October 23, 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 our hundreds of thousands of members throughout the United States, People For the American Way expresses our deep concerns about the nomination of Eric Miller of Washington to be a judge on the Ninth Circuit Court of Appeals.

Any hearing for Eric Miller is over the strong objections of Washington's senators, Patty Murray and Maria Cantwell. In the past, the opposition of even one home state senator would have stopped the nomination, regardless of the reason. Indeed, when he became chairman, Sen. Grassley's explicit policy was to not hold a committee hearing or committee vote for any judicial nominee without the support of both home state senators.[i] As a result, President Obama's nominations of Rebecca Haywood (Third Circuit), Lisabeth Hughes (Sixth Circuit), Myra Selby (Seventh Circuit), and Abdul Kallon (Eleventh Circuit) went nowhere and never received a hearing.

But now, the president is the same party as the chairman, and he has not even once let a home state senator's objections prevent him from processing the president's circuit court nominees. He held hearings and votes for David Porter (Third Circuit), Michael Brennan (Seventh Circuit), David Stras (Eighth Circuit), and Ryan Bounds (Ninth Circuit). The degradation of the Judiciary Committee continues with this week's hearing for Eric Murphy over the objections of both home state senators.

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 are seeking to become part of. This continues the debasing of democratic norms that Americans witnessed during the corrupt process of Brett Kavanaugh's confirmation.[ii] Senate Republicans are doing whatever it takes to accomplish their goal of a far-right conservative takeover of our country's independent judicial system.

Adding insult to injury, the chairman has scheduled the hearing to take place during the Senate's weeks-long recess, over the objections of the minority. When the recess was announced, every other Senate committee postponed hearings that had been scheduled during that time. Never before has the Judiciary Committee held nominations hearings during the pre-election recess without the minority's consent. The committee is considering two nominees to the Ninth Circuit, which covers the ranking member's state of California. She is currently three time zones away from Washington DC running for reelection, clearly unable to attend a confirmation hearing of particular and personal importance to her.

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This nomination has a direct impact on all who live in the states covered by the Ninth Circuit. For instance, Miller has made a career of litigating a number of positions that go against the interests of Native Americans, prompting 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. 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. As set forth by NCAI and NARF:

> [Miller] chose to build a law practice on mounting repeated challenges to tribal sovereignty, lands, religious freedom, and the core attribute of federal recognition of tribal existence. His advocacy has focused on undermining the rights of Indian tribes, often taking extreme positions and using pejorative language to denigrate tribal rights. Indeed, his law firm website touts his record, with over half his private practice achievements coming at the expense of tribal governments.[iii]

For instance, on behalf of a number of business, home construction, real-estate, and farming interests, he filed an amicus brief[iv] in *Washington v. United States*, which involved a treaty guaranteeing Native Americans' rights to fish for salmon in places where they already did so. The state had built numerous culverts that blocked salmon from their historic spawning habitat, which the tribe claimed violated the treaty. The Ninth Circuit agreed. When the state appealed, the commercial interests filed their amicus:

> The court's reasoning is not confined to culverts but will affect land-use and water-allocation decisions throughout the West. Amici therefore have a significant interest in the resolution of this case.

Miller presented a narrow interpretation of the treaty that would serve those interests, rather than the tribal interests the treaty was supposed to protect. Under Miller's interpretation, blocking the salmon didn't violate the treaty because the Native Americans could still fish for the ones that make it through. This would be in stark opposition to the treaty's text and clear intent to protect fishing rights, rather than to empower the government to sabotage the tribes' ability to fish sufficiently to make a living. Miller's argument lost at the Ninth Circuit, a judgment that was upheld by an evenly-divided Supreme Court.[v]

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*,[vi] 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*,[vii] but Miller filed an amicus brief supporting an Ohio law banning a safe abortion procedure and driving women to use riskier procedures than necessary.

We are also concerned about Miller's work at the Justice Department's Office of Legal Counsel in 2003-2004, when some of the infamous "torture memos" were drafted. The public must know what role, if any, he played in the creation of those documents.

Eric Miller's record raises serious concerns that should be addressed in an open hearing with full opportunity for questions and answers, not at one held when senators cannot attend.

Sincerely,

Marge Baker
Executive Vice President for Policy and Program

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[i] "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.")

[ii] http://www.pfaw.org/edit-memos/edit-memo-the-corrupt-process-of-brett-kavanaughs-confirmation/.

[iii] 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.

[iv] Brief amici curiae of Business, Home Building, Real Estate, Farming and Municipal Organizations, http://www.supremecourt.gov/DocketPDF/17/17-269/37764/20180305190552684_17-269%20Amicus%20Brief.pdf.

[v] 138 S. Ct. 1832 (2018).

[vi] 204 F.Supp.2d 182 (D. Mass. 2002).

[vii] 353 F.3d 436 (6th Cir. 2003).