



IndivisibleEB.org

Senator Dianne Feinstein
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Washington, D.C. 20510

To: Senator Dianne Feinstein
From: Indivisible East Bay
Date: June 5, 2018
Subject: Resisting the Trump Agenda (Judicial Nominations and Criminal Justice Reform)

JUDICIAL NOMINATIONS

Report on Stacking Courts: We thank Sen. Feinstein for her leadership in issuing the report on “Republican efforts to stack the federal courts.” (5/10/18) We hope this report will be the source of social media memes and sound bites to publicize this problem to voters this fall.

Disregard of Blue Slip Custom: We also encourage the Senator’s communications to Republicans about how their current disregard of the blue slip custom will negatively impact them someday when they are in the minority. Meanwhile, however, we have a problem with the Republicans’ blatant disregard of the blue slip for some pending nominees, i.e., Ryan Bounds nominated for the 9th Circuit and David Porter for the 3rd Circuit. We’re asking the Senator to consult with her colleagues on ways to block these nominations, or at a minimum, to express a more unified and forceful disapproval. There is some discussion among groups (besides IEB) to ask Democratic Senators to withhold their votes against all judicial nominees in protest of the Republicans’ disregard of the blue slip. We believe this proposal has some merit while we acknowledge its risks. We’re asking the Senator to put this proposal on the table for consideration. The Senator voted against Trump’s Dept of Transportation nominees in protest against a stalled Caltrain project in 2017, so this action would not be unprecedented for her.

Compromise on Judicial Nominees: There has been at least one news article[1] that Senators Feinstein and Harris are negotiating a compromise deal with the White House on a group of nominees for the federal courts in California. Senators from other states have cut these deals. Usually, the package involves a group of centrist nominees tilting left or right. We understand why some senators would do this. We can count the number of Republican votes versus Democratic votes in the Senate. However, we are concerned about (1) what is considered an “acceptable” nominee that the White House desires, and (2) the fact that these deals isolate Democratic senators who might want to resist White House nominees selected for their states. This dealmaking gives the appearance of “every Senator for himself” (or herself), the law of the jungle in the Trump era, and we would like to see more coordination and unified Democratic resistance to the White House’s selection of judicial nominees. Furthermore, the label of “compromise” on a nominee does not necessarily mean the nominee would be acceptable to us and other like-minded activists. We will examine every nominee for the federal courts in California on his/her own merits.

Cancellation of August Recess: McConnell canceled the August recess on 6/5/18 citing Democratic “obstruction” of nominees as the reason. If the Republicans were not engaged in a historic level of court packing with undesirable nominees, there wouldn’t be a problem. It is too bad that there will be no August recess. However, we support the decision of Senate Democrats to protect our judiciary as much as possible.

Issue for Midterm Elections: A fruitful path might be to link the Republicans' confirmation of unfit judges to the upcoming midterm elections, and the need for Democrats to vote and to take back the Senate. Any public statements from the Senator along these lines would be welcome. This issue would have to be coordinated with the Democratic Party at the national level, and we hope it corresponds to a more unified strategy by Democrats in handling Trump's judicial nominees.

Votes against Nominees: Among the nominations currently before the Judiciary Committee, we're asking the Senator to vote against (1) **Britt Grant**, nominated for the 11th Circuit, and (2) **Patrick Wyrick**, nominated for federal district court in OK. Grant has an extremely conservative and partisan record, as well as scanty if prestigious-sounding experience as a judge. We believe she is unfit to be a federal appeals court judge. Wyrick was mentored by Scott Pruitt, then OK Attorney General, to ignore environmental protection in favor of the fossil fuels industry. His record shows extreme conservatism as well. Wyrick should never be a judge.

Questions:

- What can you tell us about communication with the White House regarding the vacancies in California?
- What can Sen. Feinstein do to hold the Democrats together to oppose undesirable nominees and encourage a more unified front by Democrats against the Republicans who are steamrolling nominees through confirmation?

Criminal Justice Reform and Algorithmic Bias

We were encouraged to see the senator co-sponsored Senator Grassley's Sentencing Reform and Corrections Act of 2017[2] and that it has a lot of bipartisan support. We have some concerns about the current bill and wish to strengthen some of the proposed reforms, especially the use of software to determine the risk of recidivism, and hence sentencing. We are concerned that there isn't a path to appeal the software's[3] outputs, that there is lack of requirements for testing of the software's output as well as a review of the software systems' source code and input data and how those might encode bias[4]. We'd like to see more concrete safeguards against bias as part of any reform initiative. In order to adjust the assessment system to "reduce such disparities to the greatest extent possible," S.1917 Sec. 203(a) [2] giving text of proposed 18 USC sec.3621A(b)(1)(D)(ii), we believe it's necessary to investigate the issue of algorithmic bias and amend proposed law to include such requirements as periodic public review of algorithms and associated software development processes and training data.

Questions:

- Has the senator looked into the issue of algorithmic bias?
- Will the senator call for an SJC hearing on algorithmic bias in criminal procedure and ways to address it?
- If the bill moves forward and there is an opportunity, would she offer amendments to resolve the issue?

Sources:

1. Cadei E. Dianne Feinstein, Kamala Harris try to cut a deal with Trump [Internet]. sacbee. The Sacramento Bee; 2018 [cited 2018 Jun 5]. Available from: <http://www.sacbee.com/news/politics-government/capitol-alert/article211603954.html>
2. Grassley C. Sentencing Reform and Corrections Act of 2017 [Internet]. S.1917 Feb 15, 2018. Available from: <https://www.congress.gov/bill/115th-congress/senate-bill/1917>
3. Dressel J, Farid H. The accuracy, fairness, and limits of predicting recidivism. Sci Adv [Internet]. 2018;4:eaa05580. Available from: <http://dx.doi.org/10.1126/sciadv.aao5580>
4. Lohr S. Facial Recognition Is Accurate, if You're a White Guy. The New York Times [Internet]. 2018 Feb 9 [cited 2018 Jun 3]; Available from: <https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html>