

August 31, 2017

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

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

We, the 14 undersigned national organizations, write to express our strong opposition to the nomination of Justice David Stras to serve on the U.S. Court of Appeals for the Eighth Circuit.

Our deep concerns begin with the White House's lack of meaningful consultation with the home-state Senators regarding this nomination. Indeed, especially because both Senators Klobuchar and Franken serve on the Judiciary Committee, this disrespect should trouble each of you as well, as the traditional practice has been to grant Judiciary Committee Members even greater input and participation in the process—especially with respect to circuit court vacancies. For example:

- In 2013, when a Utah-based vacancy arose on the U.S. Court of Appeals for the Tenth Circuit, President Obama actually deferred to the recommendation of Judiciary Committee Members Hatch and Lee. The record shows that Judge Carolyn McHugh (then a Utah Court of Appeals Judge, appointed by Republican Governor Jon Huntsman) interviewed with Senators Hatch and Lee in January 2013 and was notified by Senator Hatch that she would be recommended to the White House for consideration. She did not have her first contact with the White House until a week later.¹
- In October 2012, the Obama administration reached out to then-U.S. District Court Judge Gregg Costa to discuss a Texas-based seat on the U.S. Court of Appeals for the Fifth Circuit.² Senators Cornyn and Hutchison had recommended Judge Costa to the White House for the district court, and he was confirmed by a vote of 97-2. Despite this previous recommendation and the overwhelming support from the entire Senate, the Obama administration nevertheless consulted with Senators Cornyn and Cruz for more than a year before President Obama nominated Judge Costa in December 2013. This included providing an opportunity for Judge Costa to meet with the Senators' Federal Judiciary Evaluation Committee and to interview with the Senators and their staff, which—tellingly—occurred three days prior to nomination.
- In 2010, then-U.S. District Judge Henry Floyd (appointed by President George W. Bush) had “at least three conversations with United States Senator Lindsey Graham” before President Obama nominated him to a South Carolina-based seat on the U.S. Court of Appeals for the Fourth Circuit.³

¹ <https://www.judiciary.senate.gov/imo/media/doc/Carolyn-McHugh-Senate-Questionnaire-Final.pdf>, page 63

² <https://www.judiciary.senate.gov/imo/media/doc/Gregg-Costa-Senate-Questionnaire-Final.pdf>, page 50

³ <https://www.congress.gov/112/chrg/shrg75307/CHRG-112shrg75307.pdf>, page 68

Because the Obama administration followed the tradition of extensively consulting home-state members of this Committee prior to circuit court nomination, eight of his circuit court judges with Republican home-state Senators on this Committee were confirmed easily—six with unanimous floor votes and two by voice vote.

Unfortunately, with the Stras nomination, the Trump administration “made clear its intention to nominate Justice Stras from the outset.”⁴ Justice Stras’ Senate Judiciary Questionnaire confirms that he did not have any contact with Senators Klobuchar or Franken prior to nomination (but he did manage to meet separately with three U.S. Representatives—who obviously do not have any constitutional role in considering his nomination).⁵ The Trump administration even refused to discuss the process or additional potential candidates with Senator Franken.⁶

The Trump administration’s refusal to more meaningfully engage the Minnesota Senators prior to nomination is even more offensive because the Senators had publicly convened a bipartisan committee last fall to assist them in evaluating Minnesotans interested in serving as life-tenured federal judges.⁷ The process with this vacancy should have included consideration by that committee, in addition to interviews with the Senators and their staff, prior to nomination—the same process the Obama administration afforded to the Texas Senators.

During the Obama administration, some Senators opposed—and outright blocked—judicial nominations solely over their objections regarding the process, despite a record that suggests months or even years of consultation. For example:

- President Obama nominated Kentucky Supreme Court Justice Lisabeth Tabor Hughes (appointed by Republican Governor Ernie Fletcher) to serve on the U.S. Court of Appeals for the Sixth Circuit, after waiting more than two years.⁸ Senator McConnell blocked the nomination by refusing to return his blue slip because the White House did not accept his preferred recommendation for this vacancy—and he did not comment on Justice Hughes’ record at all.⁹
- President Obama nominated former Indiana Supreme Court Justice Myra Selby to serve on the U.S. Court of Appeals for the Seventh Circuit after waiting 17 months.¹⁰ Senator Coats blocked the nomination by refusing to return his blue slip because he wanted Justice Selby’s nomination to be considered by an Indiana Federal Nomination Commission—which he never established, even though he had publicly called for one seven months prior to Selby’s nomination.¹¹ Senator Coats did not comment on Justice Selby’s record at all.

⁴ <http://www.politico.com/story/2017/08/11/senate-judges-democrats-trump-241448>

⁵ https://www.judiciary.senate.gov/imo/media/doc/Stras_SJO.pdf, page 68

⁶ <http://www.twincities.com/2017/08/24/franken-klobuchar-deny-blocking-trumps-federal-nomination/>

⁷ <https://www.klobuchar.senate.gov/public/2016/10/klobuchar-franken-announce-judicial-selection-committee-for-vacancies-on-federal-district-court>

⁸ <https://www.judiciary.senate.gov/imo/media/doc/Hughes%20Senate%20Questionnaire.pdf>, page 70

⁹ www.courier-journal.com/story/news/politics/2016/03/18/mcconnell-says-he-kill-6th-circuit-nomination/81971446/

¹⁰ <https://www.judiciary.senate.gov/imo/media/doc/Selby%20Senate%20Questionnaire%20Final.pdf>, page 70

¹¹ <http://wyrz.org/coats-responds-to-presidents-nominations-for-indiana-judicial-vacancies/>

- President Obama nominated U.S. District Judge Abdul Kallon to serve on the U.S. Court of Appeals for the Eleventh Circuit after waiting more than two years.¹² Senators Shelby and Sessions had recommended Judge Kallon for the district court, but they nevertheless blocked his circuit court nomination—without commenting on his record—because they did not feel the White House had negotiated “in good faith.”¹³

Simply put, the Trump administration should have more meaningfully consulted Senators Franken and Klobuchar—especially since both serve on the Judiciary Committee—and because it did not, there is ample precedent to oppose the Stras nomination. But our opposition also goes beyond the process and into Justice Stras’ record. Indeed, because of his record, we are confident that a truly consultative process never could have produced his nomination.

Judges should be fair-minded and respect the values of equality and justice for all. They should understand how the law impacts real people and works to protect all Americans—not just the wealthy and the powerful. Justice Stras’ record lacks this understanding, and his decisions can be narrow-minded, especially when he is the minority and dissenting from the Minnesota Supreme Court’s majority opinions.

- For example, in *State v. Obeta*, 796 N.W.2d 282 (Minn. 2011), a victim reported being raped, but the defendant claimed the sex was consensual, and the victim waited approximately two to three hours after the alleged assault to report it, with no evidence of serious injuries. Prosecutors tried to present expert testimony from a local director of the Victims Services Program and a professor of psychology at the University of Minnesota, regarding typical behaviors of victims during and after a sexual assault, but the trial court refused to allow it, in part because of Minnesota case law. *Id.* at 284-5.

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, lack of physical injuries, and submissive conduct by the victim. *Id.* at 294.

According to the Court:

“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.” *Id.* at 293

The Court further determined that at the time, only two states—Minnesota and Pennsylvania—categorically prohibited expert testimony regarding typical

¹² <https://www.judiciary.senate.gov/imo/media/doc/Kallon%20Senate%20Questionnaire%20Final.pdf>, page 57

¹³ <http://www.montgomeryadvertiser.com/story/news/2016/02/11/obama-appoints-judge-abdul-kallon-11th-circuit/80253358/>

counterintuitive behaviors by adult victims of sexual assault and that such testimony “may be helpful to the jury in evaluating the evidence in a particular case.” *Id.* at 293-4.

As the headline in the Star Tribune explained: “Decision could ease way to rape conviction; Minnesota Supreme Court allows experts to explain confusing behavior by some victims.”¹⁴

Justice Stras wrote the dissent in this case. Although he acknowledged that the issue is “of great importance for sexual assault prosecutions in Minnesota,” he determined that he would dismiss the case for lack of jurisdiction. *Id.* His far more narrow view of the court’s jurisdiction—rejected by the majority—would have had a significant impact on real people—not only the victim in this case, but victims in all sexual assault cases in Minnesota where the defendant claims the sexual conduct was consensual.

- In *Sleiter v. Am. Family Mut. Ins. Co.*, 868 N.W.2d 21 (Minn. 2015), Cody Sleiter was one of the children injured in a school bus accident that killed four people and injured 17 when a driver ran a stop sign and struck the bus.¹⁵ He suffered extensive damage to his right leg, hip, and lower back, which totaled \$140,000. The damages for all of the victims was \$5.3 million, but the liability limit for the at-fault vehicle and the school bus was less than \$1.1 million, so Sleiter received a pro-rated share of the insurance proceeds: only \$36,144. American Family insured Sleiter’s family for up to \$100,000 in excess uninsured motorist (UIM) 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 Sleiter’s claim, was “unreasonable in the context of accidents involving multiple injured passengers” and “leaves victims insufficiently compensated for their injuries and unable to access the coverage limits they purchased.” *Id.* at 28. Instead, it sided with Sleiter’s interpretation of the law, which gives individuals “nothing more than access to the coverage that they have selected and purchased.” *Id.*

Justice Stras was the lone dissent, clinging to what he claimed was the “plain and unambiguous language” of the statute, (*Id.*) even though the majority clearly found that the statute was ambiguous. While Justice Stras acknowledged that the facts of the case are “tragic” and that “there is no question” that Sleiter’s family did not receive the insurance benefits they expected from their policy, (*Id.*) his narrowly-focused judicial philosophy left no room in this case for understanding how the law impacts real people, and therefore, unlike the majority, he could not properly analyze the legislature’s intent.

¹⁴ <http://www.startribune.com/decision-could-ease-way-to-rape-conviction/118625969/>

¹⁵ <http://blogs.mprnews.org/newscut/2015/08/seven-years-after-horrific-bus-crash-a-victory-for-a-student/>

- In *Peterson v. Minnesota*, 2017 Minn. LEXIS 195 (Minn. April 12, 2017), Scott Peterson, a 24-year police officer for the City of Minneapolis, was transferred from his position with the Violent Offender Task Force to another unit. Peterson was 54 years old and argued that he was 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, determining that it was not the result of age discrimination. When 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. 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 under this chapter.”

In a 5-2 opinion, the Minnesota Supreme Court found that the City’s Workplace Policy, as “a formal process with the capacity to resolve 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 Peterson and the law’s one-year limitation.

Justice Stras joined the dissent, which offered a narrower, more cramped definition of “dispute resolution process” that would have prevented Peterson from presenting his case to a jury. This approach also may have discouraged workers from seeking protection from discrimination through formal internal processes, such as the City’s Workplace Policy, that might take longer to resolve.

While a judge’s dissents can be particularly revealing, we also are concerned by opinions in which Justice Stras was in the majority and will focus on two cases that were partisan in nature: *League of Women Voters v. Ritchie*, 819 N.W.2d 636 (Minn. 2012), and *Limmer v. Ritchie*, 819 N.W.2d 622 (Minn. 2012).

- In *League of Women Voters*, the Court’s Republican-appointed Justices, including Justice Stras, sided with the Republican legislature regarding the description of the question posed in a ballot proposal to amend the Minnesota Constitution to require a government-issued photo identification to vote in person, with substantially-equivalent verification provisions for those voting absentee, and to establish a provisional-voting system. 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 it did describe. These Justices 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.” *Id.* at 651. Nevertheless, they allowed the ballot question to proceed uncorrected, in what Justice Alan Page called “a classic bait and switch,” (*Id.*) “phrased to actively deceive and mislead.” *Id.* at 657

- In *Limmer*, a case involving the titles of ballot proposals—the one at issue in *League of Women Voters* and one proposing to ban same-sex marriage—the Court’s Republican-appointed Justices, including Justice Stras, allowed the Republican legislature to usurp 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...ballot.” *Id.* at 622. Nevertheless, these Justices ruled that the Secretary of State exceeded his authority when he provided appropriate titles for these ballot proposals, and instead, they allowed the Republican legislature to dictate the titles.

We are deeply troubled by the potential bias reflected in these two opinions and, in particular, by Justice Stras’ apparent willingness in *Limmer* to abandon his supposed judicial philosophy of adhering to a statute’s plain and unambiguous language, in deference to a partisan Republican outcome.

These concerns are furthered by the circumstances regarding Justice Stras’ appointment to the Minnesota Supreme Court, which a MinnPost columnist called “sticky” and “awkward.”¹⁶ As the column notes, Stras had never argued a case before the Minnesota Supreme Court, but he had filed an amicus brief in it—in support of Governor Pawlenty’s expansive executive authority in a budget case “with such highly partisan and political implications.” (*Id.*) The Governor had lost just days before, and Minnesota state Rep. Ryan Winkler said, “[It’s] clear that the governor wanted to reward a couple of people that wanted to protect his unallotment authority.”¹⁷

The cases we have cited here are reflective of our overall concerns regarding Justice Stras’ judicial philosophy. Justice Stras clerked for Supreme Court Justice Clarence Thomas, whom he called a “mentor.”¹⁸ Justice Thomas has said, “I won’t hire clerks who have profound disagreements with me,”¹⁹ and during the year that Stras clerked, Justice Thomas wrote the dissent in the affirmative action case *Grutter v. Bollinger*, 539 U.S. 306 (2003), and joined the dissent in *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down Texas’ ban on same-sex activity. Justice Stras also has said, “I really grew up with a steady diet of Justice Scalia, and I’m better for it.”²⁰ He has even written in praise of Supreme Court Justice Pierce Butler, in a paper entitled *Pierce Butler: A Supreme Technician*, 62 Vand. L. Rev. 695 (2009). Justice Butler was known as one of the “Four Horseman” for striking down New Deal laws and opposing minimum wage laws, and he was one of only two justices who would have struck down Social Security in *Helvering v. Davis*, 301 U.S. 619 (1937).

Justice Stras also has asserted that “the [Supreme] Court’s own ventures into contentious areas of social policy—such as school integration, abortion, and homosexual rights—have

¹⁶ <https://www.minnpost.com/eric-black-ink/2010/05/pawlentys-supreme-court-picks-raise-sticky-and-embarrassing-issues>

¹⁷ <https://www.mprnews.org/story/2010/05/13/magnuson-replacement>

¹⁸ <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/>

¹⁹ <http://www.nytimes.com/2010/09/07/us/politics/07clerks.html>

²⁰ <http://www.fed-soc.org/multimedia/detail/roundtable-areas-of-constitutional-doctrine-transformed-event-audiovideo>

raised the stakes of confirmation battles even higher.”²¹ Suggesting that the Supreme Court “ventured” into these areas—when core constitutional rights were at stake—may reflect a very narrow and troubling view of a court’s jurisdiction.

Based on Justice Stras’ extreme record, it is not surprising—but nonetheless alarming—that the far-right Federalist Society and Heritage Foundation selected him as one of their original 11 Supreme Court recommendations to then-candidate Trump.

Finally, the U.S. Court of Appeals for the Eighth Circuit is the least diverse circuit court in the nation, with only one female 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, as nine consecutive men followed. In 2013, the Senate unanimously confirmed Judge Jane Kelly to this court, but last year, Senate Republicans refused to consider the nomination of Assistant U.S. Attorney Jennifer Puhl, despite bipartisan support from her home-state Senators and the unanimous approval of the Judiciary Committee. Now, there are three vacancies on this 11-member court—including the vacancy that should have been filled by AUSA Puhl—and President Trump has nominated white men to fill all of them.

Of course, lack of diversity is not sufficient reason to oppose a nomination (just as diversity alone cannot compel support for one), but it is vital that our judiciary better reflects the people it serves, to instill greater confidence in this cornerstone of our democracy. Overall, President Trump’s judicial nominations have been the least diverse in decades, and we believe this would be improved if he more meaningfully consulted with home-state Senators to ensure that a diverse pool of candidates from their states is being considered.

In conclusion, there are many reasons to oppose the Stras nomination, which certainly would not have proceeded if the home-state Senators had been meaningfully consulted. Providing advice regarding nominations is not only a constitutional duty, it is a prerogative and precedent that each of you, especially as Members of the Judiciary Committee, must demand and defend, just as you have in prior administrations. If you do not, you surely will diminish your own future influence when it comes to nominees from your home states. Based on Justice Stras’ record, the process, and the precedent it would set, we urge you to oppose this nomination.

Sincerely,

Alliance for Justice
Courage Campaign
Every Voice
The Leadership Conference on Civil and Human Rights
Main Street Alliance
NAACP
NAACP Legal Defense & Educational Fund, Inc.

²¹ Understanding the New Politics of Judicial Appointments, 86 Tex. L. Rev. 1033 (2008)

NARAL Pro-Choice America
National Association of Social Workers (NASW)
National Council of Jewish Women
National Education Association
People For the American Way
Service Employees International Union
Voting Rights Forward