



February 22, 2019

United States Senate  
Washington, DC 20510

Dear Senator:

On behalf of our hundreds of thousands of members throughout the United States, People For the American Way opposes the nomination of Eric Miller of Washington to be a judge on the Ninth Circuit Court of Appeals. Confirming him would be an unprecedented violation of the institutional norms that have long protected both the Senate and the judicial system.

March 4 will mark the 230<sup>th</sup> anniversary of the first session of the United States Senate. In that immense span of time, the upper chamber has never allowed a judge to be confirmed over the opposition of both home state senators. This strong tradition has strengthened the Senate's ability to effectively fulfill its "advice and consent" role, since senators know the legal community in their own state better than other senators do. In addition, when the White House knows a nomination will fail without home-state support—regardless of the senators' political parties—it protects the judicial system from becoming simply an extension of the majority party.

Yet just a few days before that anniversary, the Senate is being asked to confirm Eric Miller over the strong objections of Washington's senators, Patty Murray and Maria Cantwell. Every senator knows that if he is confirmed, they will have voted away their own influence over their states' nominees.

In the past, the opposition of even one home state senator would have stopped the nomination, regardless of the reason. Indeed, that was then-Chairman Grassley's explicitly-stated policy for President Obama's nominees, but he abandoned it for circuit nominees as soon as control of the White House changed to his own party. Having different 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 may become part of. Unfortunately, Chairman Graham adopted his predecessor's tainted process and allowed the committee to vote on Miller's renomination.

Yet this is only one way that the Senate risks degrading itself. Senators are being asked to vote on a nominee who has not been properly vetted by the Judiciary Committee. In fact, committee members were twice denied the opportunity to question Eric Miller in a public hearing.

During last fall's pre-election recess, over the objections of Democratic committee members, the majority held what passed for Miller's hearing. Every other committee

postponed hearings that had been scheduled during that time. Never before had the Judiciary Committee held nominations hearings during the pre-election recess without the minority's consent.

Of course, no Democrats were able to attend what turned out to be a very short "hearing." Other than family introductions, Miller spoke for about 160 seconds, responding to two friendly questions from Republican Sen. Crapo. Adding insult to injury, even though the circuit Miller has been nominated to includes California, his "hearing" was held while Ranking Member Feinstein was three time zones away, during an in-state working period with her constituents and clearly unable to attend a confirmation hearing of particular and personal importance to her. When Miller was renominated this year, Chairman Graham opted to deny requests for a genuine hearing and instead proceeded directly to a committee vote.

While written questions for the record are essential to vetting a judicial nominee, they are not sufficient by themselves. They cannot replace an open hearing with full opportunity for questions and answers. Only in person can a senator see a witness's demeanor or push for a more informative response. If this were not an indispensable part of the Senate constitutional advice and consent responsibilities, committees would not hold confirmation hearings for important nominations.

The Ninth Circuit is home to 427 federally recognized tribes, more than any other circuit. Not unexpectedly, then, it has the most number of tribal cases, and this nomination has a direct impact on them. Miller is well known by tribal communities in the Ninth Circuit for his litigation of a number of positions that go against the interests of Native Americans. This has prompted the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF) to come out against his confirmation, only the third time in their history that they have opposed a judicial nomination.<sup>i</sup> In fact, this nomination has generated more than 40 letters of concern and opposition from tribes and tribal organizations, including ones in Ninth Circuit states Arizona, Alaska, California, Idaho, Nevada, Oregon, and Washington.

Unfortunately, Democratic senators were not given a reasonable chance to question Miller about this issue in person in a public hearing.

Miller's record also gives cause for concern about his opposition to abortion rights. When he worked in the Justice Department, he argued two abortion-related cases, both of which are disturbing. In *Britell v. United States*,<sup>ii</sup> he argued that federal military medical insurance does not cover the costs of an abortion in the case of an anencephalic pregnancy with no chance of survival upon birth. The United States was not a party to the second case, *Women's Medical Professional Corporation v. Taft*,<sup>iii</sup> but Miller filed an *amicus* brief supporting an Ohio law banning a safe abortion procedure and driving women to use riskier procedures than necessary.

Unfortunately, this is another issue that Democratic senators were not given a chance to question Miller about in person in a public hearing.

At every stage, this nomination has manifested an abuse of power, one that—if successful—will diminish the institution of the Senate and the prerogatives of every senator. Rather than be complicit in this degradation, we urge you to vote against confirmation.

Sincerely,

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

Marge Baker  
Executive Vice President for Policy and Program

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<sup>i</sup> <http://www.ncai.org/news/articles/2018/10/16/national-congress-of-american-indians-and-native-american-rights-fund-oppose-the-nomination-of-eric-miller-to-the-u-s-court-of-appeals-for-the-ninth-circuit>.

<sup>ii</sup> 204 F.Supp.2d 182 (D. Mass. 2002).

<sup>iii</sup> 353 F.3d 436 (6th Cir. 2003).