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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Staff Director*

January 17, 2018

Dear Senator Baldwin:

I understand that you do not intend to return a blue slip for Michael Brennan's nomination to the United States Court of Appeals for the Seventh Circuit. From our conversation, I understand that the reason behind your refusal to return a blue slip is based on what you perceive to be an issue with the nomination process. Specifically, you object to Mr. Brennan's nomination because he did not receive the support of five members of the Wisconsin Federal Nominating Commission ("Commission"), a non-governmental advisory group whose members are politically appointed by the two Wisconsin senators.

After hearing your concerns, I instructed my staff to discuss the nomination process with both the White House Counsel's Office and Senator Johnson's office. I also instructed my staff to review the nomination process for Donald Schott, President Obama's nominee for this Seventh Circuit vacancy.

It is my understanding that the Commission is comprised of six members, with each Wisconsin senator appointing three of the six members. The charter for the Commission states that "[n]o candidate for any vacancy shall be recommended for nomination to fill any vacancy except by an affirmative vote of five members of the Commission." It further states that the Commission "shall designate not less than four, nor more than six individuals it considers best qualified to fill a vacancy."

During the Obama Administration, the Commission failed to designate the required four individuals. Only two of the eight individuals considered by the Commission received the required five votes. Senator Johnson expressed to you that he would be willing to submit those two names to the Obama White House for consideration, despite the Commission having failed to produce the required four potential nominees. Instead, you submitted all eight names to the White House for consideration. On January 12, 2016, President Obama nominated Donald Schott to the Seventh Circuit. Senator Johnson, in good faith, returned his blue slip for Mr. Schott, despite significant concerns with the nomination process. On May 18, 2016, I convened a Judiciary Committee hearing to consider Mr. Schott's nomination. The Committee reported his nomination favorably to the full Senate on June 16, 2016. Ultimately, the full Senate did not vote to confirm Mr. Schott, and the Senate returned his nomination to the President on January 3, 2017.

On February 13, 2017, you and Senator Johnson reconstituted the Commission and signed an updated compact laying out the same requirements: (1) a candidate must receive five affirmative votes of the Commission's members; and (2) the Commission must designate no less than four and no more than six individuals for you and Senator Johnson to recommend to the President. The Commission convened in March 2017 and interviewed eight candidates for the Seventh Circuit vacancy. Of those eight candidates, only one, Mr. Brennan, received bipartisan support—four votes—and no candidate received the required five votes. In other words, the Commission again failed to produce the required four-to-six candidates for consideration.

Don McGahn, the Counsel to the President, contacted both you and Senator Johnson to ask for recommendations for the vacancy. In a call with Mr. McGahn on June 14, 2017, he informed you that the White House team was looking at Mr. Brennan for the vacancy and asked if you had any additional recommendations. You provided the names of Judge Rick Sankovitz and Donald Schott to Mr. McGahn for consideration, neither of which received the required 5 votes from the Commission. On June 21, 2017, the attorneys from the White House Counsel's Office and the Department of Justice's Office of Legal Policy interviewed Judge Sankovitz and Mr. Schott at the White House. In a call on June 29, 2017 between you and Mr. McGahn, Mr. McGahn stated that, after meeting with Judge Sankovitz and Mr. Schott and reviewing their records, the White House continued to prefer Mr. Brennan. You stated that you would need a few weeks to review Mr. Brennan's qualifications and record. Mr. McGahn agreed to your request and asked whether you objected to placing Mr. Brennan into the background check process, to which you expressed no objection. On August 3, 2017, after Mr. Brennan's background report was completed favorably, Mr. McGahn again spoke with you to discuss your review of his record and qualifications. At that point, you expressed concerns that Mr. Brennan had not received the requisite five votes from the Commission. On August 3, 2017, President Trump nominated Mr. Brennan to the Seventh Circuit.

I understand that you have withheld your blue slip because Mr. Brennan did not receive five affirmative votes from members of the Commission. While I recognize your and Senator Johnson's desire for a functioning nominating commission in Wisconsin, the Commission's current dysfunction cannot be permitted to hamstring the President's right to select nominees in accordance with Article II of the Constitution.

As I explained to the full Senate last year, the blue-slip courtesy exists for a specific purpose: to ensure that the White House consults with home-state senators before nominating an individual to the bench. I explained that negative or unreturned blue slips will not preclude a hearing for a nominee unless the White House failed to consult with home-state senators regarding the nomination. This is consistent with the policies of the vast majority of previous Judiciary Committee Chairmen. I also emphasized that I will not allow senators to abuse the blue-slip courtesy by withholding the blue slip for political or ideological reasons. This is particularly important for circuit-court nominees, who are nominated to regional courts that affect several states, not just the home-state senators' states. While the blue slip does not authorize a senator to unilaterally veto a nomination, neither is it necessarily an indication as to whether the senator will ultimately support the nominee on the Senate floor. Rather, it is an acknowledgement that the nominee should have a hearing before the Committee.

I am assured that the White House engaged in meaningful consultation with you and Senator Johnson regarding the Seventh Circuit vacancy. It is clear that the White House seriously considered your two proposed nominees. It is a President's prerogative to select his preferred judicial nominees for the Senate to consider. I will not deny Mr. Brennan a hearing unless I am convinced the White House did not consult with you regarding the vacancy.

I genuinely hope that the recent problems and dysfunction with the Wisconsin Federal Nominating Commission can be resolved, but I ask that you reconsider your position and return the blue slip for Mr. Brennan.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive, flowing style.

Charles E. Grassley

Chairman