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The Leadership Conference

OPPOSE THE CONFIRMATION OF DANIEL COLLINS TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write in opposition to the confirmation of Daniel Collins to the U.S. Court of Appeals for the Ninth Circuit.

Throughout his legal career, Mr. Collins has worked to restrict civil and human rights in many areas of the law, including women's reproductive freedom and criminal justice. He is an ideological and partisan activist who would not be capable of serving as a fair and independent arbiter. Senators Feinstein and Harris, his home-state senators, oppose his nomination – opposition that traditionally would have been a bar to Mr. Collins even receiving a Senate hearing. But in their zeal to pack the federal courts with far-right extremists, Senate Republicans have been advancing and confirming Trump judicial nominees like Mr. Collins at a record pace and over the strong objection of the very senators elected to represent the state where the judges would preside. The Senate must demand that its constitutionally mandated role in the judicial selection process be respected and must oppose the confirmation of nominees like Mr. Collins for lifetime appointments on the federal judiciary.

Attempted to Restrict Women's Rights: Mr. Collins filed amicus briefs on behalf of a right-wing organization arguing against women's access to basic contraceptive services through their health care coverage. In *Sebelius v. Hobby Lobby Stores*, he argued that corporations are "persons" and have the right to cite their religious beliefs as an excuse to circumvent the Affordable Care Act's requirement that employers provide contraceptive access to their employees.[1] Five Supreme Court Justices agreed with that ideological argument in a controversial decision. In *Zubik v. Burwell*, Mr. Collins filed a brief arguing that the mere act of providing notification of a religious objection to providing contraception to employees was too burdensome for religious employers and a violation of their rights under the Religious Freedom Restoration Act.[2] The Supreme Court was unwilling to go that far and remanded the case.

[1] https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_eppc.authcheckdam.pdf.
[2] https://www.scotusblog.com/wp-content/uploads/2016/01/Ethics-and-Public-Policy-Center-LSP-Amicus.pdf.

Mr. Collins also sought to restrict women's access to reproductive care when he filed an amicus brief in a Fourth Circuit case, *Greater Baltimore Center for Pregnancy Concerns v. Mayor of Baltimore*. In his brief, Mr. Collins waged a First Amendment challenge to a local ordinance that required fake women's health clinics to post disclosure notices in their waiting rooms that contraceptive and abortion services were available elsewhere.[3] A conservative Fourth Circuit panel upheld the challenge.

In the case *Doe v. Internet Brands, Inc.*, Mr. Collins defended a company, Internet Brands, that was sued by a woman who was drugged and raped by two men who used the company's website to lure the woman to a fake modeling audition.[4] The rape survivor sued Internet Brands on the grounds that they had prior knowledge of the conduct of the two men but did not warn website users of the danger. Mr. Collins sought to have the lawsuit dismissed, but the Ninth Circuit rejected his arguments and allowed the case to proceed.

Advocated for Troubling Criminal Justice Policies: During his service in the Ashcroft Justice Department from 2001 to 2003, Mr. Collins was responsible for advancing numerous policies that led to increased incarceration and adversely impacted communities of color in America. Mr. Collins defended the Ashcroft Justice Department's decision to force federal prosecutors to reject plea bargains and seek the most serious charges possible in almost all cases.[5] This controversial policy resulted in more severe prison sentences for individuals with low-level offenses and the expansion of the use of the federal death penalty. It was a dramatic departure from the discretion given to federal prosecutors during the Clinton administration, and the policy was reversed during the Obama administration.

Mr. Collins has called for limiting *Miranda* rights. In a 1995 law review article entitled "Farewell *Miranda*?," Mr. Collins praised arguments made by a law professor to overturn the Supreme Court's landmark decision in *Miranda v. Arizona*, which has safeguarded critical rights against self-incrimination for over half a century. In his article, Mr. Collins asserted: "Grano has accomplished something that is no mean feat: presenting a forceful, cogent, and ultimately persuasive argument for overturning one of the best-known and most well-established legal decisions of our time…. In sum, and despite the occasional weaknesses of the book, Professor Grano has presented a thorough, intelligent, and ultimately persuasive argument for overruling *Miranda*."[6] Mr. Collins also argued that "*Miranda* should be jettisoned, not in favor of some 'second best' theory of constitutional interpretation, but in favor of the constitutional text."[7]

Mr. Collins' extreme views about the *Miranda* decision are also demonstrated by a 2000 brief he filed with the Supreme Court in *Dickerson v. United States*. In his brief, Mr. Collins argued that the exclusionary rule as set forth in the *Miranda* decision was not constitutionally required and that Congress could effectively overturn it by statute. He opined that "it is deeply offensive that, without sufficient

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[3] https://afj.org/wp-content/uploads/2019/03/GreaterBaltCenterAmicusBrief.pdf.
[4] https://scholar.google.com/scholar_case?case=3822187665709132656&q=Doe+v.+Internet+Brands+(9th+Cir.+2016)&hl=en&as_sdt=20006.
[55] https://www.nytimes.com/2003/09/23/us/ashcroft-limiting-prosecutors-use-of-plea-bargains.html.
[6] https://afj.org/wp-content/uploads/2019/03/Farewell-Miranda.pdf.
[7] *Id.*

reason, *Miranda*'s exclusionary rule permits the guilty to escape justice."[8] The Supreme Court, in a 6-3 decision written by Chief Justice Rehnquist, rejected Mr. Collins' arguments and held that *Miranda* was a constitutional decision that could not be overruled by Congress.

In addition, Mr. Collins helped draft the Justice Department's 2003 guidance on the use of racial profiling in federal law enforcement.[9] Although the guidance sought to combat discriminatory law enforcement practices following the tragic events of September 11, 2001, it had numerous deficiencies. As a result, The Leadership Conference and dozens of other organizations called on the Obama administration to revise the guidance in five significant ways: (1) to prohibit profiling based on actual or perceived race, ethnicity, religion, national origin, gender, gender identity and expression, or sexual orientation; (2) to apply the guidance to state and local law enforcement agencies that work in partnership with the federal government or receive federal funding; (3) to cover surveillance activities; (4) to be enforceable; and (5) to close loopholes for border integrity and national security, as these broad exceptions essentially sanctioned profiling in border communities and anywhere that a national security justification could be invoked.[10] Mr. Collins' guidance failed to adequately combat discriminatory profiling, and the Obama administration made changes to the guidance to correct some of these mistakes.

Attempted to Restrict Civil Liberties: Mr. Collins has sought to restrict civil liberties and advance executive power claims. He filed an amicus brief in *Hamdan v. Rumsfeld* on behalf of a group of executive power extremists (including Robert Bork and Miguel Estrada) in which he argued that enemy combatants should be prosecuted by military commissions in which the accused did not have the right to see evidence or hear witness statements against them.[11] The Supreme Court rejected Mr. Collins' arguments and held that the military commissions at issue lacked the power to proceed because their structure and procedures violated the four Geneva Conventions and the Uniform Code of Military Justice. Mr. Collins also advanced policies to limit civil liberties when he worked in the Ashcroft Justice Department and helped to draft portions of the Patriot Act.[12]

Defended Corporate Abuses: Throughout his career, Mr. Collins has represented financial institutions, tobacco companies, environmental polluters, and large corporations in lawsuits brought by discrimination victims, consumers, and others who have suffered harm from corporate abuses. For example, Mr. Collins represented Wells Fargo Bank in a prominent Fair Housing Act lawsuit in which the City of Oakland, California sued the bank for offering mortgage loans to Oakland residents on a discriminatory basis under theories of both intentional discrimination and disparate impact. The discriminatory actions – including the allegation that Wells Fargo pushed high-cost, high-risk loans onto minority borrowers at a higher frequency than onto white borrowers – have led to high rates of foreclosures that have heavily impacted minority borrowers. In a 2018 decision, a federal judge rejected Mr. Collins' arguments that the case should be dismissed.[13]

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[8] https://afj.org/wp-content/uploads/2019/03/DICKERSON-v.-UNITED-STATES_-2000-U.S.-S.-Ct.-Briefs-LEX.pdf.
[9] https://www.judiciary.senate.gov/imo/media/doc/Daniel%20Collins%20SJQ%20-%20PUBLIC.pdf.
[10] http://civilrightsdocs.info/pdf/policy/letters/2014/Coalition-Letter-re-DOJ-Guidance-October-31-2014.pdf.
[11] https://afj.org/wp-content/uploads/2019/03/Hamdan-brief.pdf.
[12] https://afj.org/wp-content/uploads/2019/03/The-New-Privacy-Czar.pdf.
[13] https://afj.org/wp-content/uploads/2019/03/City-of-Oakland-v.-Wells-Fargo-Bank_-N.A._-2018-U.S.-Di.pdf.

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Ideological Affiliations: Mr. Collins has been an entrenched member of the Federalist Society for a quarter century – he has served as the Vice Chair for Publications of its Federalism and Separation of Powers Practice Group, as a member of the Executive Committee for the Los Angeles Lawyers Division, and as a member of its James Madison Club (consisting of members who contribute a minimum of $1,000 to the Federalist Society on an annual basis).[14] This out-of-the-mainstream legal organization represents a sliver of America's legal profession – just four percent – yet more than 80 percent of President Trump's circuit court nominees and nearly 50 percent of his district court nominees have been Federalist Society members. Never before has a president attempted to pack the courts with such a high percent of ideological extremists. Mr. Collins has also been a partisan activist, contributing $82,000 to Republican candidates over the past several years – more than almost any other Trump judicial nominee.

Temperament Concerns: In addition to Mr. Collins' ideological record, Senators Feinstein and Harris voiced concerns about Mr. Collins' temperament. In a recent statement, they said that during their in-state vetting process, "concerns were raised about his temperament and rigidity" and "we were told that Mr. Collins has a history of taking strong litigation positions for no reason other than attempting to overturn precedent and push legal boundaries. This should be a concern to all senators – it should not be a partisan issue. Consistency and stability are vital in the law."[15]

Lack of Home-State Senator Support: Nominating someone over the objection of their home-state senators departs from past Senate tradition and subverts the Constitution's advice and consent process. It is particularly alarming when one of those senators is the ranking member of the Senate Judiciary Committee, as is the case here with Senator Feinstein. The Congressional Research Service has identified only three known instances during the 102-year history of the "blue slip" – prior to the Trump presidency – in which a judicial nominee was confirmed over the objections of a home-state senator.[16] In light of this opposition, Mr. Collins should not be granted a committee hearing or a vote. During the last two years of the Obama presidency, when he served as chair of the Senate Judiciary Committee, Senator Grassley did not grant a hearing or vote to a single nominee unless they had support from both home-state senators. During the Trump presidency, Republican Senate Judiciary Committee chairs have adopted a double standard and hypocritically given a hearing to 10 circuit court nominees who lacked the support of a home-state senator: David Stras, Michael Brennan, Ryan Bounds, David Porter, Eric Murphy, Chad Readler, Eric Miller, Paul Matey, Michael Park, and Joseph Bianco. Mr. Collins and fellow Ninth Circuit nominee Kenneth Lee, who also has a controversial record and generated strong opposition,[17] will be the 11th and 12th such nominees.

Over the years, when the Senate majority placed partisan loyalty to the president over the Senate's institutional interest in independently carrying out its constitutional responsibilities, the blue slip served as a vital corrective. This institutional check has arguably never been more important than today, with a

[14] https://fedsoc.org/the-james-madison-club.
[15] https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=BA3CCC82-B45A-44AF-8A86-121B3A0D0780.
[16] https://fas.org/sgp/crs/misc/R44975.pdf.
[17] http://civilrightsdocs.info/pdf/policy/letters/2019/Kenneth-Lee-letter-of-opposition-3.1.19.pdf.

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president who undermines the legitimacy of judges and their rulings, and who prioritizes loyalty to him over fealty to the law. As former Senator Hatch astutely observed in 2014: "Weakening or eliminating the blue slip process would sweep aside the last remaining check on the president's judicial appointment power. Anyone serious about the Senate's 'advice and consent' role knows how disastrous such a move would be."[18] Republican elimination of the blue slip for circuit court nominees has led to the confirmation over the past two years of numerous extreme nominees, diminishing the power of the Senate and threatening the reputation of the federal judiciary as a fair and independent tribunal.

Disturbing Lack of Diversity: President Trump's lack of commitment to diversity on the federal judiciary is deeply disturbing. Mr. Collins, like the vast majority of the president's judicial nominees, is a white male. President Trump has appointed the least diverse group of nominees in decades.[19] Of his 44 appellate nominations, none are African-American. None are Latino. Only nine are women. His district court nominees are also predominately white and male. Our nation's great diversity should be reflected in its government institutions, especially the federal judiciary, which serves as the guardian of our rights and liberties. At a time when the legal profession has more women and attorneys of color than ever before, President Trump's record on judicial diversity is truly appalling.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Daniel Collins to the U.S. Court of Appeals for the Ninth Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel, at (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO

[18] https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role.
[19] https://www.usatoday.com/story/news/politics/2018/02/13/trumps-87-picks-federal-judges-92-white-just-one-black-and-one-hispanic-nominee/333088002/.