



November 21, 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 writes to express our opposition to the nomination of Patrick Bumatay to be a U.S. federal judge on the Ninth Circuit Court of Appeals. He has been nominated over the objections of both home state senators, and his responses to written questions for the record did not adequately address the issue.

Bumatay was nominated over the objections of Ranking Member Dianne Feinstein and Sen. Kamala Harris, who is also a member of the Judiciary Committee. Sen. Feinstein had been working with the White House on nominees they could agree to, when President Trump decided to proceed without regard to input from home state senators:

I repeatedly told the White House I wanted to reach an agreement on a package of Ninth Circuit nominees, but last night the White House moved forward without consulting me, picking controversial candidates from its initial list [Daniel Collins and Kenneth Lee] and another individual with no judicial experience who had not previously been suggested [Bumatay].ⁱ

At Bumatay's hearing, Sen. Harris noted her concerns:

I objected to Mr. Bumatay's nomination [in 2018] because of his minimal experience in trial and appellate advocacy. His nomination then lapsed at the end of 2018. In early 2019, Mr. Bumatay was nominated to the U.S. District Court for the Southern District of California, and once again, I raised concerns about his qualifications to serve on the federal bench. In September 2019, when another vacancy arose on the Ninth Circuit, the White House re-nominated Mr. Bumatay to the Ninth Circuit and withdrew his pending nomination to the district court. In once again nominating Mr. Bumatay to the Ninth Circuit, it is clear that the White House is seeking to remake the ideological composition of the court, even in the face of legitimate concerns raised by home state senators and the local legal community.ⁱⁱ

In the past, the opposition of even one home state senator would have stopped the nomination, regardless of the reason. Indeed, that was Chairman Graham's Republican predecessor's explicitly-stated policy for President Obama's nomineesⁱⁱⁱ, 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 has made it the new norm.

Bumatay's QFRs did not adequately respond to senators' concerns about his record, especially regarding *United States v. Ibarra*, a case he listed among the top ten most significant litigated matters that he has personally handled.^{iv} As an assistant U.S. Attorney, he prosecuted Elena Ibarra for drug crimes and obtained a verdict of guilty. Her appeal alleged that Bumatay had improperly solicited a witness to express his opinion on another witness's credibility, an allegation the Justice Department agreed with. In fact, DOJ filed a joint motion with Ibarra stating that "the conviction should be vacated in the interests of justice." Although the committee questionnaire directed him to "describe in detail the nature of your participation in the litigation and the final disposition of the case,"^v Bumatay did not disclose the prosecutorial misconduct and the impact on the conviction in the description of the case that he provided to the committee.

When asked by committee members whether he took responsibility for engaging in prosecutorial misconduct, Bumatay dissembled:

I am proud of my record as a prosecutor. I learned a lot from that case and from all my cases. After the jury found Ms. Ibarra guilty, she argued on appeal that there was a violation of the rule against eliciting opinion testimony. While it could be argued that that rule did not extend to the circumstances of the case, I accept that the U.S. Attorney's Office ultimately decided to not to [sic] contest the appeal.^{vi} [case citation removed]

His response to why he didn't provide the full context of the case in his questionnaire was equally unsatisfactory:

I listed the *United States v. Ibarra* case in my Senate Judiciary Questionnaire because that case involve [sic] significant pre-trial and trial litigation. I provided my role in that case. I was not appellate counsel in that case.^{vii}

But whether he worked on the appeal is not relevant. The appeal was based on Bumatay's conduct during the trial, which determined the disposition of the case. All nominees have an obligation to provide relevant material in response to direct requests from the Judiciary Committee. Senators can decide for themselves how important Bumatay's prosecutorial misconduct was. It is not up to a nominee to make that decision for them and withhold the information.

That was not his only uninformative, unhelpful, and disrespectful response. Sen. Leahy asked him "when [is it] appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?" This is of central importance to how judges approach cases. As Sen. Leahy pointed out, a five-member majority of the Supreme Court had disregarded congressional findings—backed by more than 15,000 pages of committee testimony—in order to strike down the Voting Rights Act's preclearance formula in *Shelby County v. Holder*. Yet Bumatay pointedly left Congress out of his answer:

Appellate courts should not disturb the factual findings of lower courts unless they are clearly erroneous.^{viii}

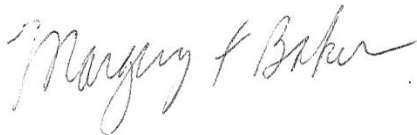
In another instance, although Ranking Member Feinstein asked him to “please identify the [judicial] nominations you worked on” as part of the Trump administration he kept the identity of one a secret:

During my most recent service at the Department of Justice, I worked and advised on the confirmations of Justices Neil Gorsuch and Brett Kavanaugh. I also attended a hearing preparation session for **one other judicial nominee**.^{ix} [emphasis added]

This response raises the question as to who the undisclosed nominee was and why Bumatay is concealing his role in that nomination.

We urge senators to oppose the nomination.

Sincerely,



Marge Baker
Executive Vice President for Policy and Program

ⁱ “California senators will try to block White House judicial nominees for the 9th Circuit,” Los Angeles Times, Oct. 11, 2018, <https://www.latimes.com/politics/la-na-pol-9th-circuit-nominees-20181011-story.html>.

ⁱⁱ Statement of Sen. Kamala Harris, Oct. 30, 2019, <https://www.judiciary.senate.gov/download/10302019-harris-statement>.

ⁱⁱⁱ “Working to secure Iowa’s judicial legacy,” Des Moines Register, April 14, 2015, <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowas-judicial-legacy/25801515>.

^{iv} Senate Judiciary Committee Questionnaire, pp. 21-22.

^v Id., p. 15.

^{vi} QFRs, pp. 14, 38, 41, 44, and 52.

^{vii} Id., pp. 41, 45.

^{viii} Id., p. 17.

^{ix} Id., p. 6.