AFJ NOMINEE REPORT

ERIC MILLER

U.S. Court of Appeals for the Ninth Circuit

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INTRODUCTION

On July 19, 2018, President Trump nominated Eric D. Miller to the Ninth Circuit Court of Appeals seat previously held by Judge Richard C. Tallman in Washington state.

Miller's nomination is strongly opposed by both national organizations and local tribes, as a result of his career spent fighting tribal interests and tribal sovereignty. Neither home state senator supports his nomination.

In private practice, Miller has frequently represented powerful corporations fighting the interests of consumers and employees. At the Justice Department, his work as a career attorney included several controversial national security and reproductive rights cases.

Miller's personal comments and writings also raise questions about whether he understands the impact of the law on real people, or simply prefers that the law protect the wealthy few. And like many Trump nominees, Miller is a member of and speaker at the extremely conservative Federalist Society.

Based on our review of his record and career, Alliance for Justice strongly opposes Miller's nomination.

BIOGRAPHY

Miller, who is 43 years old, is a partner at Perkins Coie LLP in Seattle, Washington. Before moving to private practice, Miller was an assistant solicitor general at the U.S. Department of Justice (DOJ) from 2007-12. He also worked at DOJ during the Bush administration, as an attorney in the Civil Division's Appellate Staff from 2001-03 and 2004-06, with time in between as an attorney-advisor in the Office of Legal Counsel from 2003-04. Miller also served as deputy general counsel at the Federal Communications Commission from 2006-07.[1]

Miller clerked for Justice Clarence Thomas on the U.S. Supreme Court and for Judge Laurence Silberman of the D.C. Circuit. He received his J.D. from the University of Chicago and his A.B. from Harvard University.[2] During college in the 1990s, Miller was the director of the Civil Liberties Union of Harvard. As director, he commented on a number of discrimination issues on campus.

According to his Senate Judiciary Questionnaire, Miller first became a member of the Federalist Society at age 21.[3] Miller has given several speeches to the Federalist Society Puget Sound Lawyers Chapter.[4] He is

no doubt being selected for this position because he is part of this network of lawyers.

Miller's views are also reflected in letters of support for other recent Trump nominees for the federal judiciary that he joined, including Stephanos Bibas for the Third Circuit, Gregory Katsas for the D.C. Circuit, and Neil Gorsuch for the Supreme Court.[5] Miller also served as a part-time lecturer at the University of Washington School of Law in 2014 and in 2017.[6]

TRIBAL ISSUES

Miller has a lengthy and disturbing record on native issues, leading to opposition to his nomination from the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). This is one of only a small handful of times in NCAI's history that they have formally opposed a judicial nomination.

On August 21, 2018, NCAI and NARF wrote a joint letter to the Senate Judiciary Committee expressing their concerns about Miller's record. When the Senate Judiciary Committee announced its unprecedented plans to proceed with a hearing for Miller during an extended congressional recess, NCAI adopted an emergency resolution on October 16, 2018 opposing Miller's nomination. The resolution also noted that NCAI would "immediately urge President Trump to reconsider and withdraw Eric Miller's nomination[.]"

Miller's anti-tribal work is well-documented. *Indian Country Today* published an article titled "Trump's 9th Circuit Court nominee has record of litigating cases against Tribes," which details his campaign to erode tribal rights. *Indianz* published a similarly critical article, "President Trump's nominee loves beating tribal interests in court."

The Suquamish Tribe, located in Washington state, is a local tribe that would no doubt be impacted by Miller's confirmation to the federal bench. Leonard Forsman, chairman of the Suquamish Tribe and president of the Affiliated Tribes of Northwest Indians, described his concerns about Miller's nomination:

> Federal judicial nominations have a disproportionate impact on Indian Country because Indian law is often made and changed more from the judicial bench than by Congress. As an attorney, the nominee has represented interests that were opposed to treaty rights. He has attacked Tribal sovereign immunity. He has disputed a Tribal nation's ability to acquire trust lands under

> the Indian Reorganization Act and [shown] a repeated willingness to side against Tribes in court, and we fear this track record will follow him to the bench.

As NCAI and NARF explain in detail:

> Mr. Miller is a talented attorney with an impressive resume. When entering private practice five years ago, he had a wide range of choices. Our concern is that he 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 of his private practice achievements coming at the expense of tribal governments.

In *Washington v. United States*, 138 S. Ct. 2666 (2018), Miller represented a coalition adverse to tribal fishing rights. In an amicus brief that NCAI and NARF labeled as taking "an extreme anti-treaty rights position," Miller argued that "[i]f tribes have a right to ensure that States maintain a particular number of fish for tribal interests, then few activities in the West will escape judicial superintendence at the behest of tribes."[7] As NCAI and NARF noted, the brief essentially "argu[ed] that although tribes may have a treaty right to fish, the treaties did not guarantee that there would be any fish to catch."

Miller has also taken on cases challenging tribal sovereignty and tribal sovereign immunity, including *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), and *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018). Miller argued both cases before the U.S. Supreme Court, noting in his merits brief in *Upper Skagit* that "[t]he limited nature of tribal sovereignty suggests that to the extent tribal sovereign immunity differs from that of other sovereigns, it should be narrower, not broader."[8]

While NCAI and NARF viewed these comments as a troubling indication of Miller's disposition towards tribal sovereignty, Miller himself described the case in his Senate Judiciary Questionnaire as a pro bono case he took on "representing homeowners seeking to protect their property from encroachment by a neighboring Indian tribe."[9]

Miller's record includes several cases attacking tribal recognition and land rights, including *Conf. Tribes of the Grand Ronde Cmty. of Or. v. Jewell*

(consolidated with *Citizens Against Reservation Shopping v. Zinke*), 830 F.3d 552 (D.C. Cir. 2016) (cert denied); *Robinson v. Jewell*, 790 F.3d 910 (9th Cir. 2015); and *Stand Up for California! v. U.S. Dep't of Interior*, D.D.C. No. 17-CV-00058 (2018). In one case, *Friends of Amador Cty. v. Jewell*, 9th Cir. No. 11-17996 (2014) (cert denied), Miller repeatedly used pejorative language to describe the Buena Vista Rancheria of Me-Wuk Indians as a "putative Indian tribe."[10]

Miller also represented parties challenging tribal interests in Indian gaming in *New Mexico v. U.S. Dep't of Interior*, 854 F.3d 1207 (10th Cir. 2017), and *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013).

It is no surprise that NCAI and NARF are "concerned that Mr. Miller does not possess a mainstream understanding of tribal sovereignty, treaty rights, and the federal trust responsibility, or their role in the Constitution and federal law."[11]

Miller's dedication to fighting tribal interests could have a far-reaching impact. If confirmed to the Ninth Circuit, which covers nine states and two Pacific Island jurisdictions, Miller would adjudicate cases in a circuit with 427 federally recognized tribes. NCAI notes that "the Ninth Circuit hears more tribal cases than any other" court of appeals, often taking a leading role in Indian law matters.

NARF's executive director, John Echohawk, summarizes the stakes, "It is crucially critically important that tribes coming before any federal court are heard by judges who share the Constitution's fundamental understanding of tribal government rights. **Eric Miller does not share these values**[.]" (emphasis added).

ACCESS TO JUSTICE

Miller is on record articulating his personal views on issues that have an effect on whether the law will provide an even playing field for everyone, or solely protect corporations and the powerful. His personal statements and professional work in this area raise concerns.

In June 2017, Miller wrote a "Legal Opinion Letter," published by the conservative Washington Legal Foundation, about a prominent case of a routine surgery gone wrong. In the publication, Miller's biographical note explicitly states that "[t]he views expressed here are his own."[12]

Miller's piece criticizes a Washington Supreme Court decision that held that

manufacturers of complex surgical devices have a duty to warn hospitals that perform surgeries with those devices about their potential dangers.[13] His argument seems to question whether warning hospitals about a device's dangers would help promote patient safety,[14] arguing that "[w]arning hospitals makes little more sense" than warning a layperson undergoing surgery.[15]

Implementing Miller's approach could place patient safety at greater risk, given the role that hospitals play in overseeing and managing surgeries and patient care. It could also help protect powerful corporations who fail to give proper warnings about their potentially dangerous products.

In recorded video remarks, Miller also provides a window into his views on the ability of groups of individuals who are harmed to band together in class actions. As a speaker on a Seattle University School of Law "2015 Supreme Court Watch" panel, Miller described two cases where the Supreme Court restricted class actions, *Wal-Mart v. Dukes*, 564 U.S. 338 (2011),[16] and *Comcast v. Behrend*, 569 U.S. 27 (2013),[17] as "strong statements" that this would continue.[18]

He stated, "I think it is fair to say that there has been a trend toward insisting on finding *genuine* commonality in the class to allow the case to go forward" (emphasis added).[19] Miller's comments raise questions about his openness to allowing those who are harmed by the privileged few the opportunity to access justice through the courts – like women facing discrimination *(Wal-Mart)* or customers getting overbilled *(Comcast)*.

As a lawyer in private practice, Miller has also advocated on behalf of corporate interests to prevent recovery by victims of unsafe working conditions and consumer fraud.

On behalf of the Chamber of Commerce, Miller filed an amicus brief arguing an out-of-state victim of deceptive debt collection practices should not have the ability to sue under Washington state law. He contended that a Texan victim of consumer fraud could not sue Washington corporations under the Washington Consumer Protection Act. The Washington Supreme Court unanimously disagreed, holding that the corporation's interpretation of the law would defeat its "twin purposes of protecting the public and fostering fair and honest competition[.]"[20] The corporation eventually secured a dismissal of the claim on a separate choice-of-law argument.[21]

WORKERS' RIGHTS

When a Boeing employee was exposed to asbestos at work and later died from mesothelioma, Miller worked to shield the corporation from liability.[22] On appeal before the Washington Supreme Court, Miller filed a brief arguing that:

> any suggestion that Boeing had actual knowledge of certain injury from exposure to asbestos founders on the reality that, even today – let alone at the time Walston was exposed – there is no evidence that exposure to asbestos is certain to cause injury, [sic] To the contrary, while asbestos exposure creates a risk that some people may develop mesothelioma, it is not certain to cause it. Even for individuals exposed to levels of asbestos far higher than those alleged here, mesothelioma is a rare condition.[23] (emphasis added)

Although the court ruled 5-4 for Boeing, even the majority acknowledged that, "Boeing does not dispute that it was aware that asbestos was a hazardous material in 1985. Neither does Boeing dispute the facts underlying the 1985 incident."[24]

Indeed, the dissenting justices noted that:

> By 1985, The Boeing Company knew that forcing its workers to inhale asbestos fibers causes immediate scarring of lung tissue and long-term disease such as mesothelioma. Nevertheless, Boeing forced Walston to work under a shower of asbestos over his objection . . . Walston's evidence, including expert testimony that inhaling asbestos causes certain injury to the lungs, raises questions of fact as to whether Boeing knew its employees were being injured and willfully disregarded that knowledge.[25] (emphasis added)

While in private practice, Miller has defended corporations against employment discrimination claims that women brought alleging harassment and a hostile work environment. As one example, Miller represented Microsoft, defending a corporate policy that made it difficult for employees to bring forward credible workplace harassment claims.

In 2008, a long-time employee encountered gender-based harassment upon moving from Washington state to London to manage an international team. After unsuccessful attempts to ameliorate the situation and find a new job, she sued in Washington state.[26]

Miller represented Microsoft while the corporation argued that a clause in the employee's new employment contract meant that the dispute needed to be brought in Switzerland. Washington state courts sensibly found that enforcing the Swiss dispute resolution clause would be contrary to public policy.[27] The U.S. Chamber of Commerce later tried to have this decision overturned.

DEPARTMENT OF JUSTICE

While serving as a career attorney at DOJ during the Bush administration, Miller signed briefs or argued before the court in a number of controversial cases.

EXECUTIVE POWER

Miller worked at the Office of Legal Counsel (OLC) from 2003-2004, providing advice on issues including "administrative law, constitutional law, and foreign-affairs law."[28] During the Bush administration, OLC signed off on a number of legal opinions that were either deeply controversial and/or subsequently withdrawn.[29] It is unclear whether Miller's advice on constitutional and foreign-affairs law touched on any of these issues.

While in other positions at DOJ, Miller represented the interests of the United States in court on a number of detention and due process issues. In the landmark case *Boumediene v. Bush*, 553 U.S. 723 (2008), Miller joined the government's brief defending the constitutionality of depriving detainees at Guantanamo Bay access to habeas corpus. In a related case regarding the government's authority to detain and hold an individual in potentially indefinite military detention, *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), Miller also joined a government brief.

In other cases, Miller joined briefs defending the government's decisions to withhold information on detainees under the Freedom of Information Act (FOIA)[30] and to close immigration deportation hearings to the public.[31]

REPRODUCTIVE RIGHTS

While working as a career attorney at DOJ, Miller signed briefs that advanced the Bush administration's interest in restricting access to abortion care.

When the state of Ohio passed a ban on a specific abortion procedure, DOJ filed an amicus brief in the Sixth Circuit that one commentator – now Dean of NYU Law – described as "appear[ing] to be motivated principally by a desire to provide a legal justification for President Bush's political preference for certain abortion restrictions." Miller filed

the brief on behalf of the United States, despite the fact that the commentator argued:

> DOJ should not have filed the brief, for the federal government had no proper interest in the case. The United States is not a party, and no federal program or law is directly implicated. The government's decision to file the amicus brief anyway, despite the lack of a bona fide federal interest in the case, may well reflect a renewed political determination by the Bush Administration to align the federal government with the pro-life community.

Although the district court judge had found the ban "lack[ed] adequate exceptions" for a specific abortion procedure to be performed "when it is necessary to preserve a woman's health,"[32] the Sixth Circuit upheld the state's ban. In dissent, Judge Arthur Tarnow wrote that the ban "unconstitutionally compromises [the health interests of pregnant women] by forcing women to use riskier methods of abortion."[33]

In another case, the wife of a U.S. service member challenged regulations that denied insurance coverage to their family for the costs of abortion care. The family sought abortion care after discovering that the fetus suffered from anencephaly, which causes fetal development without a brain. In *Britell v. United States*, 372 F.3d 1370 (Fed. Cir. 2004), Miller joined the government's brief defending the denial of coverage.

The district judge had found that, "Through the funding power the government seeks to encourage Britell and women similarly situated to suffer by carrying their anencephalic fetuses until they are born to a certain death. This rationale is no rationale at all. It is irrational, and worse yet, it is cruel."[34] The Federal Circuit reversed, siding with Miller and the federal government.

CONCLUSION

Eric Miller has a lengthy track record of opposing tribal rights, earning him strong opposition from both national and local tribal leaders. Neither home state senator supports his nomination. Miller's personal comments and writings reinforce our concerns about whether he would be a fair-minded judge. For these reasons, Alliance for Justice strongly opposes his nomination.

ENDNOTES

1 Sen. Comm. On the Judiciary, 115th Cong., Eric David Miller Questionnaire for Judicial Nominees, 1-3, available at https://afj.org/wp-content/uploads/2018/10/Eric-Miller-Senate-Questionnaire-.pdf.
2 *Id.*
3 *Id.* at 3.
4 The Federalist Society's "Eric Miller" events page appears to conflate two Eric Millers. In the provided link, the nominee Eric D. Miller gave two speeches to the Puget Sound Lawyers Chapter. The speech to the St. Louis Student Chapter may have been delivered by a speaker other than the nominee.
5 Sen. Comm. On the Judiciary, 115th Cong., Eric David Miller Questionnaire for Judicial Nominees, 8.
6 *Id.* at 2.
7 Amici Curiae Brief for Petitioner at 5, *Washington v. U.S.*, No. 17-269 (Sept. 2017), available at http://www.scotusblog.com/wp-content/uploads/2018/01/17-269-cert-tsac-business-home-building.pdf.
8 Brief for the Respondents at 27, *Upper Skagit Indian v. Lundren*, No. 17-387 (Feb. 2018), available at https://www.supremecourt.gov/DocketPDF/17/17-387/36071/20180221123548256_Merits%20Brief.pdf.
9 Sen. Comm. On the Judiciary, 115th Cong., Eric David Miller Questionnaire for Judicial Nominees, 42.
10 Brief for the Petitioners at 3, *Friends of Amador Cty. v. Jewell*, No. 14-340 (Nov. 2014), available at http://sblog.s3.amazonaws.com/wp-content/uploads/2014/11/Friends-of-Amador-County-14-340-reply.pdf.
11 Letter to Chairman Grassley and Ranking Member Feinstein, National Congress of American Indians and Native American Rights Fund, *Re: Nomination of Eric Miller to Serve on the U.S. Court of Appeals for the Ninth Circuit*, August 21, 2018.
12 Eric D. Miller, *Washington Supreme Court Extends Medical-Device Manufacturers' Duty to Warn*, Legal Opinion Letter (Washington Legal Foundation, D.C.), June 30, 2017.
13 *Taylor v. Intuitive Surgical, Inc.*, 187 Wash. 2d 743 (2017).
14 Eric D. Miller, *Washington Supreme Court Extends Medical-Device Manufacturers' Duty to Warn*, Legal Opinion Letter (Washington Legal Foundation, D.C.), June 30, 2017 ("The majority opinion does not explain how providing a warning to the hospital could realistically have helped Taylor. The purpose of a warning, after all, is to make sure that the product is 'reasonably safe' when used. Providing a warning to the product's users helps to promote safety; however, giving a warning to others in the chain of distribution does not. In the case of medical devices, the user is the physician employing (or prescribing) the device.").
15 *Id.*
16 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).
17 *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).
18 Eric D. Miller, Speaker, "7th Annual Supreme Court Watch: Representative Processes: Class Actions, Voting," Seattle University School of Law, Recording at 51:00, available at https://www.youtube.com/watch?v=a16tb4d3J5k (Oct. 9, 2015).
19 *Id.* at 52:20.
20 *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wash. 2d 793, 803 (2015).
21 *Thornell v. Seattle Serv. Bureau, Inc.*, No. 16-35569, 2018 U.S. App. LEXIS 19531, at *3 (9th Cir. July 16, 2018).
22 *Walston v. Boeing Co.*, 181 Wash. 2d 391 (2014).
23 Brief for Respondent at 1-2, *Walston v. Boeing Co.*, No. 88511-7 (Aug. 9, 2013), available at https://www.afj.org/wp-content/uploads/2018/10/WALSTON-v.-BOEING-CO._-2013-WA-S.-Ct.-Briefs-LEXIS-166.pdf.
24 *Walston v. Boeing Co.*, 181 Wash. 2d 391, 395 (2014).
25 *Id.* at 399.
26 *Acharya v. Microsoft Corp.*, 354 P.3d 908 (Was. 2015).
27 *Id.* at 914.
28 Sen. Comm. On the Judiciary, 115th Cong., Eric David Miller Questionnaire for Judicial Nominees, 40.

ENDNOTES

29 See, for an example, the "torture memos," that "paved the way for waterboarding of terrorism suspects and other harsh interrogation tactics."
30 *Ctr. for Nat'l Sec. Studies v. United States DOJ*, 331 F.3d 918 (2003), available at https://law.resource.org/pub/us/case/reporter/F3/331/331.F3d.918.02-5300.02-5254.html.
31 *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), available at https://scholar.google.com/scholar_case?case=15974758987197656757&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
32 *Women's Med. Prof'l Corp. v. Taft*, 162 F. Supp. 2d 929, 932 (S.D. Ohio 2001).
33 *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 466 (6th Cir. 2003).
34 *Britell v. United States*, 204 F. Supp. 2d 182, 198 (D. Mass. 2002).