

December 6, 2017

Dear Senator,

On behalf of Alliance for Justice, a nationwide association representing a broad array of groups committed to justice and civil rights, I write to oppose the nomination of James Ho to a seat on the U.S. Court of Appeals for the Fifth Circuit.

While in the George W. Bush Administration's Office of Legal Counsel, Ho authored a memo on "interpretations" of Common Article 3 of the Geneva Conventions. Ho's memo was then cited in the infamous Bybee-Yoo "Torture Memo," which "paved the way for waterboarding of terrorism suspects and other harsh interrogation tactics[.]" In a passage arguing that the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment "distinguishes between torture and other acts of cruel, inhuman, or degrading treatment or punishment," Ho's memo was cited as evidence that Common Article 3 of the Geneva Conventions "contains somewhat similar language" that distinguishes torture from "outrages upon personal dignity, in particular, humiliating and degrading treatment" toward prisoners. The Torture Memo appears to use Ho's work as intellectual backing for the proposition that the Bush administration's barbaric waterboarding of detainees did not violate international law.

Ho failed to list his memo on his Senate Judiciary Committee questionnaire. It has not been seen by the public. Moreover, Ho's answers to the Senate Judiciary Committee during his hearing on this subject were unsatisfactory. For example, Ho has admitted to working on the Bush administration's controversial legal positions on detainee rights, but the extent of his involvement in the effort to defend torture is unknown. Given that a critical question for any nominee is whether he will be independent of the President who nominated him, and given that this President has made expansive arguments regarding executive power, his nomination should certainly not move forward until his full record on these critical issues can be fully evaluated.

In 2014, Chairman Chuck Grassley made [clear](#) with respect to the need to gain access to OLC opinions during consideration of David Barron's nomination, "[t]his administration must turn over . . . every legal opinion from the Office of Legal Counsel written by, or related to" David Barron. "Our obligation, as senators, is to ensure that our constituents have full access to information." He added, "[w]ithout full disclosure, to the full Senate . . . this nomination cannot proceed." Following Grassley's statement, Barron's OLC memo was made available to all senators, and ultimately made public. The same principle should apply here.

Ho has also taken troubling positions in the past that raise serious concerns regarding whether he will faithfully apply critical rights, laws, and legal protections. For example, Ho has fought LGBTQ rights, vigorously defending the Texas and federal Defense of Marriage Acts. And, Ho has been vocal in his support for Jeff Mateer, President Trump's nominee to the U.S. District Court for the Eastern District of Texas. Mateer, the former general counsel of the First Liberty Institute, has called transgender children part of "Satan's plan" and compared Obama-era regulations to "Nazi Germany." When Mateer was nominated to serve as the assistant attorney general of Texas, Ho wrote that the appointment was "worthy of praise," that "[i]t was an honor to share the podium with [Mateer]," and "[h]is appointment should be celebrated—not criticized."

Also relevant, with regard to campaign finance reform, is the fact that Ho has written that he opposes the concept of regulating campaign finance altogether. In a Federalist Society article opposing the McCain-Feingold Act, Ho proposed that “[f]or truly radical but effective reform, we must reverse course and abolish all restrictions on campaign finance.” He went on to argue that government corruption should be blamed not on money in politics, but on government regulation, claiming that “[p]oliticians can coerce campaign contributions from ever-willing donors for one simple reason: the state intrudes upon so many areas of personal and commercial life that success is impossible without permission from the sovereign.”

Given all these concerns, as well as concerns detailed in our report on his nomination issued prior to his hearing, which can be found at afj.org/our-work/nominees/james-c-ho, we call on the Judiciary Committee to reject James Ho as a candidate for the U.S. Court of Appeals for the Fifth Circuit. We stand ready to answer any questions you may have about our conclusions regarding this nominee.

Sincerely,

A handwritten signature in black ink, appearing to read "Nan Aron". The signature is fluid and cursive, with a long horizontal stroke at the end.

Nan Aron