



December 4, 2017

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 our hundreds of thousands of members across the country, People For the American Way opposes the nomination of James Ho to the Fifth Circuit Court of Appeals. Ho's vision of the law is not consistent with the constitutional values of liberty and equality.

Ho is hostile toward the idea that the American people, through their elected representatives, can impose limits on money in politics, a problem that threatens the foundation of our democracy. His solution to the enormous influence wielded by a small percentage of Americans is not to curtail their ability to buy elections, but to enhance it. He has written that our nation should abandon efforts to limit money in politics and instead, "abolish all restrictions on campaign finance." His "cure" is to let the disease run rampant.

Ho's vision of the Constitution also does not appear to be one that requires equality for LGBTQ people, having opposed their rights in court, including the right of same-sex couples to marry. He has also partnered with the strongly anti-equality First Amendment Institute and praised its former general counsel (and current district court nominee) Jeff Mateer. Mateer participated at the notorious "Kill the Gays" conference and has condemned transgender children as satanic. Since the revelation of these obviously disqualifying actions, Ho has refused to repudiate his earlier praise that Mateer "firmly believes in the profound and abiding importance of protecting and enforcing the legal rights and civil liberties of every Texan." In Ho's eyes, LGBTQ people are apparently not part of the Texas community.

We are also concerned about Ho's willingness to be a check on presidential power. He has acknowledged working on legal matters relating to the administration's positions on detainee rights that were subsequently addressed by the Supreme Court's 2004 *Rasul*, *Padilla*, and *Hamdi* cases. The justices rejected the Bush administration's claims that (1) the president can block terrorism detainees' right to challenge their imprisonment in federal court by holding them on Guantánamo; (2) the president can—without any judicial oversight—deem Americans captured abroad "enemy combatants" and indefinitely imprison them in military detention with absolutely no contact with the outside world; and (3) the president can similarly "disappear" an American citizen picked up anywhere within the United States. The Justice Department's arguments constituted a sharp departure from the rule of law, prompting Justice O'Connor to remind the administration "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." Therefore, even with a promise by Ho to abide by those and other precedents, it remains important for the committee to know how he analyzed these issues before the Court ruled. Senators must know Ho's views on the limits of executive authority and the jurisprudential framework he uses to analyze the issue.

Ho also wrote a memo on possible “interpretations” of the Geneva Convention while in the Bush Administration’s Office of Legal Counsel, Ho’s work was cited by what came to be called “the torture memos” secret OLC documents developed to give legal cover to the torture of detainees by the United States. The office concluded that abuse of detainees did not constitute torture—and hence did not violate the law—unless it caused pain equivalent to organ failure or death. When the legal community and general public learned the contents of the secret memos, they were widely condemned across the ideological spectrum as poorly reasoned, inconsistent with American values, and contrary to the rule of law. Senators should not vote on the nomination until senators are allowed to see the Ho memo the discredited torture memos cited.

When asked directly in writing if waterboarding is torture, Ho avoided answering the question, choosing instead to acknowledge the fact that “Congress [has] enacted legislation for the purpose of expressing its serious opposition to waterboarding as torture.” Ho did not say that Congress has outlawed waterboarding, but only that it has stated a position. This carefully phrased non-responsive answer strongly suggests a belief that the president has authority to ignore the law when he sees fit. While that is dangerous at any time, it is especially so as President Trump dismantles one democratic norm after another.

It is also not the only way that the nominee has treated the Senate’s constitutional responsibilities and the Senate itself with what appears to be contempt. In her written questions, Ranking Member Feinstein asked the nominee a direct question about how the White House or Justice Department advised him to respond to question 12 of the committee questionnaire, regarding published writings and public statements. As she explained, the committee recently learned after Brett Talley’s hearing that he had not disclosed relevant material he wrote and published only on the Internet. That cannot be allowed to occur again.

But Ho’s answer had nothing to do with communications with the administration on question 12 or anything else. Instead, he stated:

It has always been my understanding that nominees should answer the Senate Questionnaire fully and truthfully.

And when asked if anyone in the administration had advised that certain material need *not* be disclosed in order to be considered responsive to question 12a’s request for “material published only on the Internet,” he stated:

It has always been my understanding that responsive material “published only on the Internet” must be disclosed under Question 12a and I have done so to the best of my ability.

These do not answer any question remotely like what he was being asked. They are truisms. They are a rhetorical finger in the eye of the Senate Judiciary Committee.

Ho is just the latest of Donald Trump’s judicial nominees to show the committee such disrespect. But the Senate must protect its institutional interests. The constitutional structure of the separation of powers—a key to maintaining the people’s liberty—depends on each branch of government jealously

protecting its own power. When senators place loyalty to the president and their party over the Senate's and their own dignity and independence, a critical check on the power of the president has been lost.

James Ho's record and his contempt for the Senate's constitutional responsibilities merit rejection of his nomination. We urge you to vote against his confirmation to the Fifth Circuit.

Sincerely,

A handwritten signature in cursive script that reads "Marge Baker".

Marge Baker
Executive Vice President for Policy and Program