



October 23, 2018

OPPOSE THE CONFIRMATION OF ERIC MILLER 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 Eric Miller to the U.S. Court of Appeals for the Ninth Circuit.

Mr. Miller is the latest in a series of young, white, male conservative ideologues nominated to the federal appellate courts by President Trump. His efforts to restrict the rights and sovereignty of Indian tribes are particularly troubling. In addition, his home-state senators oppose his nomination, which historically would have stopped it. Senate Judiciary Committee Chair Chuck Grassley has thrown out this tradition, and many others, in his haste to pack the federal courts with Trump extremists. Chairman Grassley is giving Mr. Miller a hearing during the Senate recess over the objections of the minority party and before the American Bar Association (“ABA”) has had a chance to finish its evaluation of him. These factors will seriously compromise the ability of senators to properly vet Mr. Miller’s suitability for the Ninth Circuit. The Senate must oppose this controversial nominee.

Hostility to Tribal Rights: Two of the leading national organizations that represent tribal governments and communities – the National Congress of American Indians (“NCAI”) and the Native American Rights Fund (“NARF”) – rarely oppose judicial nominees, but they strongly oppose Mr. Miller. In a statement issued last week, NCAI and NARF said: “Our concern is that [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.”¹ In a letter sent to the Senate Judiciary Committee in August, NCAI and NARF discussed 11 cases in which Mr. Miller worked to restrict tribal rights.² In one such case, *Friends of Amador County v. Jewell*, NCAI and NARF wrote that although Mr. Miller’s petition for certiorari was denied by the Supreme Court, “the standard urged by Mr. Miller is alarming, as it could

¹ <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>.

² http://www.ncai.org/policy-issues/tribal-governance/legal-judicial/NCAI_NARF_Re_Eric_Miller_9th_Circuit.pdf.

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be used to challenge the legitimacy of any federally-recognized tribal government and would encourage a scorched earth approach to litigation involving tribal rights.”³ NCAI and NARF noted there are 427 federally-recognized Indian tribes in the Ninth Circuit – more than any other federal circuit – and that it is “crucially important that tribes coming before this court are heard by judges who share our Nation’s fundamental understanding of tribal government rights.”⁴ Mr. Miller would not be such a judge.

Ideological Affiliations: Mr. Miller is a longtime member of the Federalist Society, having joined in 1996 during his first year of law school. This out-of-the-mainstream legal organization represents just a sliver of America’s legal profession – less than four percent – yet more than 80 percent of President Trump’s circuit court nominees, and many of his district court nominees, have been Federalist Society members. In addition, Mr. Miller served as a judicial law clerk to two of the most ultra-conservative judges in the nation: Justice Clarence Thomas and D.C. Circuit Judge Laurence Silberman. Justice Thomas has publicly declared that he only hires law clerks who share his extreme judicial philosophy.⁵

Lack of Home-State Senator Support: Mr. Miller should also be rejected because he lacks the support of Washington Senators Murray and Cantwell, his home-state senators.⁶ In light of this significant opposition, he should not be granted a committee hearing or vote. During the Obama presidency, Chairman Grassley did not grant a hearing or vote to a single nominee unless they had support from both home-state senators. Here is what Chairman Grassley pledged in 2015:

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.⁷

During the Trump presidency, Chairman Grassley has made the hypocritical decision to give a hearing to six circuit court nominees who lacked the support of a home-state senator: David Stras, Michael Brennan, Ryan Bounds, David Porter, Eric Murphy, and Chad Readler. Mr. Miller will be the seventh such nominee. In the case of Mr. Bounds, whose nomination was ultimately withdrawn, both home-state senators opposed the nomination. The Congressional Research Service has identified only three known instances during the 101-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, but there are no known instances in

³ *Id.*

⁴ *Id.*

⁵ <https://www.cbsnews.com/news/former-clarence-thomas-clerks-are-a-presence-in-trump-administration/>.

⁶ <https://www.law.com/therecorder/2018/10/19/in-fracas-over-9th-circuit-nominee-grassley-calls-on-home-state-senators-to-return-blue-slips/?slreturn=20180922142246>.

⁷ <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowas-judicial-legacy/25801515/>.

which a nominee has ever been confirmed over the objections of both home-state senators.⁸ The Senate must not let Mr. Miller be the first, or it will strip senators of their constitutional role of providing advice and consent for appellate appointments in their states from this and all future administrations.

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 president who undermines the legitimacy of judges and their rulings, and who prioritizes loyalty to him over fealty to the law. As 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."⁹

Lack of ABA Rating: Mr. Miller is being given a hearing before the ABA has had a chance to finish its evaluation of him. This will seriously compromise the ability of senators to properly vet his suitability for the Ninth Circuit. Chairman Grassley has demonstrated sheer hypocrisy in ignoring ABA ratings when he schedules nomination hearings, but touting ABA ratings if they are favorable. Chairman Grassley has defied the tradition of not scheduling hearings until ABA ratings are completed in his rush to pack the courts with Trump's judicial nominees.

Senate Republican Abuse of Confirmation Process: Scheduling Mr. Miller's hearing for October 24, 2018 over Democratic objections – during a Senate recess when senators are out of town – is another example of Chairman Grassley bulldozing over the minority in order to pack the courts with ideological extremists. Republicans have systematically reduced the important role that senators play in independently vetting lifetime appointments in their effort to remake the courts in Trump's image.

The scheduling of Mr. Miller's hearing is the second of two unprecedented hearings being held by Chairman Grassley during the current Senate recess. The first hearing occurred on October 17, 2018, and no Democrats were able to attend. As Senate Judiciary Committee Democratic members explained in an October 15, 2018 letter to Chairman Grassley:

The Committee has never before held nominations hearings while the Senate is in recess before an election. The handful of nominations hearings that have been held during a recess have been with the minority's consent, which is not the case here – in fact, we were not even consulted.... We take our constitutional duty to vet nominees for lifetime appointments to the federal bench very seriously. An essential part of that vetting process is an opportunity to question nominees in a public hearing. Holding hearings during a recess, when members cannot attend, fails to meet our constitutional advice-and-consent obligations.¹⁰

⁸ <https://fas.org/sgp/crs/misc/R44975.pdf>.

⁹ <https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role>.

¹⁰ https://www.feinstein.senate.gov/public/_cache/files/0/4/0403a9bc-a914-484f-a82d-c4cc2e3fe86e/051C1FA0FF33D91CF3412B4DE0752785.2018.10.15-sjc-dems-to-grassley-re-nominations-hearings-during-recess.pdf.



In addition, Chairman Grassley is defying Senate tradition by stacking the upcoming hearing with two circuit court nominees at the same time: Mr. Miller and Ninth Circuit nominee Bridget Bade. The tradition of scheduling just one circuit court nominee per hearing exists because federal appellate courts are the second highest courts in the land, and they make critical decisions involving multiple states and tens of millions of people. Each circuit court nominee is deserving of the Senate Judiciary Committee's time, attention, and thorough examination. During the eight years of the Obama presidency, only three hearings featuring two circuit court nominees took place – out of 94 judicial nominations hearings – and there was bipartisan consent for all three hearings. During the Trump presidency, by contrast, Chairman Grassley has jammed two circuit court nominees into six different judicial nominations hearings over Democratic objections. Such hearings have deprived the committee of adequate time and resources to properly assess each lifetime nominee.

This abuse of power by Chairman Grassley and Senate Republicans has also been demonstrated by their unilaterally changing the 60-vote threshold for Supreme Court nominees to confirm Neil Gorsuch and Brett Kavanaugh; their sham confirmation process for Justice Kavanaugh in which they failed to hold him accountable for his blatant misrepresentations to the Senate, multiple sexual assault allegations, and record as a White House political operative; their overturning the century-old tradition of deference to home-state senators; and their scheduling hearings for nominees before their ABA ratings are finished. This Republican effort to pack the courts with Trump extremists demonstrates a dangerous lack of respect for the independence of the federal judiciary.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Eric Miller 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,

A handwritten signature in black ink, appearing to read 'Vanita Gupta'. The signature is fluid and cursive, with a long, sweeping underline.

Vanita Gupta
President & CEO