United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

October 23, 2018

The Honorable Patty Murray
United States Senate
154 Russell Senate Office Building
Washington, DC 20510

Dear Senator Murray:

I am writing in response to your letter dated October 22, 2018, regarding the nomination of Eric Miller to the United States Court of Appeals for the Ninth Circuit. I would like to take the opportunity to address several points in your letter.

As an initial matter, the purpose of my letter to you and Senator Cantwell was to describe to you the White House's version of its consultation with you and Senator Cantwell regarding the Ninth Circuit vacancy so that you can offer your version of the consultation history. I have done this with every senator who has hesitated to return a blue slip for a circuit-court nominee during this Congress. It was an attempt to gather more information, not "an effort to justify [a] rushed consideration" of Mr. Miller for "political reasons."

Your letter confirms my understanding that you did not express any objection to Mr. Miller from the date the White House first expressed interest in nominating him to the date of his nomination. Under your own version of events, you and Senator Cantwell did not offer any meaningful guidance to the White House with respect to this nomination during a period of more than nine months. Based on the facts described in your letter, it appears that the White House attempted to consult with you and Senator Cantwell in good faith, but that effort was not reciprocated. It's not necessary that you intend to support Mr. Miller's ultimate confirmation for him to receive a hearing. It's only necessary that the White House sought your input and guidance.

You also note that the White House has not sent us the nominations paperwork for two district court nominees, Kathleen O'Sullivan and Tessa Gorman, whom you support. It is my hope that you and the White House can reach an agreement on the current district court vacancies. But it's my understanding that the White House would not have nominated Ms. O'Sullivan and Ms. Gorman without an agreement from you and Senator Cantwell to return blue slips for Mr. Miller. In light of your decision not to return your blue slips, it's not surprising the White House has not sent the Senate their nominations paperwork.

You also make several incorrect assertions about the blue-slip process. As I explained in numerous public statements and my letter to you, the blue slip exists to encourage consultation between the White House and home-state senators. It is not meant to give a home-state senator unilateral veto power over a circuit-court nominee. All but two of my predecessors who extended the blue-slip courtesy allowed for hearings even without two positive blue slips, including Chairmen Ted Kennedy and Joe Biden. Your suggestion that all previous chairmen required two positive blue slips from home-state senators before holding a hearing is simply incorrect.

Previously, the prerogatives of home-state senators were enforced on the Senate floor, not in the Judiciary Committee through blue slips. For example, Chairman Hatch held hearings for five circuit-court nominees who lacked a positive blue slip from either home-state senator. After they were reported out of Committee, Democratic senators filibustered the nominees and they were not confirmed. In 2013, however, you and Senator Cantwell supported Leader Harry Reid's effort to abolish the filibuster for lower court nominees. I opposed this short-sighted action to abolish the filibuster. But I won't allow senators to weaponize the blue slip in its place. After all, you previously believed that 41 senators should not be allowed to thwart judicial nominees, but today you ask for a single senator to have that right.

Your insinuation that I had a different blue-slip policy under President Obama is also incorrect. I did not hold a hearing on Justice Hughes's nomination because it came too late. President Obama nominated her in March of a presidential election year. During presidential election years, the Leahy-Thurmond Rule applies and typically prevents judicial confirmations starting in mid-summer around the time of the political conventions. Assuming that I gave the Kentucky senators the same amount of time to return their blue slips that I gave to the Minnesota senators to return theirs for Judge David Stras—who was the first nominee for whom I held a hearing despite an unreturned blue slip—we couldn't have a hearing until October 2016, months after the Leahy-Thurmond Rule kicked in.

Finally, as I have explained on numerous occasions, including in the *Des Moines Register* op-ed you cite, I am much less likely to hold hearings for district court nominees who do not have two positive blue slips returned from home-state senators. I value the blue-slip tradition and have preserved it during my chairmanship. Any suggestion to the contrary is false.

Sincerely,

Chuck Grassley

Chuck Grassley
Chairman