refused to give a hearing to Rebecca Haywood – who would have been the first woman of color to serve on the Third Circuit, and who was nominated for a vacancy on the same court to which Mr. Porter has been nominated. Because Pennsylvania Senator Toomey refused to support Ms. Haywood, Chairman Grassley denied her a hearing. By giving a hearing to President Trump’s Third Circuit nominee, Mr. Porter, this is a clear double standard.

The Congressional Research Service has identified only three known instances during the 101-year history of the blue slip in which a judicial nominee was confirmed over the objections of a home-state senator, prior to 2018. The Republican-controlled Senate has stripped senators of their constitutional role of providing advice and consent for circuit court nominees in their states from this and all future administrations.

Over the years, when the Senate majority placed partisan loyalty to the president over the Senate’s institutional interest in independently carrying out its constitutional responsibilities, the blue slip served as a vital corrective. This institutional check has arguably never been more important than today, with a president who undermines the legitimacy of judges and their rulings, and who prioritizes loyalty to him over fealty to the law. As Senator Hatch astutely observed in 2014: “Weakening or eliminating the blue slip process would sweep aside the last remaining check on the president’s judicial appointment power. Anyone serious about the Senate’s ‘advice and consent’ role knows how disastrous such a move would be.”²⁰

¹⁸ <https://www.rnla.org/bio/BioDetail.asp?MemberID=1263>.

¹⁹ <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowas-judicial-legacy/25801515/>.

²⁰ <http://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role>.



For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of David Porter to the U.S. Court of Appeals for the Third Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel and Legal Director, at (202) 466-3311.

Sincerely,

A handwritten signature in black ink, appearing to read "Vanita Gupta". The signature is fluid and cursive, with a large initial "V" and a long, sweeping tail.

Vanita Gupta
President & CEO