

July 14, 2011

The Honorable Patrick Leahy, Chairman
The Honorable Chuck Grassley, Ranking Member
United States Senate Judiciary Committee
224 Dirksen Building
Washington, D.C. 20510

Dear Chairman Leahy & Ranking Member Grassley:

We urge you to hold a Senate Judiciary Committee hearing and seek a prompt vote for Seventh Circuit nominee Victoria F. Nourse. Professor Nourse is the Burrus-Bascom Professor of Law at the University of Wisconsin Law School and a resident of Shorewood, Wisconsin. President Obama nominated her after a rigorous merit selection process. The Wisconsin nominating commission, with the blessing of both of Wisconsin's United States Senators at the time, chose Professor Nourse, among a select list, as qualified to fill this important judicial vacancy.

On July 14, 2010, President Obama nominated Professor Nourse to fill a seat on the Seventh Circuit that Judge Terence Evans had vacated in July 2009, at which time all procedural requirements for her nomination were met. Since her nomination, there has been no public opposition to her nomination. Yet, almost two years since the seat became vacant, and eighteen months since the Wisconsin nominating commission recommended her for the announced vacancy, Professor Nourse has yet to receive a hearing or a vote. *Purely as a matter of process, this delay raises serious questions about whether the Senate is fulfilling its constitutional role to provide the President's nominees with a prompt hearing and full Senate vote.*

Professor Nourse's excellent credentials are a matter of public record. She is a chaired professor at a distinguished public law school, and has held visiting appointments at the nation's top private law schools. Before joining the academy, she served her country in both the legislative and executive branches, working for both Republicans and Democrats. She has argued appeals for the Justice Department under Attorneys General Meese and Thornburgh and advised the Senate Judiciary Committee on major legislation, including the 1993 Biden-Hatch crime bill. She has received the rating of "unanimously well qualified," the American Bar Association's highest grade for judicial nominees.

A nominee of sterling credentials, who has served her country under Republicans and Democrats, who was approved by a state merit commission, and praised by the A.B.A., should not be subject to unending delay. For a single Senator from one state within the Circuit to assert a hold, months after the nomination was complete, undermines Wisconsin's merit-based selection system, blocking highly qualified nominees from a hearing and a vote. This hold is being justified under the Senatorial convention known as a "blue slip." In this case, there

has been no substantive reason asserted for the blue slip based on the nominee's qualifications. A hold without reason is an arbitrary Senatorial process, for any nominee of any party. It allows one Senator the ability to bar a hearing and a vote on a nominee with broad based support. The effect is an unbreakable *one-person-filibuster*. The rights of a Senatorial minority are not at issue (even if the objection were withdrawn, filibuster by a minority of Senators remains a procedural possibility); the only question is the right of a single Senator to retroactively assert this privilege to block a highly qualified nominee from even a hearing.

Wisconsin's new Senator was sworn in months after Professor Nourse's nomination was complete and blue slips filed in July of 2010. No hearing was held because the Judiciary Committee stopped any hearings prior to the mid-term elections. Months later, the newly-elected Senator asserted a hold for no reason associated with the nominee's merit, but because the White House had not consulted him. It is our understanding that the White House has in fact consulted with the new Senator, although typically new Senators have no power to countermand completed presidential nominations. It is also our understanding that, for months, Senator Kohl, the senior Senator from Wisconsin, has attempted to compromise the matter by creating a new Wisconsin merit selection commission but that negotiations have yielded no new commission. Even if such a commission had the unusual power to reverse the President's choice of a nominee, to create such a commission now would mean that its recommendations and ensuing negotiations between the Wisconsin Senators might not be completed until *after* the Senate Judiciary Committee shuts down hearings next summer in anticipation of the 2012 Presidential election. In that case, no further action on this vacant seat may occur until the induction of new Senators in January of 2013. Given the excellent credentials and bipartisan government service of this nominee, one must ask whether delay is the inevitable end of a new government commission and post-nomination review.

The procedural process accorded this nomination reflects a serious threat to a fair and viable nomination process for all nominees. Professor Nourse deserves prompt consideration by the Senate.

Sincerely
The Undersigned

Professor Bruce Ackerman, Yale Law School
(Sterling Professor of Law and Political Science)

Professor Akhil Amar, Yale Law School
(Sterling Professor of Law)

Professor Randy Barnett, Georgetown University Law Center
(Carmack Waterhouse Professor of Legal Theory)¹

Professor David Bernstein, George Mason Law School
(Foundation Professor of Law)

¹ Author of legal arguments challenging the Obama health care law.

Professor Philip Bobbitt, Columbia University School of Law
(Herbert Wechsler Professor of Federal Jurisprudence)
(State Department advisor, Pres. George H.W. Bush)
(National Security Council, Director for Intelligence, Pres. Bill Clinton)

Professor Richard Briffault, Columbia University School of Law
(Joseph P. Chamberlain Professor of Legislation)

Professor Jesse Choper, University of California (Boalt Hall)
(Earl Warren Professor of Public Law)
(former Dean, University of California (Boalt Hall))

Professor Amy Chua, Yale Law School
(John M. Duff, Jr. Professor of Law)

Professor Larry Church, University of Wisconsin School of Law
(Volkman-Bascom Distinguished Teaching Professor)

Professor Kenneth Davis, University of Wisconsin School of Law²
(former Fred W. & Vi Miller Deanship)
(former chair, 2009-10 Wisconsin Federal Nomination Commission)

Professor Kenneth G. Dau-Schmidt, Indiana University Maurer School of Law
(Willard & Margaret Carr Professor)

Professor Brannon Denning, Cumberland School of Law, Samford University
(Professor of Law)

Professor William Eskridge, Yale Law School
(John A. Garver Professor of Jurisprudence)
(former Deputy Dean, Yale Law School)

Professor John Ferejohn, New York University School of Law
(The Samuel Tilden Professor of Law)
(former Professor of Political Science, Stanford University, Senior Research Fellow, Hoover Institution)

Professor Janine P. Geske, Marquette University School of Law
(Distinguished Professor of Law)
(former Justice, Wisconsin Supreme Court)

² On July 1, 2011, Dean Davis of the University of Wisconsin School of Law was succeeded by Dean Margaret Raymond. The Dean of the Marquette School of Law recused himself from proceedings regarding this nomination because his wife competed for the position during the merit selection phase.

Professor Michele Goodwin, University of Minnesota School of Law
(*Everett Fraser Professor of Law*)

Professor William D. Henderson, Indiana University Maurer School of Law
(*Professor of Law & Val Nolan Faculty Fellow*)

Professor Dan M. Kahan, Yale Law School
(*Elizabeth K. Dollard Professor of Law*)
(*former Prof., University of Chicago Law*)

Professor Michael Kang, Emory University School of Law
(*Professor of Law*)

Professor Herma Hill Kay, University of California (Boalt Hall)
(*Barbara Nachtrieb Armstrong Professor of Law*)
(*former Dean, University of California (Boalt Hall)*)

Professor Neil Komesar, University of Wisconsin School of Law
(*Miller Professor of Law Emeritus*)
(*PhD, economics, University of Chicago*)

Dean Larry Kramer, Stanford Law School
(*Richard E. Lang Professor of Law*)
(*former Professor, University of Chicago Law School*)

Dean Harold J. Krent, Chicago-Kent College of Law
(*Dean & Professor of Law*)

Professor Gary Lawson, Boston University School of Law
(*Professor of Law, Abraham & Lillian Benton Scholar*)
(*founding member, Federalist Society*)

Professor Gerard N. Magliocca, Indiana University School of Law Indianapolis
(*Professor of Law & Grimes Fellow*)

Professor M. Elizabeth Magill, University of Virginia School of Law
(*Joseph Weintraub - Bank of America Distinguished Professor of Law*)

Professor Mathew D. McCubbins, University of Southern California School of Business & Law
(*Provost Professor of Business, Law & Political Economy*)

Professor John O. McGinnis, Northwestern University School of Law
(*George C. Dix Professor of Constitutional Law*)
(*former Deputy Ass't AG, Office of Legal Counsel, Pres. Reagan & Pres. George H.W. Bush*)

- Professor Tracey L. Meares, Yale Law School
(Walton Hale Hamilton Professor of Law)
(former Deputy Dean, Yale Law School)
(former Professor, University of Chicago Law School)
- Professor Thomas Merrill, Columbia University School of Law
(former Deputy Solicitor General, Pres. George H. W. Bush)
- Professor Michael M. O’Hear, Marquette University School of Law
(Professor of Law)
- Professor Chad Oldfather, Marquette University School of Law
(Associate Professor of Law)
- Professor Richard Painter, University of Minnesota School of Law
(S. Walter Richey Professor of Corporate Law)
(former Associate White House Counsel, Pres. George W. Bush)
- Professor Polly Price, Emory University School of Law
(Professor of Law)
- Dean Robert K. Rasmussen, University of Southern California Law Center
(Carl M. Franklin Chair in Law and Professor of Law & Pol. Science)
(former Professor, Vanderbilt University School of Law)
- Professor Judith Resnik, Yale Law School
(Arthur Liman Professor of Law)
- Professor Daniel B. Rodriguez, University of Texas School of Law
(Minerva House Drysdale Regents Chair in Law)
(former Dean, University of California, San Diego School of Law)
- Professor Peter K. Rofes, Marquette University School of Law
(Professor of Law)
- Professor Edward L. Rubin, Vanderbilt University School of Law
(University Professor of Law & Political Science)
(former Dean, Vanderbilt University School of Law)
(former Professor, University of Pennsylvania Law School)
- Professor Charles A. Shanor, Emory University School of Law
(Professor of Law)
(former General Counsel U.S. EEOC, Pres. Ronald Reagan)
- Professor Stephen A. Siegel, DePaul University College of Law
(Distinguished Research Professor of Law)

Professor Gregory Shaffer, University of Minnesota School of Law
(*Melvin C. Steen Professor of Law*)

Professor Suzanna Sherry, Vanderbilt University School of Law
(*Herman O. Loewenstein Professor of Law*)

Associate Dean Gordon Smith, J. Reuben Clark Law School, Brigham Young University
(*Glen L. Farr Professor of Law*)

Professor Brad M. Snyder, University of Wisconsin School of Law
(*Assistant Professor of Law*)

Professor Peter Strauss, Columbia University School of Law
(*Betts Professor of Law*)
(*former Counsel to the U.S. Nuclear Regulatory Comm'n under Pres. Gerald Ford & Pres. Jimmy Carter*)

Dean William Treanor, Georgetown University Law Center
(*Executive Vice President and Dean, Georgetown Law Center*)
(*former Dean, Fordham University Law School*)

Professor Frank Tuerkheimer, University of Wisconsin School of Law
(*Professor of Law Emeritus*)
(*former U.S. Attorney for the Western District of Wisconsin*)

Associate Dean Robin West, Georgetown University Law Center
(*Frederick J. Haas Professor of Law & Philosophy*)

Professor G. Edward White, University of Virginia School of Law
(*David & Mary Harrison Distinguished Professor of Law*)

Professor Jason Yackee, University of Wisconsin Law School
(*Assistant Professor of Law*)
(*Faculty Advisor, Student Federalist Society*)

cc: *Senators Ron Johnson & Herb Kohl*