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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
JENNIFER DUCK, *Democratic Chief Counsel and Staff Director*

October 18, 2018

The Honorable Patty Murray
United States Senator
154 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Maria Cantwell
United States Senator
511 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Murray and Cantwell:

The President has nominated Eric Miller for a Washington-based seat on the United States Court of Appeals for the Ninth Circuit. After the nomination was referred to the Senate Judiciary Committee on July 19, 2018, my office issued you blue slips asking for your opinion on Mr. Miller. I have not yet received your blue slips.

Mr. Miller appears to be a highly qualified and well-regarded nominee. He is currently a partner at Perkins Coie in Seattle. He served in the U.S. Department of Justice from 2007 to 2012 as an Assistant to the U.S. Solicitor General. He clerked for Justice Clarence Thomas of the U.S. Supreme Court and Judge Laurence Silberman of the U.S. Court of Appeals for the District of Columbia.

I understand that both of you oppose Mr. Miller's nomination, but you have not expressed any substantive reasons for your opposition. You also did not express any reasons for your opposition during the White House's consultation regarding this vacancy.

It is my understanding that the White House staff engaged in extensive consultation with you prior to announcing the nomination of Mr. Miller. In fact, you and the White House had reached an agreement for Mr. Miller's nomination to the Ninth Circuit, which included the nomination of two of your preferred district court candidates. But after Mr. Miller's candidacy was announced, Senator Murray's staff called the White House to claim there was no agreement.

After hearing your concerns, I instructed my staff to discuss the nomination process with the White House Counsel's Office. It is my understanding that the White House staff attempted to begin the consultation process about the Ninth Circuit on October 5, 2017, but discussions about the Washington district court seats began a few months earlier. On April 12, 2017, former White House Counsel Don McGahn spoke to Senator Murray about the need to fill the three Western

District of Washington vacancies. Over the months that followed, the White House considered the records of dozens of Washington state attorneys, and interviewed about fifteen candidates.

On August 15, 2017, Judge Richard A. Tallman of the U.S. Court of Appeals for the Ninth Circuit sent the President a letter announcing his intent to take senior status on March 3, 2018. On August 23, 2017, the White House staff forwarded to Senator Murray's staff the names and resumes of six candidates, to seek input and advice from Senators Murray and Cantwell. On October 5, 2017, after a subsequent conversation, White House staff sent Senator Murray's staff a follow-up email, including the resumes previously forwarded on August 23, 2017. That email included the resumes of three candidates for the Ninth Circuit seat vacated by Judge Tallman's retirement. In that email, the White House staff reminded Senator Murray's staff that the President needed to receive advice on all of these candidates by December 1, 2017, because of their need to make recommendations to the President by the end of the year.

On November 13, 2017, the White House staff met with Senator Murray's staff to discuss these vacancies. During this meeting, the White House staff learned that despite the passage of nearly three months, none of their recommended district court candidates had been interviewed, nor had any other action been taken to fill the three Western District of Washington vacancies. Senator Murray's staff indicated that she and Senator Cantwell wished to support the five candidates produced from the commission convened during President Obama's administration. The White House staff reminded her staff that the administrations had changed and these nominees would not be acceptable. On the Ninth Circuit vacancy, Senator Murray's staff asked White House staff for a list of published writings from the three candidates for the Ninth Circuit seat. Senator Murray's staff indicated that a review of these lists could be done within a week. On November 15, 2017, White House staff promptly provided Senator Murray's staff with the three lists responsive to that request. The next day, Senator Murray's staff acknowledged receipt of the lists.

On December 7, 2017, Mr. McGahn called Senator Murray. Senator Murray proposed that she would support Mr. Miller and one of the White House's preferred district court candidates if the White House would support two of the five district court candidates preferred by the senators. Mr. McGahn tentatively accepted the agreement and asked Senator Murray to proceed to interview the seven White House candidates for the third district court spot. Senator Murray said she would coordinate with Senator Cantwell regarding this agreement, and Mr. McGahn informed Senator Murray that he would set up a call with Senator Cantwell to confirm.

On December 13, 2017, Mr. McGahn had a phone call with Senator Cantwell. After Mr. McGahn relayed the terms of the agreement that Senator Murray had proposed, Senator Cantwell reiterated that she remained committed to the district court candidates from the Obama-era commission. She also said she needed more time to review the White House's recommended candidates. Mr. McGahn asked her to connect with Senator Murray about the terms of the agreement, and asked that she complete her review and interview the candidates promptly.

On January 4, 2018, the White House staff reached out to your staffs, asking they advise the White House of their thoughts and whether a phone call or meeting was necessary. Your staffs did not respond. Twice more in January—on January 16 and January 29—the White House staff sent Senator Murray's staff emails to touch base. Both times there was no response received.

On February 1, 2018, the White House staff sent Senator Murray's staff a follow up e-mail, but again received no response. On February 7, 2018, the White House staff sent your staffs an e-mail memorializing the December 7 agreement proposed by Senator Murray. The email asked to be notified when the two district court nominees had been congratulated, and for an update on the status of interviews for the third district court seat. Senator Murray's staff called the White House staff later that day and asked for an in-person meeting on February 9, 2018, to review the agreement.

On February 9, 2018, the White House staff met with Senator Murray's staff to discuss the agreement. Senator Murray's staff confirmed that pending final approval from both Senators, the agreement would be Mr. Miller for the Ninth Circuit, Tessa Gorman and Kathleen O'Sullivan for two of the three existing district court seats, and that the senators would fill the third district court seat with someone from the White House's list. The White House had suggested seven names, but Senator Murray's staff said if the White House were willing to reduce that list, the process would move faster. Senator Murray's staff assured the White House that both Senators would provide final sign-off no later than Friday, February 16. The White House agreed to send a final list of three White House-backed district court names that same day.

On February 16, 2018, White House staff emailed Senator Murray's staff seeking confirmation that they could proceed to put the Ninth Circuit candidate and two Senator-recommended district court candidates in background. But no response was received. On February 20, 2018, White House staff emailed Senator Murray's staff, asking for follow-up on the promised final sign-off from the senators. Later that day, Senator Murray's staff responded with an apology and explained "a few more days" were needed for final approval. On February 23, 2018, the White House staff sent Senator Murray's staff another follow-up email, with no response. On February 26, 2018, White House staff called and sent email to Senator Murray's staff, but again received no response.

Two months passed. On April 26, 2018, Mr. McGahn called Senator Murray. Senator Murray agreed to let the White House put Mr. Miller, along with Ms. O'Sullivan and Ms. Gorman, into background investigation. She said that her commission had just been assembled and wished to consider Mr. Miller and an additional candidate for the Ninth Circuit—despite the earlier agreement—and the three White House recommendations for the third district court seat. Mr. McGahn said he would check back with Senator Murray in a month on her commission's results.

On July 11, 2018, Mr. McGahn called Senator Murray. Mr. McGahn told Senator Murray that Mr. Miller was ready to be nominated for the Ninth Circuit and, as a sign of good faith, the White House would go ahead and nominate Ms. O'Sullivan and Ms. Gorman for the two district courts although the White House-backed district court nominee had not yet been chosen. He was told that the senators' commission was unlikely to issue recommendations on the third seat until Labor Day, but would send the White House six candidates at that time. On July 11 and 12, 2018, White House staff corresponded with Senator Murray's staff, offering to answer any questions about the agreement and asking to be informed once Senator Cantwell had signed off.

Senator Murray's staff informed the White House on July 12 that the senators had agreed to the agreement. After receiving confirmation that both senators had signed off on the agreement, the White House waited until the next day to make an announcement.

On July 13, 2018, the White House announced its intent to nominate Mr. Miller to the Ninth Circuit and the Washington senators' preferred candidates to the district court. Afterwards, Senator Murray's staff called White House staff expressing unhappiness that Mr. Miller's nomination had been announced. Senator Murray's staff claimed that no agreement had been agreed to with regards to Mr. Miller, only with regard to the district court nominees. On July 18, 2018, Senator Murray called Mr. McGahn and insisted. According to the *Seattle Times*, Senator Cantwell "did not and does not consent to Eric Miller's nomination," but did not elaborate on any reasons for her opposition.

On July 18, 2018, Mr. McGahn spoke with Senator Murray to better understand the source of the miscommunication. Senator Murray first said that Mr. McGahn had never referred to an "Eric Miller" or the Ninth Circuit vacancy. Mr. McGahn told Senator Murray that he specifically remembered saying that the White House was ready to announce Mr. Miller's nomination to the Ninth Circuit, and he had spoken from a prepared script which included the exact line. Senator Murray then remembered that Mr. McGahn had mentioned an "Eric Miller," but said that Mr. McGahn had not indicated the White House's intention to nominate him. Mr. McGahn again corrected her. Senator Murray said that she had not understood the conversation that way, and the two agreed to disagree.

My preliminary conclusion is that the White House staff attempted to engage in meaningful consultation with you but that their engagement was not reciprocated. The White House staff sought your input on three potential nominees to the Ninth Circuit starting in October 2017. At no point prior to Mr. Miller's nomination on July 13, 2018 did either Senator Murray or Senator Cantwell express opposition to the nomination. In fact, Senator Murray's staff indicated to White House staff on July 12 that both Senators Murray and Cantwell approved of Mr. Miller's nomination.

Moreover, the White House staff waited several months while your judicial selection committee considered another Ninth Circuit candidate. I do not believe that the President is required to choose a circuit-court nominee approved by a state's judicial selection committee, but the White House staff's actions demonstrate respect for the Senate's consultative role in the nomination process.

You have not provided any reasons for opposing Mr. Miller. As I explained to the full Senate last year, the blue-slip courtesy exists for a specific purpose: to ensure the White House consults with home-state senators before nominating an individual to the bench. I explained that negative or unreturned blue slips will not preclude a hearing for a circuit nominee unless the White House failed to consult with home-state senators regarding the nomination. This is consistent with the policies of all but two of the previous eighteen Judiciary Committee Chairmen.

I also emphasized that I will not allow senators to abuse the blue-slip courtesy by withholding the blue slip for political or ideological reasons. This is particularly important for circuit-court nominees, who are nominated to regional courts that affect several states, not just the home-state senators' states. While the blue slip does not authorize a senator to unilaterally veto a nomination, neither is it necessarily an indication as to whether the senator will ultimately support the nominee on the Senate floor. Rather, it is an acknowledgement that the nominee should have a hearing before the Committee. It is a President's prerogative to select his preferred judicial nominees for the Senate to consider. And it is your prerogative to vote against the nominee on the Senate floor.

if you do not think the nominee is qualified. But there are 98 other senators who also should have the opportunity to vote on this judicial nominee.

Based on this set of facts, I believe that the White House engaged in meaningful consultation with you regarding the Ninth Circuit vacancy in Washington. During the months-long consultation process, neither Senator Murray nor Senator Cantwell expressed opposition to Mr. Miller. Indeed, Senator Murray's staff indicated that both senators approved of the nomination. If you opposed the nomination, you did not communicate that fact to the White House until after the nomination was made, more than months after consultation began.

If you have additional pertinent information for me to consider, please disclose it to me by close of business on October 22. If you do not, I ask that you return your blue slips for Mr. Miller.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is written in a cursive, flowing style.

Charles E. Grassley

Chairman