



November 27, 2017

OPPOSE THE CONFIRMATION OF DAVID STRAS TO THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write in strong opposition to the confirmation of David Stras to the U.S. Court of Appeals for the Eighth Circuit.

The Stras nomination is highly troubling not only because the nominee's extreme ideology earned him a place on then-candidate Trump's Supreme Court short list, but also because Chairman Grassley has decided to use this nomination to overturn the Senate's century-old "blue slip" tradition, which has protected the role of home state senators in the judicial nominating process.

Grassley Destruction of Blue Slip Tradition: The Constitution assigns to the Senate a separate and independent role from the president for lifetime appointments to the federal judiciary. The first prong of the Senate's role is to provide advice and the second is to determine whether to consent to a nominee's confirmation. The blue slip is a piece of paper that reflects the important role that home state senators have played for the last century in providing advice to presidents about lifetime appointments in their state. If the chairman of the Senate Judiciary Committee allows judicial nominees to advance without receiving the blue slips from the home state senators, no president will be compelled to listen to the advice of home state senators. A recent Congressional Research Service report identified only three judicial nominees since 1917 who have been confirmed over blue slip objections.¹ The blue slip practice is one of the constitutional checks and balances that helps maintain equilibrium among the branches of government. Over the years, when the Senate majority placed partisan loyalty to the president over the Senate's institutional interests in independently carrying out its constitutional responsibilities, the blue slip served as a vital corrective. This institutional check has arguably never been more important than now, with a president who acts with contempt for the rule of law, who undermines the legitimacy of judges who disagree with his actions, and who prioritizes personal loyalty to him over fealty to the law.

In the case of David Stras, who has served as a justice on the Minnesota Supreme Court since 2010, Minnesota Senator Franken has announced he will oppose Justice Stras and will not return the blue slip.² The Trump administration did not engage in meaningful consultation with the Minnesota senators, a clear departure from how previous presidents from both parties have acted. This lack of consultation is particularly egregious in light of

¹ <https://fas.org/sgp/crs/misc/R44975.pdf>.

² https://www.franken.senate.gov/?p=press_release&id=3753.

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the fact that the Minnesota senators are both members of the Senate Judiciary Committee, and such members have historically received even greater deference from the White House than other senators.³

Chairman Grassley's decision to nonetheless proceed with a hearing on the Stras nomination is his latest – and most severe – abuse of the judicial confirmation process. No one should forget what Chairman Grassley promised just two years ago, during the presidency of Barack Obama:

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.⁴

Chairman Grassley's strict observance of the blue slip tradition led to the denial of hearings and votes for 18 Obama judicial nominees.⁵ But now that President Trump is making judicial nominations rather than President Obama, Chairman Grassley has abandoned his own promise and a century of Senate tradition in order to rush through Trump's far-right judicial nominees. Chairman Grassley's about-face should be condemned by senators of both parties because it will strip senators of their constitutional role of providing advice and consent for judicial appointments in their states. As Senator Hatch astutely observed in 2014: "Weakening or eliminating the blue slip process would sweep aside the last remaining check on the president's judicial appointment power. Anyone serious about the Senate's 'advice and consent' role knows how disastrous such a move would be."⁶ When the American people next elect a Democratic president and Senate, Senator Grassley and Republican senators who support his ending of this Senate practice will rue the day they voted for judicial nominees over the objection of the home state senators.

Stacked Hearings: Chairman Grassley continues to abuse another Senate tradition by scheduling hearings with multiple circuit court nominees. The tradition of having just one circuit court nominee per hearing exists because circuit courts are the second highest courts in the land, and they make critical decisions involving multiple states and tens of millions of people. Each such nominee is deserving of the Senate Judiciary Committee's time, attention, and thorough examination. During the eight years of the Obama presidency, only three hearings featuring two circuit court nominees took place – out of 94 judicial nominations hearings – and Republican senators agreed to each of them. In just the first year of the Trump presidency, Chairman Grassley has jammed two circuit court nominees into four out of the 11 judicial nominations hearings – over 36 percent of the time – despite Democratic objections. Chairman Grassley has steamrolled President Trump's judicial nominees through the committee and deprived the committee adequate time and resources to properly assess each lifetime nominee. This rushed process has already led to an embarrassing trend of previously undisclosed information coming to light after nominees have been reported from committee.

³ <http://files.pfaw.org/uploads/2017/08/2017-08-31-SignOnLetter-DavidStras-Opposition-3.pdf>.

⁴ <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowas-judicial-legacy/25801515/>.

⁵ <https://www.acslaw.org/acsblog/10-things-you-need-to-know-about-blue-slips>.

⁶ <http://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role>.

Troubling Record of Dissents: Justice Stras’s extreme record on the bench can be seen in his pattern of dissents. For example, in *State v. Obeta*,⁷ a victim reported being raped, but the defendant claimed the sex was consensual, and the victim had no physical injuries and waited a few hours to report it to the police. Prosecutors tried to present expert testimony from a victim services expert and a law professor regarding typical behaviors of victims during and after a sexual assault, but the trial court refused to allow it. In a 5-2 opinion, the Minnesota Supreme Court reversed, holding that in criminal sexual assault cases in which the defendant argues that the sexual conduct was consensual, the trial court has discretion to admit expert opinion testimony regarding delayed reporting by the victim and lack of physical injuries.⁸ According to the majority: “This record demonstrates that many jurors may wrongly believe that most sexual-assault victims will forcefully resist their assailant, suffer severe physical injuries – including vaginal injuries – and immediately report the attack. But social science contradicts these misconceptions about how victims actually respond to sexual assault.”⁹ Justice Stras wrote the dissent in this case, concluding there was a lack of jurisdiction. His narrow view of the court’s jurisdiction – soundly rejected by the majority – would have had a significant impact on many sexual assault victims, not just the victim in this case.

In *Peterson v. Minnesota*,¹⁰ plaintiff Scott Peterson, a 24-year Minneapolis police officer, was transferred from his position with the Violent Offender Task Force to another unit. Mr. Peterson was 54 years old and argued that he was illegally transferred because of his age. He filed a complaint with the city’s human resources department, following the city’s Workplace Policy, and the city investigated the claim for 14 months, concluding that it was not the result of age discrimination. When Mr. Peterson later sued, the trial court ruled that his claim could not proceed because it was not filed within the one-year limitation period required by law. Mr. Peterson argued that his claim should be heard because the law also provides that the limitation period is suspended during the time a potential charging party and respondent are voluntarily engaged in a dispute resolution process involving a claim of unlawful discrimination. In a 5-2 opinion, the Minnesota Supreme Court found that the Workplace Policy, as “a formal process with the capacity to resolve Mr. Peterson’s claims,” constituted a “dispute resolution process” and therefore, the 14 months that the city spent on its investigation should not be counted against Mr. Peterson and the law’s one-year limitation. Justice Stras joined the dissent, which took a narrow, cramped definition of “dispute resolution process” that would have prevented Mr. Peterson from presenting his age discrimination case to a jury.

In *Sleiter v. American Family Mutual Insurance Company*,¹¹ Cody Sleiter was a child injured in a school bus accident that killed four people and injured 17. Cody suffered significant injuries, which cost \$140,000 to treat. The damages for all of the victims totaled \$5.3 million, but the liability limit for the at-fault vehicle and the school bus was only \$1 million, so Cody received a pro-rated share of the insurance proceeds: \$36,144. American Family insured Cody’s family for up to \$100,000 in excess uninsured motorist coverage, so he sought \$65,456 to reach that limit, but his claim was denied, and the trial court sided with the insurance company. The Minnesota Supreme Court determined that American Family’s interpretation of the Minnesota No-Fault Automobile Insurance Act, denying Cody’s claim, was unreasonable and “leaves victims insufficiently compensated for their injuries and unable to access the coverage limits they

⁷ 796 N.W.2d 282 (Minn. 2011).

⁸ Id. at 294.

⁹ Id. at 293.

¹⁰ 892 N.W.2d 824 (Minn. 2017).

¹¹ 868 N.W.2d 21 (Minn. 2015). See also <http://blogs.mprnews.org/newscut/2015/08/seven-years-after-horrific-bus-crash-a-victory-for-a-student/>.

purchased.”¹² Justice Stras was the lone dissent. While Justice Stras acknowledged that the facts of the case were “tragic” and that “there is no question” that Cody’s family did not receive the insurance benefits they expected from their policy,¹³ he took a narrow and cruel approach to statutory interpretation that disregarded the legislature’s intent.

Other Troubling Opinions: In *League of Women Voters v. Ritchie*,¹⁴ the Minnesota Supreme Court’s Republican-appointed justices, including Justice Stras, sided with the Republican legislature and permitted a proposed amendment to the Minnesota Constitution – which would have required a photo ID to vote – to be placed on the ballot despite the fact that the wording of the ballot question was misleading. The proposed ballot question described only two of the four substantive changes to the voting laws and misstated the terms of one of the provisions. Justice Stras and the majority acknowledged that the ballot question “does not use the same words used in the amendment itself nor does it list all of the potential effects of implementation” and that “these failures may be criticized, and it may indeed have been wiser for the Legislature to include the entire amendment on the ballot.”¹⁵ Nevertheless, they allowed the ballot question to proceed uncorrected, in what Justice Alan Page called “a classic bait and switch . . . phrased to actively deceive and mislead.”¹⁶ In a separate dissent, Justice Paul Anderson wrote that the legislative proposal amounted to an “inaccurate, misleading, and deceptive question on the November ballot.”¹⁷

In a related case, *Limmer v. Ritchie*,¹⁸ involving the titles of ballot proposals – the one at issue in *League of Women Voters v. Ritchie* and one proposing to ban same-sex marriage – the court’s Republican-appointed justices, including Justice Stras, allowed the Republican legislature to disregard the clear statutory authority provided to the Secretary of State, who was a Democrat. Minnesota law clearly and unambiguously required that the Secretary of State shall “provide an appropriate title for each question printed on the [constitutional amendment] ballot.”¹⁹ Nevertheless, Justice Stras and the majority ruled that the Secretary of State exceeded his authority when he provided more honest titles for these ballot proposals than those dictated by the Republican legislature. The Secretary of State had sought to change the misleading title “Photo Identification Required for Voting” to “Changes to In-Person & Absentee Voting & Voter Registration; Provisional Ballots,” and he sought to change the loaded title “Recognition of Marriage Solely Between One Man and One Woman” to “Limiting the Status of Marriage to Opposite Sex Couples.”²⁰ Fortunately the voters of Minnesota rejected both proposed constitutional amendments despite their slanted wording.

In *A.A.A. v. Minnesota Department of Human Services*,²¹ Justice Stras sided with the majority in limiting state benefits for a severely disabled 9-year-old child, who had autism, epilepsy, chronic seizures, sleep disturbances, and behavioral difficulties. Under Minnesota law, the boy was entitled to state assistance to help pay for medical care, with a multi-factor test used to determine the number of hours per day of care. In this case, an administrative law judge and the trial court judge determined that the child was entitled to 7 ½ hours of care per day. The state reduced that number to 6 ½ hours because the child was not

¹² Id. at 28.

¹³ Id. (Stras, J., dissenting).

¹⁴ 819 N.W.2d 636 (Minn. 2012).

¹⁵ Id. at 651.

¹⁶ Id. at 657 (Page, J., dissenting).

¹⁷ Id. (Anderson, J., dissenting).

¹⁸ 819 N.W.2d 622 (Minn. 2012).

¹⁹ Id. at 627.

²⁰ Id. at 625-26.

²¹ 832 N.W.2d 816 (Minn. 2013).

dependent in mobility, and Justice Stras and the majority affirmed that decision. In a stinging dissent, Justice Anderson wrote: “There has been too much parsing of the separate meaning of particular words, such that the plain meaning and overall concept of the statutory scheme has been lost. In the case before us, we must look at section 256B.0659 as a whole. When we do look at the statute as a whole, A.A.A. is entitled to the relief he seeks.”²²

Intemperate Comments about Supreme Court Justices: David Stras has publicly criticized Justice Kennedy and Justice Sotomayor, and his criticism was based on those justices’ pro-civil rights opinions with which he appears to disagree. In 2007, he wrote about *Parents Involved in Community Schools v. Seattle School District No. 1*, in which Justice Kennedy wrote a concurrence concluding that school districts had a compelling interest to pursue integrated schools but that the districts at issue failed to narrowly tailor their plans. Justice Kennedy’s concurrence has been considered the controlling opinion in all three federal courts of appeals that have considered the question,²³ yet Mr. Stras wrote: “Are we so used to the power wielded by the swing vote in our era of a deeply fragmented Supreme Court that we assume that, without more, what is said by the swing Justice is controlling in all respects? Because of the various rules at play in these cases, it has always seemed to me that the swing Justice already has too much power. As a result, I find it absolutely fascinating that we are so quick to give Justice Kennedy even more power and discretion than the Court’s rules actually require.”²⁴ A leading education law professor, Derek Black, offered this critique of Mr. Stras’s article: “Stras’ perspective is curious because it overlooks key details in the Court’s opinions and does so with a skepticism of school integration. His point appears to be to minimize the importance of Justice Kennedy’s crucial decision, rather than accept its’ [sic] import: racial diversity and integration are compelling interests and states are free to pursue them under a number of different circumstances.”²⁵

In a 2008 law review article about the judicial confirmation process, Mr. Stras wrote that President Reagan “was forced to settle for Kennedy” due to the political dynamics at the time.²⁶ Mr. Stras also stated that “according to [Reagan] Administration officials, Kennedy had been far too willing to accept novel constitutional rights beyond those that the Constitution specifically provides and to cite foreign law when it supported his views,” and he concluded: “Not surprisingly, Kennedy, like O’Connor, has drifted to the left over time, joining and coauthoring the joint opinion in *Casey* in addition to writing the majority opinion in *Lawrence v. Texas*, the Supreme Court case that struck down a Texas ban on homosexual sodomy because, according to the Court, the state law violated privacy rights.”²⁷

In a 2008 blog post that was highly critical of Justice Kennedy’s majority opinion in *Boumediene v. Bush*,²⁸ which granted habeas rights to suspected terrorists, Mr. Stras wrote: “Justice Kennedy’s discussion of the political question doctrine in the opinion is such a doctrinal mess that the Court will be forced to deal with it at some point in the future.”²⁹ Mr. Stras also cynically stated that the other justices

²² Id. 830-31 (Anderson, J., dissenting).

²³ http://lawprofessors.typepad.com/education_law/2017/09/voluntary-integration-decisions-take-center-stage-in-debate-over-eighth-circuit-judicial-nomination.html.

²⁴ <http://www.scotusblog.com/2007/07/commentary-rationally-conscious-alternatives-for-school-systems-and-the-power-of-the-swing-justice/>.

²⁵ http://lawprofessors.typepad.com/education_law/2017/09/voluntary-integration-decisions-take-center-stage-in-debate-over-eighth-circuit-judicial-nomination.html.

²⁶ Understanding the New Politics of Judicial Appointments, 86 Tex. L. Rev. 1033, 1038 (2008).

²⁷ Id. at 1038-39.

²⁸ 553 U.S. 723 (2008).

²⁹ <https://balkin.blogspot.com/2008/12/decline-of-political-question-doctrine.html>.

in the *Boumediene* majority were “willing to go along with Justice Kennedy’s analysis, despite its incoherence, in order to keep him in the majority.”³⁰

In a 2009 Federalist Society website blog post, Mr. Stras criticized Justice Sotomayor, writing that “President Obama could have done much better” and “Democrats have probably successfully framed the debate by pervasively (but not persuasively in my opinion) claiming that Judge Sotomayor is a careful, thorough judge.”³¹ Discussing her testimony before the Senate Judiciary Committee, Mr. Stras commented: “I thought her response to Senator Cornyn on *Ricci* [a case in which she followed precedent and upheld the use of affirmative action in hiring] was at best weak, and at worst misleading.”³² He also wrote: “Her answers were often uninspiring and even misleading at times, and as someone who studies the federal judiciary closely as an institution, I wondered on several occasions whether she could possibly believe what she was saying during her testimony.”³³

Right-Wing Judicial Philosophy: David Stras clerked for ultraconservative Supreme Court Justice Clarence Thomas, whom he has called a “mentor.”³⁴ In a speech to the Federalist Society, the far-right organization to which he has actively belonged since 2003, Mr. Stras said, “I really grew up with a steady diet of Justice Scalia, and I’m better for it.”³⁵ Mr. Stras has even written in praise of early twentieth century Supreme Court Justice Pierce Butler, in a law review article entitled “Pierce Butler: A Supreme Technician.”³⁶ Justice Butler was known as one of the “Four Horsemen” for striking down New Deal laws and opposing minimum wage laws, and he was one of only two justices who voted to strike down Social Security.

In his 2008 law review article about the judicial confirmation process, Mr. Stras asserted that “the [Supreme] Court’s own ventures into contentious areas of social policy – such as school integration, abortion, and homosexual rights – have raised the stakes of confirmation battles even higher.”³⁷ Suggesting that the Supreme Court “ventured” into these areas – when core constitutional rights were properly raised in court by litigants – reflects a narrow and troubling view of a federal court’s jurisdiction, and a reflexive skepticism of the ability of federal courts to establish civil and human rights that some states have attempted to limit. And in foreshadowing his own nomination by President Trump, Mr. Stras wrote: “[P]residents would not feel as much pressure to nominate candidates as close to their ideal policy points (and those of their political party) as possible if the federal courts were not as embroiled in deciding some of the most divisive social and cultural issues facing our country today.”³⁸

Justice Stras’s extreme ideology earned him a place on the Federalist Society and Heritage Foundation’s list of potential Supreme Court nominees that then-candidate Trump embraced last year. Justice Stras, age 43, was on the original list of 11 recommendations. During the 2016 presidential campaign, Mr.

³⁰ Id.

³¹ <https://fedsoc.org/commentary/publications/the-sotomayor-nomination-part-ii>.

³² Id.

³³ <https://fedsoc.org/commentary/publications/the-sotomayor-nomination-part-iii>.

³⁴ <http://www.twincities.com/2010/07/12/new-supreme-court-chief-justice-lorie-gildea-says-shell-fight-against-partisan-judicial-elections-and-for-better-court-funding/>.

³⁵ <http://www.fed-soc.org/multimedia/detail/roundtable-areas-of-constitutional-doctrine-transformed-event-audiovideo>.

³⁶ 62 Vand. L. Rev. 695 (2009).

³⁷ Understanding the New Politics of Judicial Appointments, 86 Tex. L. Rev. 1033, 1034 (2008).

³⁸ Id. at 1071-72.



Trump created unseemly litmus tests and expressly stated he would only appoint Supreme Court justices who opposed abortion rights and gun safety laws. Asked in a presidential debate if his Supreme Court appointees would vote to overturn *Roe v. Wade*, candidate Trump said: “If we put another two or perhaps three justices on, that is really what will happen. That will happen automatically in my opinion. Because I am putting pro-life justices on the court.”³⁹ In the same debate, he stated: “I’m very proud to have the endorsement of the NRA and it was the earliest endorsement they’ve ever given to anybody who ran for president.... We are going to appoint justices that will feel very strongly about the second amendment.”⁴⁰ Justice Stras presumably passed these litmus tests.

Lack of diversity: Finally, the U.S. Court of Appeals for the Eighth Circuit is the least diverse circuit court in the nation, with only one woman and one minority judge. In fact, Judge Diana Murphy, whom Justice Stras would replace, was the first female judge to serve on this court, and for 19 years, she remained the only one. There have been three vacancies on this 11-member court, and President Trump has nominated white men to fill all of them. The overall lack of diversity of Trump judicial nominees is stunning. To date, 91 percent of his nominees are white, and 81 percent are men.⁴¹ This is the least diverse slate of nominees in decades. Lack of diversity is not sufficient reason to oppose a nomination, but it is an important consideration in the quest to establish a federal judiciary that better reflects the people it serves and to instill greater confidence in this co-equal branch of government.

For the foregoing reasons, The Leadership Conference urges you to reject the nomination of David Stras to the U.S. Court of Appeals for the Eighth Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel and Legal Director, at (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO

³⁹ <http://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063>.

⁴⁰ Id.

⁴¹ https://www.washingtonpost.com/politics/whitehouse/ap-analysis-finds-little-diversity-in-trumps-judicial-picks/2017/11/14/983ece8c-c916-11e7-b506-8a10ed11ecf5_story.html?utm_term=.59248637f2e8.