

United States Senate

WASHINGTON, DC 20510

January 23, 2018

The Honorable Charles E. Grassley
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Chairman Grassley:

I write to express my disappointment that the Judiciary Committee, under your leadership, will consider the nomination of Michael Brennan to the United States Court of Appeals for the Seventh Circuit without my having returned a blue slip. This action breaks with a longstanding precedent that you have previously embraced on judicial nominations.

As you and I have discussed, President Trump's nomination of Mr. Brennan disregards the longstanding, bipartisan commission process in Wisconsin that has informed the selection of federal judges in my state for nearly four decades. Furthermore, the nominee's own accounting of the selection process to the Judiciary Committee makes clear that the White House intended to ignore the Wisconsin Federal Nominating Commission process and neglect meaningful consultation with both home-state Senators on this nomination.

In 2015, you wrote: "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."

Proceeding with consideration of Mr. Brennan's nomination does not honor this longstanding tradition; instead, it endorses President Trump's disregard of state selection processes and each Senator's constitutional responsibility of advice and consent. This is a particularly troubling step at a time when institutions and traditions of our democracy seem under constant attack, and bipartisanship feels like a fading concept.

The Wisconsin Federal Nominating Commission has existed in some form since 1979, and has helped to guide Wisconsin Senators of both parties in fulfilling their constitutional duties by engaging in the bipartisan vetting of potential candidates for federal judgeships. The Commission process has served our state well and produced results. Since I joined the Senate,

the Commission has recommended consensus candidates who have been confirmed to two district judgeships and a United States Attorney position, as well as two additional candidates who have been nominated by President Trump and await consideration for a U.S. Attorney and judicial position, respectively.

The vacancy on the Seventh Circuit for which Mr. Brennan has been nominated has also been before the Commission for consideration several times. In November 2009, the Commission recommended candidates to then-Senators Kohl and Feingold; one of them, Victoria Nourse, was subsequently nominated by President Obama. Her nomination expired at the end of 2010, and when she was re-nominated, newly-elected Senator Ron Johnson refused to return his blue slip, arguing that he had not had a role in the process. Of note, Mr. Brennan publicly supported Senator Johnson's actions in an op-ed published in the Milwaukee Journal-Sentinel. Then-Chairman Leahy respected Senator Johnson's decision and the Nourse nomination received no further consideration in the Judiciary Committee.

When I joined the Senate in 2013, I worked with Senator Johnson to return to the use of a bipartisan commission. I believe strongly in this longstanding tradition in Wisconsin, which helps us to identify and advance consensus candidates, and therefore agreed to restructure the Nominating Commission to give Senator Johnson parity – despite the fact that both the White House and the Senate were in Democratic hands. Under our agreement, each Senator named three commissioners, and no candidate could be advanced for our consideration without the support of a supermajority of the Commission.

On January 12, 2016, President Obama nominated Donald Schott for this Seventh Circuit vacancy, after he received supermajority support from the Commission. He did so only after Senator Johnson was permitted to interview Schott and review his record. Under your leadership as Chairman, the Judiciary Committee honored longstanding tradition and did not consider Mr. Schott's nomination until Senator Johnson returned his blue slip. The Committee advanced his nomination to the Senate floor by a bipartisan vote. Unfortunately, Leader McConnell obstructed the nomination and never allowed Schott, a bipartisan, consensus nominee, to receive a floor vote and the vacancy remained.

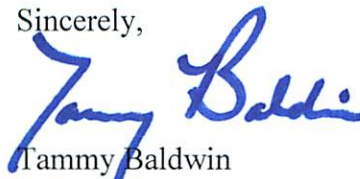
Recognizing the value of the Commission, however, Senator Johnson and I agreed to restart the process at the beginning of last year. In February, we jointly announced that renewed work and outlined the dates the Commission would solicit and consider applicants for U.S. Attorney and judicial vacancies in our state. For the Seventh Circuit, we established that applications would be available on March 15 and due April 29, and the Commission would have to make recommendations to the Senators by July 13. While the Commission considered Brennan among several candidates on June 1, he did not receive the requisite supermajority support. Nevertheless, as he indicated in his Senate Judiciary Committee questionnaire, Brennan was informed on June 30 that the President wished to nominate him.

While it is troubling enough that the President chose to nominate someone who was not a product of our bipartisan process, another fact emerged from Mr. Brennan's committee questionnaire that makes clear the White House never intended to respect what Senator Johnson and I had established. Mr. Brennan notes that he was approached by the White House regarding his interest in a federal judicial position in March, and interviewed for said position on March 15, the same day that the Commission made applications available for the Seventh Circuit vacancy.

Furthermore, in addition to circumventing our commission process, the White House did not engage in any meaningful consultation with me as a home-state Senator. I first spoke with White House Counsel Donald McGahn regarding this nomination on June 14, when I was informed that Mr. Brennan was the President's choice. I urged Mr. McGahn to recommend instead that the President nominate Donald Schott, a consensus nominee with bipartisan support, or a second candidate who had also previously received the Commission's supermajority support. The President instead moved forward in a partisan manner, with a nominee preselected by the White House before our state's bipartisan process had even begun. This does not reflect respect for the Commission or my role as one of Wisconsin's duly-elected Senators. It is unacceptable and it is why I could not in good conscience return a blue slip on this nomination.

I applaud your years of service to the Senate and the people of Iowa. However, I am disappointed by your decision to disregard the Wisconsin Federal Nominating Commission process, the value of meaningful consultation with home-state Senators, and the blue slip tradition in the Senate. I am troubled that I am not being afforded the same consideration that has previously been provided to our Republican colleagues, including Senator Johnson and fear that this will set a troubling precedent for the Judiciary Committee and the Senate. Moving forward with this nomination without my blue slip sends the message to my colleagues that President Trump need not respect their roles as home-state Senators in the selection of judicial nominees.

Sincerely,



Tammy Baldwin
U.S. Senator

cc: Senator Dianne Feinstein, Ranking Member