



June 4, 2019

United States Senate
Washington, DC 20510

Dear Senator:

On behalf of our 1.5 million supporters nationwide, People For the American Way opposes the nomination of Richard Hertling to a vacancy on the United States Court of Federal Claims. This vacancy has been open for nearly five years. It stands as evidence of the Republican project to fill our nation's courts with narrow-minded elitists who can be relied upon to regularly rule in favor of corporate interests.

In written questions for the record, Hertling refused to state that *Brown v. Board of Education* was correctly decided.ⁱ Unfortunately, he is merely one of many of Donald Trump's judicial nominees to avoid the question, a sharp departure from the norm. It would be understandable for nominees to be careful in how they discuss legal issues that they might be called upon to address as judges. But there is no indication that the principle of *Brown* is going to be relitigated. Revisiting separate-but-equal has not been a subject of any serious public debate. Our nation's legal structure—indeed, our entire society—is built upon the foundation of *Brown*. There simply is no valid reason for a nominee to refuse to express an opinion on this most seminal of cases.

In this case, Hertling's avoidance warrants our opposition, because his nomination does not exist in a vacuum. In fact, this vacancy should not even exist. But it does, due to the far right's dangerous politicization of the American judicial system.

Judge George W. Miller retired took senior status in 2013, and President Obama nominated Jeri K. Somers to fill his seat on the Court of Federal Claims.ⁱⁱ In July of 2014, the Senate Judiciary Committee voted to advance her nomination by unanimous voice vote.ⁱⁱⁱ She was one of five Court of Federal Claims nominees approved by the Judiciary Committee during the 113th Congress, each one by unanimous voice vote.

Senate Republicans, then in the minority, prevented the Senate from holding a full confirmation vote on any of the nominees. President Obama renominated them in 2015,^{iv} and they once again cleared the Judiciary Committee (by then controlled by Republicans) by unanimous voice vote.^v That was in February of 2015, near the beginning of the new Congress. But once again, Republicans refused to allow confirmation votes for any of them. Five highly qualified, fully vetted jurists with enormous bipartisan support needlessly had their nominations languish for the entirety of the 114th Congress.

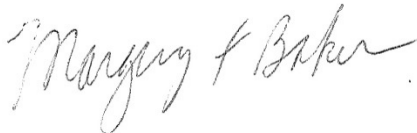
Like Merrick Garland, their qualifications were not in doubt, and they would almost certainly have been confirmed if a floor vote had been held. And as with Garland, the vacancies became available for a Republican president to fill.

President Trump chose not to renominate Somers, but to instead nominate Damien Schiff, whose record of ridiculing environmentalists and impugning their motives made his pro-corporate bias unmistakable.^{vi} Indeed, that appears to be one of the reasons he was selected. Fortunately, the Senate did not confirm him.

Now Richard Hertling has been nominated for a vacancy that should have been filled by President Obama's unopposed nominee in 2014, 2015, or 2016. Republican actions around this vacancy reflect the party's increasingly brazen politicization of the federal courts. In a situation so rife with bad faith, the least—the *very* least—a nominee can do to address our concerns is acknowledge that *Brown v. Board of Education* was rightly decided.

We urge you to oppose Hertling's nomination.

Sincerely,



Marge Baker
Executive Vice President for Policy and Program

ⁱ <https://www.judiciary.senate.gov/download/hertling-responses-to-questions-for-the-record>, p. 9.

ⁱⁱ Nomination of Jeri Kaylene Somers, of Virginia, to be a Judge of the United States Court of Federal Claims for a term of fifteen years, vice George W. Miller, retired, PN1729 (113th Congress).

ⁱⁱⁱ <https://www.judiciary.senate.gov/download/results-of-executive-business-meeting-07-17-14>.

^{iv} Nomination of Jeri Kaylene Somers, of Virginia, to be a Judge of the United States Court of Federal Claims for a term of fifteen years, vice George W. Miller, retired, PN10 (114th Congress).

^v <https://www.judiciary.senate.gov/download/results-of-executive-business-meeting-2-26-15-update>.

^{vi} "The Judiciary Committee Should Reject Damien Schiff's Nomination," People For the American Way, June 9, 2017, <http://www.pfaw.org/blog-posts/the-judiciary-committee-should-reject-damien-schiffs-nomination>.