



April 3, 2019

United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Graham, Ranking Member Feinstein, and Committee Members:

On behalf of our 1.5 million supporters nationwide, People For the American Way strongly opposes the nomination of Daniel Bress of Virginia to be a judge on the Ninth Circuit Court of Appeals. Bress lives in Virginia and works in Washington, D.C. Confirming him would set a new precedent that circuit court vacancies can be filled by individuals with no connection to any of the states within that circuit, a substantial self-inflicted wound to every senator's influence.

Just as senators know their states better than their colleagues in Washington, D.C. do, judges who live in the states comprising the Ninth Circuit know the region far better than a Washington lawyer does. Bress was born in California, but he has spent all but a fraction of his adult life in Washington, D.C. and the adjacent state of Virginia. He has not worked as an attorney in any Ninth Circuit state since a brief stint in San Francisco in 2007-2008.

Yet he has been nominated to fill a California slot. By tradition, certain judgeships in a regional circuit are allotted to residents of a particular state. As one political science professor has written:

At the circuit court level, party leaders and senators expect that their state will be represented on the bench by a citizen of that state. Larger states feel entitled to more than one seat on their circuit. Smaller states in circuits in which there are not enough seats to go around expect that they will have a turn at representation.<sup>i</sup>

This tradition has been enforced by the senators themselves, acting in mutual protection by not confirming circuit nominees from the wrong states.

In this case, the vacancy would fill a California slot. Congress created the judgeship in 1984,<sup>ii</sup> and Judge Alex Kozinski of California is the only person to have occupied it. He attended college and law school in California, clerked in California for then-Judge Anthony Kennedy of the Ninth Circuit, and (after a Supreme Court clerkship in Washington) went into private practice in Los Angeles. He was a product of California's law schools and legal community who was tapped by President Reagan for several administration positions in Washington, D.C. before his nomination to the Ninth Circuit.<sup>iii</sup>

To fill this California slot, President Trump has chosen to nominate Daniel Bress, who has lived and worked in the Washington, D.C. area. California Sens. Feinstein and Harris have rightly condemned this latest violation of the norms that once governed our political system:

Chairman Graham has said he wants to protect senators' role in the nominations process. Historically, the greatest protection for home-state senators has been the blue-slip tradition. When he was chairman, Senator Leahy ensured that no nominee had a hearing unless Republican senators returned their blue slips. We hope Chairman Graham will honor the same standards Republicans were afforded when a Democratic president held the White House.<sup>iv</sup>

In fact, just by giving Feinstein and Harris blue slips to submit, Sen. Graham implicitly conceded the illegitimacy of this nomination. Why would the chairman give them a blue slip unless there was supposed to be some meaningful connection between the judgeship, the nominee, and California? A key premise of the blue slip is the idea that senators are more familiar with the legal communities in their state than their colleagues are. But Bress is not part of California's legal community.

Nevertheless, Sen. Graham gave them the blue slips for this nomination. He appears to recognize that there must be some meaningful connection between Judge Kozinski's replacement and the state of California.

This is the second time President Trump has nominated a career Washington, D.C. lawyer for a regional circuit. In 2017, Washington attorney Kyle Duncan was nominated to fill a Louisiana slot on the Fifth Circuit. (Duncan had more connections to Louisiana than Bress does to California, having worked for several years in the state attorney general's office.) Sen. Kennedy made his displeasure with this move clear at Duncan's hearing:

Mr. Duncan is a Washington lawyer. ... I have received scores of phone calls from experienced, accomplished, whip-smart, pro-life, pro-religious liberty, Louisiana lawyers and judges -- I got another one yet this morning -- who have asked me why I would support a Washington lawyer for this seat over them?

One of those nominees asked me direct -- or one of those applicants asked me directly what am I, chopped liver? So I've got to answer that question, and -- and that's what I'm hoping Kyle can help me with today.

I hope that, and I say this with as much respect as I can possibly muster, I can hope -- I hope that he can demonstrate to me today that he is the second coming of Justice Holmes or Justice Scalia and not the second cousin of somebody who is politically connected in the Washington swamp.<sup>v</sup>


In that case, Sen. Kennedy ultimately opted to support the nominee for the Louisiana seat, so nothing happened over his objection. By contrast, both Sens. Feinstein and Harris have strongly objected to Bress' nomination to fill a California seat on the Ninth Circuit.

Confirming an out-of-circuit nominee for a circuit court position would be yet another violation of the norms under which the Senate once operated. The chairman should be standing up to the White House and refusing to denigrate his fellow senators. Instead, he has chosen to serve as

Trump's lapdog, tossing his colleagues aside to further the GOP's efforts to stack the courts with narrow-minded elitists.

Every senator should have enough respect for their colleagues and the institution of the Senate to oppose 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> Sheldon Goldman, "Picking Federal Judges: Lower Court Selection From Roosevelt Through Reagan" (New Haven: Yale University Press, 1997), p. 136, cited by the Congressional Research Service in "The History of the Blue Slip in the Senate Committee of the Judiciary, 1917-Present," updated October 22, 203.

<sup>ii</sup> Public Law 98-953, An act to amend title 28 of the United States Code regarding jurisdiction of bankruptcy proceedings, to establish new Federal judicial positions, to amend title 11 of the United States Code, and for other purposes, 98 Stat. 333 (July 10, 1984).

<sup>iii</sup> Federal Judicial Center, Biographical Directory of Article III Federal Judges, biography of Judge Alex Kozinski, <https://www.fjc.gov/history/judges/kozinski-alex>.

<sup>iv</sup> "Feinstein, Harris on Ninth Circuit Nominees," Sen. Feinstein, January 30, 2019, <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=BA3CCC82-B45A-44AF-8A86-121B3A0D0780>.

<sup>v</sup> Nomination hearing for Stuart Kyle Duncan, Senate Judiciary Committee, November 29, 2017, <https://www.judiciary.senate.gov/meetings/11/29/2017/nominations>.