



January 19, 2018

United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and Committee Members:

On behalf of the hundreds of thousands of members of People For the American Way throughout the nation, we write to urge the Judiciary Committee not to hold a hearing on the nomination of Wisconsin's Michael Brennan to the Seventh Circuit Court of Appeals. We also ask Chairman Grassley to advise the White House to withdraw the nomination.

Our concerns go to the very heart of whether the Senate will remain an independent body as envisioned by the founders, implementing the separation of powers vital to maintaining our liberty. In nominating Brennan, President Trump simply ignored a longstanding bipartisan arrangement between Sens. Ron Johnson and Tammy Baldwin on recommending judicial nominees. The eight-year history of this vacancy is an indispensable backdrop to understanding why consideration of the nominee at a hearing would represent a dangerous surrender of congressional authority and senatorial influence to Donald Trump.

The details are essential, because they show the great lengths that the White House and Wisconsin's senators have gone to respect the state practice, and to respect one another. Holding a hearing for Brennan would represent a sharp break with that process and the years of bipartisan agreement associated with it. It would also represent a break from the previous chairman's willingness to put the long-term institutional interests of the Senate above partisanship.

Wisconsin has long used a selection committee to identify possible nominees based on merit and to reduce the importance of political or personal connections. During the 111<sup>th</sup> Congress, the commission recommended Victoria Nourse for the Seventh Circuit seat, and then-Sens. Herb Kohl and Russ Feingold in turn recommended her to President Obama, who nominated her in 2010. However, Nourse did not complete the confirmation process before the end of the year, and President Obama renominated her in 2011. By this time, Feingold had been replaced by Sen. Ron Johnson, who objected because he had not been adequately consulted, and who sought to create a new commission process for the state so both he and Sen. Kohl could participate.

Among Wisconsinites strongly supporting Johnson's position then was Michael Brennan, the current nominee. He wrote in a 2011 opinion piece:

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. Johnson represents millions of Wisconsin citizens, just as Sen. Herb Kohl does and as Feingold did. In the same way those senators had their say in Nourse's first nomination, Johnson should have his say.

...

[He] just wants to be heard and fulfill his constitutional duty of “advice and consent.” Why can't 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?<sup>i</sup>

Johnson and Kohl never reached an agreement on forming a new commission; Johnson continued to oppose Nourse's nomination; and Chairman Leahy—applying the same standard he had applied to George W. Bush's nominees—did not ever hold a hearing for her.

When the 113<sup>th</sup> Congress convened in 2013, Tammy Baldwin had been elected to replace Sen. Kohl. On April 17, 2013, Johnson and Baldwin announced the formation of a bipartisan commission to identify potential nominees for Wisconsin's circuit and district court vacancies.<sup>ii</sup> It was structured to have six members (three selected by each senator) to ensure equal input regardless of which party held the White House. They also agreed that it would address two existing district court vacancies before taking applications for the circuit seat. Despite the longevity of the vacancy, President Obama respected the senators' process, declining to make a nomination. It was more than a year later, in July 2014, before the commission announced it would begin its work on the circuit court vacancy.<sup>iii</sup>

Sens. Johnson and Baldwin had agreed on a charter requirement that ensured bipartisanship: Committee approval required the support of five of its six members. Eight applicants advanced to the interview stage, and two of them earned the requisite five votes. One of them—Don Schott—was subsequently nominated and had the support of both senators, advancing through the Judiciary Committee but never getting a vote on the Senate floor. Hence, the vacancy remained open when President Trump took office.

On February 13, 2017, Sens. Johnson and Baldwin renewed their commission. They announced that applications for the Seventh Circuit would become available March 15 and due April 29, and that the commission would be required to make a recommendation to both Wisconsin senators by July 13.<sup>iv</sup> After that point, Johnson and Baldwin would be able to make a joint recommendation to the White House.

However, unlike his predecessor, President Trump chose not to respect the Wisconsin senators' process. Before applications were even available, the White House had already arranged for Brennan to go to Washington to interview with administration officials. He returned home and applied to the commission, which interviewed him on June 1. On June 30, two weeks before the commission was scheduled to make its recommendation, Brennan learned from Sen. Johnson's office that the White House wanted to nominate him.<sup>v</sup> But when the commission voted on the various candidates before them, Brennan failed to get the five votes required for recommendation.<sup>vi</sup> Nevertheless, despite that lack of support, President Trump nominated him in August.

That decision was ominous for all United States senators: No matter how carefully they create a selection process, no matter how much they work to make it public and bipartisan, no matter how important it is for the senators to work together to identify highly qualified consensus nominees, Donald Trump will apparently ignore their process and pick who he wants. This goes even farther than not meaningfully consulting with home state senators; this is actively sabotaging them and bipartisan cooperation.

But this attempted power grab at the expense of every U.S. senator is not a *fait accompli*. It will succeed only if the Senate allows it to.

Chairman Grassley should decline to hold a hearing for Michael Brennan unless both Johnson and Baldwin consent to it. Grassley should not help the president undermine the Senate and its members. Our democracy and liberty rely on each of the three branches of government jealously protecting their prerogatives from the other two. Congressional independence is particularly important here, since it involves the makeup of the third branch of government.

We urge committee members to remember that their oaths as senators are to the Constitution, not to the president.

Sincerely,



Marge Baker  
Executive Vice President for Policy and Program

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<sup>i</sup> “Sen. Johnson only wants to have his say on Nourse nomination,” Milwaukee Journal Sentinel, July 23, 2011, <http://archive.jsonline.com/news/opinion/126042043.html>.

<sup>ii</sup> <https://www.baldwin.senate.gov/press-releases/wisconsin-senators-announce-agreement-on-wisconsin-judicial-commission-to-move-federal-nominations-forward>

<sup>iii</sup> <http://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=11704>

<sup>iv</sup> <https://www.baldwin.senate.gov/press-releases/wisconsin-federal-nominating-commission>

<sup>v</sup> Michael Brennan Senate Questionnaire, <https://www.judiciary.senate.gov/download/brennan-sjq>, page 51. Brennan’s Washington DC interviews were on March 15.

<sup>vi</sup> “Baldwin: Trump ignored bipartisan panel by nominating Gov. Scott Walker ally to 7<sup>th</sup> Circuit Court of Appeals,” Milwaukee Journal Sentinel, Aug. 4, 2017, <https://www.jsonline.com/story/news/politics/2017/08/04/donald-trump-appoints-gov-scott-walker-ally-federal-7th-circuit-court-appeals/539442001>.