

United States Senate

WASHINGTON, DC 20510-4704

COMMITTEES:
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AND PENSIONS
VETERANS' AFFAIRS

October 22, 2018

Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing in response to your letter, dated October 18, 2018, regarding the nomination of Eric Miller to the United States Court of Appeals for the Ninth Circuit. Your letter contained several mischaracterizations or otherwise false assertions which are important to clarify and correct. First, I have not yet stated whether I oppose or support Mr. Miller's nomination. More importantly, the assertion in your letter, that I reached an agreement or deal with the White House to exchange three favorable Western District court nominees for a Ninth Circuit Court nominee chosen by the White House, is simply false.

Throughout my time in the United States Senate, I have respected the tradition of genuine and good-faith consultation between the White House and home state Senators in the selection of judicial nominees. When President Bush was in office, the White House consulted with Senator Cantwell and me before nominating Judge Richard Tallman, who vacated the seat to which Mr. Miller has been nominated. But the process for selecting nominees to Washington state district courts is wholly unrelated to the selection of nominees to the Ninth Circuit Court of Appeals.

For years, consultation on nominees to district courts in Washington state has involved a bipartisan selection committee. Democrats and Republicans are equally represented on the committee, which solicits applications, vets and interview candidates, and forwards finalists, which we transmit to the White House for final selection. This ensures that our district court judges are nominated and confirmed even when different political parties hold Senate seats or the White House. This process was honored when my Republican colleague, former-Senator Slade Gordon, and I worked with President Clinton to nominate and confirm district court judges; it was honored when Senator Cantwell and I worked with President Bush on judicial nominations. Most recently, in 2015, three Western District court judges announced their retirements and I worked with Senator Cantwell and Representative Dave Reichert to set up a bipartisan selection committee to evaluate and vet potential nominees. The committee forwarded five highly qualified finalists to the White House, and three were selected as nominees to the Western District court. Unfortunately, you and your colleagues in Republican leadership halted this fair and effective process and refused to give these nominees a hearing.

Your letter describes the several discussions between myself and former White House Counsel Don McGahn and our staffs on the judicial nomination process, as reported to you by the White House. As the letter demonstrates, the White House initially refused to honor the longstanding bipartisan process for selecting district court nominees in Washington state. After several discussions, the White House eventually agreed to follow the process for the three Western District court vacancies. However, contrary to the representations in your letter, at no point did I ever agree to a deal with the White House in which I would return a blue slip or otherwise support Mr. Miller's nomination, in exchange for the White House nominating Kathleen O'Sullivan and Tessa Gorman, two of the original five candidates forwarded by the bipartisan selection committee in 2015.

In fact, the White House's account severely mischaracterizes the consequential discussions between myself and Mr. McGahn, and our staffs leading up to White House's announcement of the nominations.

- On April 14, 2017, immediately following a conversation with Mr. McGahn, my staff sent a letter to the White House memorializing our understanding that the White House would consider five candidates chosen by the bipartisan committee for the three Western District court vacancies, which had been pending since 2015. I've included that letter as an attachment here.
- Though the White House sent materials for six separate candidates for the Western District vacancies on August 23, 2017, my office never agreed to consider any candidates that did not go through the bipartisan selection committee process.
- On December 7, 2017, I spoke with Mr. McGahn about the White House's three candidates for the Ninth Circuit Court vacancy. Though I may have commented on my first impression of the records of each candidate, I did not propose supporting Mr. Miller's nomination. As it is the constitutional duty of the Senate to provide advice and consent on judicial nominations, I would never offer support of a judicial nominee before reviewing his or her entire record.
- On April 26, 2018, Mr. McGahn notified me that the White House would ask the FBI to conduct a standard background investigation on Mr. Miller, and two of the three Western District court nominees. During this phone conversation, I reiterated that the selection of the district court nominees was completely unrelated to the selection of a Ninth Circuit Court nominee. I did not agree to support Mr. Miller's nomination, and instead informed Mr. McGahn that I was still reviewing Mr. Miller's record.
- On July 11, 2018, Mr. McGahn notified me that the White House was ready to announce two of the Western District court nominees. However at no point during the conversation did he mention Mr. Miller's nomination or the Ninth Circuit Court vacancy.
- On July 13, 2018, the White House announced the nomination of Ms. O'Sullivan and Ms. Gorman, as agreed upon. However, the White House also unexpectedly announced Mr. Miller's nomination.
- On July 18, 2018, I spoke with Mr. McGahn to share my concern that despite not discussing the Ninth Circuit Court vacancy for nearly seven months, Mr. Miller had been

selected and nominated by the White House. Though Mr. McGahn claims to have read from a script regarding Mr. Miller's nomination during our July 11 conversation, two of my staff members who were on the call distinctly remember that Mr. McGahn did not mention Mr. Miller or the Ninth Circuit Court vacancy.

As is clear, from our earliest discussions with the White House, my staff and I reiterated that the bipartisan committee selects candidates for nominees to the district courts in Washington state, and the consultation on nominees for the Ninth Circuit Court of Appeals is entirely unrelated.

Furthermore, though the White House promptly sent Mr. Miller's nomination materials to the Senate Judiciary Committee, it is my understanding that materials for Ms. O'Sullivan and Ms. Gorman have not been sent. What are we to derive, Mr. Chairman, from the fact that the White House and the Committee continue to ignore these district court vacancies, despite the consistency of the Washington state process and the public declaration of intent to nominate from a list created in January 2016 and re-sent early in 2017?

Prior to sending your letter, you made no attempt to discuss the nomination process with myself and Senator Cantwell. I am troubled by your choice to detail the private conversations between the White House and your Senate colleagues in a letter that has become public, without consulting us or our staffs. As a result, it is difficult for me to view your letter as more than an incorrect characterization of conversations in an effort to justify your rushed consideration of this one vacancy you have chosen to prioritize for your own political reasons.

I have remained committed to protecting the Senate's century-old blue slip tradition, which both parties have followed regardless of who controlled the Senate or occupied the White House. This tradition is rooted in our constitutional duty as senators to provide advice and consent regarding nominations, it ensures that the White House meaningfully consults with home state senators on judicial nominations, and it is an essential constraint which enables the Senate to exercise a check on the president's appointment power. Importantly, meaningful consultation is not a bureaucratic chore that can be fulfilled through the course of brief phone calls between home state senators and the White House. I know that you and Leader McConnell can agree with this premise. You have described the blue slip tradition as "designed to encourage outstanding nominees and consensus between the White House and home-state senators."¹ When President Obama was in office, you refused to hold a hearing for a nominee to the Sixth Circuit Court of Appeals, as Leader McConnell withheld the blue slip on the nominee despite "a back and forth with the administration for a year and a half or two," feeling that the White House did not abide by the normal "consulting process."² With respect to Mr. Miller's confirmation, the White House has made false assumptions about my motivations and has failed to honor the blue slip tradition which both you and Leader McConnell so forcefully adhered to when considering

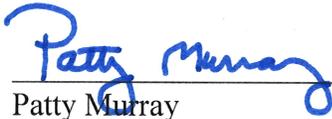
¹ <http://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowas-judicial-legacy/25801515/>

² <https://www.courier-journal.com/story/news/politics/mitch-mcconnell/2016/03/22/mcconnell-no-supreme-court-justice-appeals-judge/82125848/>

President Obama's judicial nominees. As I've stated, the White House fell well-short of engaging in a good-faith and genuine consultation process with me and Senator Cantwell on the Ninth Circuit Court vacancy. Therefore, it should be understandable that I cannot return the blue slip on Mr. Miller's nomination at this time.

I fear that the clear and intentional conflation of processes for selecting district court and Ninth Circuit Court nominees from Washington state is meant to conceal an underlying motivation to completely eradicate the well-established blue slip tradition for judicial nominations. I hope this letter helps you and your staff gain a better understanding of the nomination process and the conversations between my office and the White House. And I hope that the Senate Judiciary Committee, under your leadership, will strive to protect at least some of the norms that the legitimacy of the United States Senate depends upon.

Sincerely,



Patty Murray
United States Senator

United States Senate

WASHINGTON, DC 20510-4704

April 14, 2017

Mr. Donald McGahn
White House Counsel
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. McGahn:

Thank you for your attention to the pending vacancies on the District Court for the Western District of Washington. Per Wednesday's conversation, please find enclosed the original communication to the White House of the five individuals chosen by Washington state's bipartisan judicial selection commission.

Each of these individuals has confirmed their continued interest in serving in the federal judiciary, and we reaffirm our commitment to their selection.

We appreciate you forwarding this information for the President's consideration and look forward to working with you to confirm three of these individuals.

Sincerely,



Patty Murray
United States Senator



Maria Cantwell
United States Senator