



January 23, 2018

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OPPOSE THE CONFIRMATION OF MICHAEL BRENNAN TO THE U.S. COURT OF APPEALS FOR THE SEVENTH 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 Michael Brennan to the U.S. Court of Appeals for the Seventh Circuit.

Mr. Brennan's nomination is objectionable both on process and substance grounds. Now that a Republican occupies the White House, Chairman Grassley has reversed his own adherence to the century-old practice of only scheduling hearings for judicial nominees who have the support of both home-state senators. If he were following the practice he required under the previous administration, Mr. Brennan would not move forward in the confirmation process because Senator Tammy Baldwin opposes this nominee and has not returned her blue slip. Mr. Brennan has a far-right judicial philosophy that includes a disrespect for the bedrock principle of *stare decisis*. In addition, he served for six years as the chair of Wisconsin Governor Scott Walker's judicial selection committee, and he helped appoint several judicial extremists to the state supreme court. His nomination should be rejected by the United States Senate.

Blue Slip Abuse: The scheduling of a hearing for Mr. Brennan over the objection of home-state senator Tammy Baldwin is the latest example of Senator Grassley's deeply troubling disregard of Senatorial courtesy and Senate tradition.¹ Senator Baldwin has not returned her blue slip for Mr. Brennan, so he should not be granted a hearing. This is now the second time during the Trump presidency that Chairman Grassley has abused the blue slip tradition in order to help President Trump attempt to install a conservative ideologue over the objection of a Democratic senator. When he was chair of the Senate Judiciary Committee during the Obama presidency, Chairman Grassley did not grant a hearing to any nominee unless they had blue slips from both home-state senators.

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 chair of the Senate Judiciary Committee allows judicial nominees to advance without receiving the blue slips from home-state senators, no president will be compelled to listen to their advice. A recent Congressional Research

¹<https://medium.com/@civilrightsorg/top-ten-ways-grassley-is-choosing-politics-over-principle-in-judicial-confirmations-41ffe34e59bf>.

Service report identified only three judicial nominees who have been confirmed over blue slip objections.² The blue slip practice is one of the critical 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 interest 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 today, with a president who undermines the legitimacy of judges who disagree with his actions and who prioritizes loyalty to him over fealty to the law.

Chairman Grassley's decision to give a hearing to Mr. Brennan, and in November to controversial Eighth Circuit nominee David Stras – over the objection of a home-state senator – is a rejection of Senate tradition and demonstrates his troubling double standard. Here is what Chairman Grassley promised less than three 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.³

Chairman Grassley's strict observance of the blue slip tradition during the Obama presidency led to the denial of hearings and votes for 18 Obama judicial nominees.⁴ But now that President Trump is the one making judicial nominations, Chairman Grassley has abandoned his promise and a century of Senate tradition in order to jam through Trump's far-right judicial nominees. Chairman Grassley's about-face should be condemned by senators of both parties because it will strip them of their constitutional role of providing advice and consent for judicial appointments in their states from this and all future administrations. 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."⁵

Ironically, Mr. Brennan himself has written in defense of Senate deference to home-state senators in the selection of federal judges. Following Wisconsin Senator Ron Johnson's election to the Senate in November 2010, he decided not to return a blue slip on Victoria Nourse, who had been nominated by President Obama to fill the vacancy for which Mr. Brennan has now been nominated. In a 2011 op-ed entitled "Sen. Johnson only wants to have his say on Nourse nomination," Mr. Brennan and his co-authors wrote:

There are now two senators from Wisconsin from different political parties, so to exclude Johnson and those citizens who voted for him would be a purely partisan move.... Why can't

²<https://fas.org/sgp/crs/misc/R44975.pdf>.

³<https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowa-judicial-legacy/25801515/>.

⁴<https://www.acslaw.org/acsblog/10-things-you-need-to-know-about-blue-slips>.

⁵<http://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role>.

Johnson, elected by the citizens of Wisconsin, participate in the selection of a judge for a Wisconsin seat on the 7th Circuit, as Kohl did? Lady Justice is blindfolded, which represents her neutrality. Neutrality comes from applying the same procedures to all.⁶

In light of the position he took in this op-ed, it is the height of hypocrisy for Mr. Brennan to have agreed to being nominated without the support of Senator Baldwin. Senator Johnson's obstruction of this judicial vacancy during the Obama presidency is why it has become the oldest circuit court vacancy in the United States; it has been vacant since January 2010.

Rejection of the Wisconsin Tradition: Mr. Brennan's nomination is an affront not only to the Senate's constitutional advice-and-consent role as represented by the blue slip tradition, but also to the Wisconsin federal judicial selection tradition. After Mr. Brennan was nominated in August 2017, Senator Baldwin declared: "President Trump has decided to go it alone and turn his back on a Wisconsin tradition of having a bipartisan process for nominating judges. I am extremely troubled that President Trump has taken a partisan approach that disrespects our Wisconsin process."⁷

The Wisconsin tradition, which goes back for decades, requires a bipartisan commission – whose members are chosen by the two Wisconsin senators – to solicit applications and recommend finalists for judicial vacancies to the senators, who then decide which names to send to the White House for consideration. The commission's charter requires that the commission only recommend applicants who receive votes from at least five of the commission's six members.⁸ What is the purpose of the five-vote requirement? Here is an explanation from Senator Johnson in 2015: "To ensure that the senators would nominate qualified judges rather than candidates who were on either extreme, the senators each selected three commissioners and required that any candidate recommended to the senators have the support of at least five commissioners."⁹ Mr. Brennan received only four votes, thus making him ineligible for recommendation. He is just too extreme. Nonetheless, the Trump White House went forward with Mr. Brennan's nomination.

Mr. Brennan's own Senate questionnaire reveals that he was interviewed by the White House for this vacancy a month before the Wisconsin bipartisan commission even began accepting applications.¹⁰ The White House and Senator Grassley may claim there was meaningful consultation with Senator Baldwin about filling this vacancy, but that claim is belied by the timing of Mr. Brennan's White House interview.

Scott Walker Appointee: From 2011 to 2017, Mr. Brennan served as the chair of Governor Scott Walker's Judicial Selection Advisory Committee. In this position, to which he was appointed by Governor Walker, Mr. Brennan made recommendations to fill 75 state judgeships,¹¹ and the judges appointed by Governor Walker have been uniformly ultraconservative and out of the mainstream of legal thought. Two state supreme court justices, Rebecca Bradley and Daniel Kelly, made particularly offensive comments. In a 1992 newspaper column, now-Justice Bradley wrote: "One will be better off

⁶<http://archive.jsonline.com/news/opinion/126042043.html/>.

⁷<https://www.jsonline.com/story/news/politics/2017/08/04/donald-trump-appoints-gov-scott-walker-ally-federal-7th-circuit-court-appeals/539442001/>.

⁸<https://www.wisbar.org/aboutus/governmentrelations/Documents/Wisconsin%20Judicial%20Nominations%20Commission%20Charter%202017.pdf>.

⁹<https://www.ronjohnson.senate.gov/public/index.cfm/2015/5/johnson-contacts-white-house-regarding-seventh-circuit-court-of-appeals-nomination>.

¹⁰<https://www.judiciary.senate.gov/imo/media/doc/Brennan%20SJO.pdf>.

¹¹Id.

contracting AIDS than developing cancer, because those afflicted with the politically-correct disease will be getting all the funding. How sad that the lives of degenerate drug addicts and queers are valued more than the innocent victims of more prevalent ailments.”¹² She also wrote that conservative author Camille Paglia “legitimately suggested that women play a role in date rape,”¹³ and that “Feminists whined about the ‘ordeal’ perjurer Anita Hill suffered under the male-dominated Senate judiciary committee, yet they vociferously supported members Herb Kohl over Susan Engeleiter and Paul Simon over Lynn Martin.”¹⁴ The other Walker supreme court appointee, Daniel Kelly, wrote in 2014: “Affirmative action and slavery differ, obviously, in significant ways. But it’s more a question of degree than principle, for they both spring from the same taproot. Neither can exist without the foundational principle that it is acceptable to force someone into an unwanted economic relationship. Morally, and as a matter of law, they are the same.”¹⁵ Although the views of Justices Bradley and Kelly cannot be attributed directly to Mr. Brennan, as the head of Governor Walker’s judicial selection committee, it is reasonable to conclude that he was aware of the comments and did not find them disqualifying for the bench.

An article entitled “Scott Walker ties himself to the Federalist Society,” indicates that Governor Walker – much like President Trump – has outsourced the selection of judges to the far-right Federalist Society.¹⁶ The article noted that the two extreme judges appointed by Governor Walker to the state supreme court – Justices Bradley and Kelly – were past presidents of the Milwaukee Federalist Society chapter. The article also noted that Mr. Brennan was the founder of the Milwaukee Federalist Society chapter, and he served as the chapter president from 1991 to 1999 and has been an advisor since 2000. This out-of-the-mainstream legal organization represents a sliver of America’s legal profession – just 4 percent – yet over 94 percent of Trump’s circuit court nominees, and a significant number of his district court nominees, have been Federalist Society members. In the article discussing Governor Walker’s reliance on Mr. Brennan and the Federalist Society in making state judicial selections, a prominent Milwaukee attorney, Craig Mastantuono, observed: “The Federalist Society is the developmental league for the takeover of the conservative movement in the judiciary in the United States and they’ve been quite effective in getting the far right into positions of power in disproportionate numbers in the state and federal judiciaries. It’s an activist movement. It’s an organized takeover.”¹⁷

Far-Right Judicial Philosophy: Mr. Brennan believes that judges should dismiss the principle of precedent and *stare decisis* when it conflicts with their personal, ideological view of how the Constitution should be interpreted. This view is antithetical to the rule of law and the clear obligations of lower court judges. In a 2001 *National Review* op-ed, Mr. Brennan wrote: “If, after reexamination of a legal decision, a court concludes that the ruling was incorrect, *stare decisis* does not require that the rule of that case be followed. To do so would violate a judge’s oath.... *Stare decisis* does not dictate slavish adherence to poorly reasoned precedent, nor does it transform originalist interpretation of a constitutional or statutory provision into judicial activism. Bush-appointed judges cannot accurately be labeled as activists for

¹²http://host.madison.com/ct/news/local/govt-and-politics/rebecca-bradley-called-gay-people-degenerates-queers-in-college-newspaper/article_7b92ace5-d4d2-54af-a2de-54860858be47.html.

¹³http://host.madison.com/ct/news/local/govt-and-politics/rebecca-bradley-in-camille-paglia-legitimately-suggested-women-play-role/article_28cb63fe-d647-5ce3-b558-3497c8f6f418.html.

¹⁴Id.

¹⁵<https://www.dailykos.com/stories/2016/7/22/1551102/-Judge-says-affirmative-action-and-slavery-are-morally-the-same-is-appointed-to-WI-Supreme-Court>.

¹⁶http://host.madison.com/wsj/news/local/govt-and-politics/scott-walker-ties-himself-to-the-federalist-society/article_15b2e76a-5229-5ab1-b785-5e6c39087671.html.

¹⁷Id.

reexamining and following only correct precedent.”¹⁸ Mr. Brennan’s theory is at odds with the bedrock principle of stare decisis, which the Supreme Court has said “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”¹⁹

In the same article, Mr. Brennan wrote: “The oath of a federal justice or judge at 28 U.S.C. § 453 makes express that his or her duty is first to the Constitution and the laws of the United States, not to other judges’ interpretation thereof. That duty includes reexamination of precedent to ensure that the correct law is applied.”²⁰ But this statute says nothing about what a judge should do if he or she believes that the law conflicts with other judges’ interpretation of it. Rather, the statute merely sets forth the basic judicial oath of office in which a judge vows to perform all duties “under the Constitution and laws of the United States.” Mr. Brennan’s interpretation of this statute is alarming and a clear indication of judicial activism. He seems to believe that judges should only follow those precedents with which they agree, and that is a deeply troubling approach to legal analysis.

Mr. Brennan’s far-right judicial philosophy has also led him to praise Supreme Court decisions that limit Congress’s authority to help victims of domestic violence and discrimination victims. In a 2001 Federalist Society blog post, he praised Supreme Court cases that struck down portions of the Violence Against Women Act and the Americans with Disabilities Act, and he wrote that “justices and judges faced with activist legislatures are not required to roll over in the name of judicial restraint.”²¹ In his tight embrace of limited government, Mr. Brennan also opined that “Legal reasoning that could result in truncating a small part of Congress’s power is not activism. It is not second-guessing. It is a check in the balance of the separation of powers.”²² In a 2005 article entitled “Are courts becoming too activist?,” Mr. Brennan discussed examples of judicial activism by the Wisconsin Supreme Court, and all the cases he cited involved plaintiffs who prevailed in tort cases or defendants who prevailed in criminal cases.²³

Harsh Criminal Sentencing: When he served as a Milwaukee County trial court judge, from 2000-2008, Mr. Brennan presided over a case in which four young African-American men, including the son of Congresswoman Gwen Moore, were charged with vandalism for letting the air out of the tires on some vans that had been rented by the Republican Party on election day in 2004. The Milwaukee District Attorney reached a plea agreement with the defendants, who pled to a misdemeanor in return for a recommended sentence of probation. Mr. Brennan rejected the plea agreement and imposed a jail sentence of six months, which one commentator called “one of the most blatant demonstrations of racial inequality in justice in Milwaukee County.”²⁴

Mr. Brennan’s draconian approach to criminal sentencing can also be seen in his work from 1998-1999 while serving as staff counsel to the Wisconsin Criminal Penalties Committee, a position to which he was appointed by Governor Tommy Thompson. The committee rewrote Wisconsin’s criminal sentencing law, and, as explained by Mr. Brennan: “Parole was abolished” and “The act also increased penalty ranges 50

¹⁸<https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-170-1.pdf>.

¹⁹Kimble v. Marvel Enterprises, 135 S. Ct. 2401, 2409 (2005).

²⁰<https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-170-1.pdf>.

²¹<https://fedsoc.org/commentary/publications/hot-topics-judicial-activism>.

²²Id.

²³<https://www.afj.org/wp-content/uploads/2018/01/Are-Courts-Becoming-Too-Activist.pdf>.

²⁴https://afj.org/wp-content/uploads/2017/10/ZIEGLER_-WMC-ESTABLISH-NEW-LOW-IN-COURT-ETHICS.pdf.



percent for all felonies.”²⁵ At the time he worked on this Wisconsin Criminal Penalties Committee, Mr. Brennan also served as an Assistant District Attorney.

Partisan Activities: Mr. Brennan has been a Republican Party activist for many years. He has not just made political contributions, though he has certainly made his share: he has contributed over \$10,000 to Republican politicians, including a contribution of \$500 to Chairman Grassley in 2016. He has also served as a fundraiser. He acknowledged on his Senate questionnaire that he has served as a fundraiser for Ron Johnson for Senate in 2010 and 2016, and for Tommy Thompson in 2012, among others. And he served on the finance committee of the Wisconsin State Republican Party from 1992-1995 and from 1998-1999. If confirmed, Mr. Brennan would have to consider recusing himself in any case involving the Republican Party or Republican officials due to his partisan bias.

For the foregoing reasons, The Leadership Conference urges you to reject the nomination of Michael Brennan to the U.S. Court of Appeals for the Seventh 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

²⁵<https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-159.pdf>.