WE LIKE MIKE: An Open Letter To Senator Patrick Leahy In Support Of Judicial Nominee Michael Mcconnell

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(/legal-commentary/akhil-amar-and-vikram-amar-archive)
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To: Senator Patrick Leahy, Chair, Senate Judiciary Committee

Dear Senator Leahy,

We write this open letter in strong support of Professor Michael McConnell, who has been nominated by President Bush to sit on the U.S. Court of Appeals for the Tenth Circuit.

By way of introduction, we are registered Democrats who voted for Al Gore and Joe Lieberman. We have not hesitated to publicly oppose the Bush Administration where we think its policies endanger constitutional liberty. In a previous column (/legal-commentary/the-new-regulation-allowing-federal-agents-to-monitor-attorney-client-conversations.html), we sharply criticized Attorney General Ashcroft for issuing a constitutionally troubling eavesdropping regulation (https://www.washingtonpost.com/wp-dyn/articles/A64096-2001Nov8.html). In that column, we directed our readers to your website (http://leahy.senate.gov/press/200111/110901.html), which raised similar questions about this regulation. (We have also worked with your staff on a variety of other post 9-11 issues.) This week, we have filed a pro bono amicus brief in the Supreme Court opposing an intrusive and ill-justified high school drug-testing policy in Tecumseh, Oklahoma; the Bush Administration has filed an amicus brief on the other side.

But on the subject of the McConnell nomination, we applaud the Bush Administration. Here is an issue where thoughtful Democrats and Republicans, liberals and conservatives, should come together.

A Uniter, Not a Divider

We begin with a few observations about Michael McConnell, the man. Character counts, and nowhere does it matter more than for judicial appointments for life. We know McConnell well, and admire him. He is soft-spoken, modest, and generous towards others, both personally and intellectually. These qualities are all the more striking because McConnell is a truly gifted legal scholar. (Brilliance and humility do not often coincide, especially in the legal academy.) McConnell is a man of moderation, balance, and judgment. In short, he has an ideal "judicial temperament."

We are hardly alone in this assessment. In early July, over 300 law professors sent you a letter "enthusiastically" endorsing McConnell's nomination. This letter included many of McConnell's past and current colleagues-men and women who have seen him up close over many years. Its signatories included the past and present deans of many distinguished law schools, including Yale, Harvard, Chicago, Stanford, Michigan, and Cal-Berkeley.

Perhaps most strikingly, the list was genuinely bipartisan and cross-sectional, featuring dozens of leading "liberal" as well as "conservative" scholars, including Al Alschuler, Jack Balkin, Randy Barnett, Robert W. Bennett, Lillian BeVier, Vince Blasi, Steve Calabresi, Evan Caminker, Stephen Carter, Ron Cass, Jesse Choper, Bob Clark, Michael Dorf, John Hart Ely, Richard Epstein, Sam Estreicher, Dan Farber, Charles Fried, John Garvey, Mary Ann Glendon, Carole Goldberg, Kent Greenawalt, Sam Issacharoff, Elena Kagan, Yale Kamisar, Doug Kmiec, Anthony Kronman, Doug Laycock, Jeff Lehman, Lawrence Lessig, Sanford Levinson, Saul Levmore, Dan Lowenstein, Cal Massey, Tracey Meares, Robert Nagel, Mike Paulsen, Scot Powe, H. Jefferson Powell, David Shapiro, Suzanna Sherry, Ann-Marie Slaughter, Kate Stith, David Strauss, Peter Strauss, Bill Stuntz, Cass Sunstein, and Jeremy Waldron, to name just a few.

Rarely do law professors-by nature a contentious lot, rewarded for strong opinions-come to such universal consensus. It is hard to imagine many other things that the above-named professors (to say nothing of the broader list of 300) could all agree on.

A Legal Eagle

Competence counts alongside character; and here too McConnell is off the charts. After clerking for Judge J. Skelly Wright and Justice William Brennan, McConnell has gone on to be a leading public servant, private lawyer, and legal academic. In an earlier column (/legal-commentary/ground-rules-for-senators-facing-judicial-nominees.html), we argued that courts should bring together lawyers with varied legal backgrounds and pre-judicial careers. McConnell brings this desired balance together in a single person, who has excelled at very different legal jobs, and who has synthesized the distinctive virtues of each.

McConnell is a scholar's scholar AND a lawyer's lawyer. Each side of his resume is dazzling, but what is most remarkable is that a single person has excelled at both. (Only Larry Tribe, Walter Dellinger and a few others may claim comparable achievements both as a constitutional scholar AND as a constitutional practitioner.)

As a scholar, McConnell has published over fifty law review articles, many of which appeared in leading law reviews and are now considered classics. As a practitioner, he has served in various high-level governmental positions and has practiced law on his own. All told, he has argued eleven cases before the U.S. Supreme Court.

Being an outstanding scholar has made McConnell a better lawyer, and being an outstanding lawyer has made him a better scholar. To overstate: great scholars sometimes lack judgment, and good lawyers sometimes lack ideas. But McConnell sees both the big picture and the details; he has both vision and prudence. In his scholarship and his briefs, he has deftly woven legal tapestries respectful both of constitutional text and of the sometimes competing considerations of tradition, precedent, and established practice.

We give McConnell special credit for the way he has pursued private practice. He has taken on many pro bono cases, rather than simply selling himself to the highest bidder. He has worked well in partnership with other lawyers on his cases, who praise his collegiality. Collegiality is a special requirement for appellate judges, who do their work in panels; and the lack of it is sometimes a weakness of pure academics, who do most of their work alone.

The Vision Thing

As we have explained in an earlier column (/legal-commentary/ground-rules-for-senators-facing-judicial-nominees.html), Senators may properly and openly consider nominees' overall legal philosophies and likely judicial rulings. Given McConnell's scholarly writings and practice experience, we highlight two areas that will likely be of particular interest in his hearings.

McConnell is perhaps America's pre-eminent scholar of religious liberty. Although we do not agree with everything he has written on the subject, we find his general views carefully argued and normatively congenial.

A couple of media pieces have misstated McConnell's general views, so it's useful to set the record straight. McConnell generally champions the idea of governmental "neutrality"-government ordinarily should not favor any specific religion or religion generally; but neither should government single out religion for unique disfavor and disadvantage. Government shouldn't discriminate *against* religion. For example, if a veteran can use his GI loan to help finance his education at a nonreligious college, he should likewise be allowed to use the loan at Notre Dame or BYU-otherwise, the government is discriminating against religion.

This is a generally attractive vision, and it has real bite from a civil libertarian perspective, connecting the religion clauses to the Constitution's grand theme of equal citizenship. McConnell opposed state-sponsored graduation prayers at public school commencements even before the Supreme Court struck down this practice, 6-3, in the 1992 case of *Lee v. Weisman* (https://caselaw.findlaw.com/). McConnell has likewise publicly endorsed the result of the more recent *Santa Fe Independent School District v. Doe* (https://caselaw.findlaw.com/) case, which invalidated (by a similar 6-3 vote) government-sponsored prayer at high school football games. In both situations, government flunked the neutrality/equality test.

McConnell has also championed the idea that courts should treat congressional statutes with deference, and should not lightly strike them down. This is a principled position of judicial restraint, and it stands in stark contrast to more virulent forms of conservative ideology now prominent in federal courts generally and in the Supreme Court in particular.

In the almost eighty years between the Founding and Reconstruction, the Supreme Court invalidated acts of Congress on only two occasions, *Marbury v. Madison* in 1803 and *Dred Scott v. Sanford* in 1857. By the mid 1920s, this number had risen to about fifty-less than one case a year. Overall, the Warren Court invalidated acts of Congress in about twenty cases over a sixteen year span. By contrast, the Rehnquist Court in the last six years alone has struck down congressional laws (most of them constitutionally sound laws, in our view) in almost 30 cases-far more than in any prior six-year period.

This is a trend that should disturb Congress-and the confirmation process is one place for Congress to begin to fight back for its rightful place in the Constitution's scheme-co-ordinate with courts rather than below them.

One of the worst trends on the current Supreme Court has been its willingness to invalidate Congressional civil rights laws enacted pursuant to congressional power under the Reconstruction Amendments, from the Religious Freedom Restoration Act to the Violence Against Women Act and the Americans With Disabilities Act. McConnell has been a leading critic of this trend toward judicial imperialism. Put differently, McConnell has been a principled champion of Congress's right to implement its broad vision of civil rights even when Congress seeks to protect rights more generously than the Supreme Court has chosen to do on its own.

If Not McConnell, Who?

McConnell's nomination to the Tenth Circuit draws additional support from the fact that he is strongly supported by his home-state Senators, one of whom, Orrin Hatch, is the ranking member and former chair of the Judiciary Committee. Indeed, McConnell is supported by virtually all the Senators from the entire circuit. And if the Senate is to play anything close to an equal role with the president in the appointments game, it is important-and consistent with Senate traditions of courtesy and deference-for the Senate as a whole to pay particular respect to the views of Senators with a special stake in a given nomination.

We realize that in the mid 1990s, when the political situation was reversed-a Democratic President confronting a Republican Senate-some of President Clinton's judicial nominees were obliged to wait far too long to be confirmed. In particular, we were saddened that our friend Willy Fletcher, then a Professor at Cal-Berkeley, waited several years before finally winning confirmation to the Ninth Circuit. We strongly supported Fletcher then-for many of the same reasons we support McConnell now. Both are outstanding scholars with superb judicial temperaments.

It may be tempting to play tit for tat-Republicans stalled Fletcher so now Democrats obstruct McConnell. But we urge our fellow Democrats to resist this temptation.

At some point, someone needs to take a huge step away from an endless cycle of reprisal that works to the long-term disadvantage of both parties, and of the country. We were thus heartened to read your recent comments in the Congressional Record promising to hold hearings soon on McConnell's nomination.

But perhaps it's naive to think that moderate payback can be eliminated altogether from the appointments game. So here is a realpolitik point: President Bush is nominating and probably will continue to nominate several other judicial candidates who deserve very close scrutiny. Some of these candidates may have less prominent paper trails than McConnell. But many are likely inferior to McConnell in almost every way-less smart, less open, less humble, less lawyerly, less respectful of Congress, less knowledgeable about the Constitution. If there must be payback, please pick on someone else.

We like Mike-as does virtually everyone who knows him well-and we think that if you give him a chance, you will, too.

Akhil Reed Amar and Vikram David Amar are brothers who write about law. Akhil graduated from Yale College and Yale Law School, clerked for then-judge Stephen Breyer, and teaches at Yale Law School. Vikram graduated from U.C. Berkeley and Yale Law School, clerked for Judge William Norris and Justice Harry Blackmun, and teaches at U.C. Hastings College of Law. Their "brothers in law" column appears regularly in Writ, and they are also occasional contributors to publications such as the New York Times, the Los Angeles Times, and the Washington Post. Jointly and separately, they have published over one hundred law review articles and five books.

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