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**From:** Barbara\_Ledeen@src.senate.gov (Barbara Ledeen) ( Barbara\_Ledeen@src.senate.gov (Barbara Ledeen) [ UNKNOWN ] )

**To:** andrew\_wilder@kyl.senate.gov ( andrew\_wilder@kyl.senate.gov [ UNKNOWN ] ), Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] ), P6/b(6)

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**Subject:** : Fwd:FW: PFAW: ALERT: Don't Let Bush Claim Mandate on Judges!

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SUBJECT:: Fwd:FW: PFAW: ALERT: Don't Let Bush Claim Mandate on Judges!

TO:andrew\_wilder@kyl.senate.gov ( andrew\_wilder@kyl.senate.gov [ UNKNOWN ] )

READ:UNKNOWN

TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )

READ:UNKNOWN

P6/b(6)

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##### End Original ARMS Header #####

PFAW recently sent this missive out. Attached are some short pdf's on  
McConnell. The vote is this morning.

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ACTIVIST NETWORK -- People For the American Way  
Alert Date: Nov. 13, 2002 -- Circulate Until: Nov. 14, 2002

ELECTION WAS NOT A MANDATE TO CONFIRM RIGHT-WING JUDGES!

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URGENT ACTION:

Call your member of the Senate Judiciary Committee TODAY to  
urge the rejection of right-wing judicial nominees Michael

McConnell and Judge Dennis Shedd!

It has just been announced that the Committee plans to vote on these nominations on THURSDAY, NOVEMBER 14, so please ACT NOW!

Sen. George Allen  
Capitol Hill Phone: (202) 224-4024  
Capitol Hill Fax: (202) 224-5432

SAMPLE MESSAGE:

(Ask to speak with the staff person responsible for judiciary issues.)

"I am calling to urge that Sen. Allen reject the federal appeals court nominations of Michael McConnell and Judge Dennis Shedd. Both McConnell and Shedd have expressed right-wing views that threaten fundamental civil rights and undermine efforts to end discrimination. Last week's election was not a mandate to confirm such nominees. In fact, I expect Sen. Allen to vote against the confirmation of nominees like McConnell and Shedd now more than ever."

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\*\*\* A QUICK REFRESHER ON THE RECORDS OF McCONNELL AND SHEDD \*\*\*

#### MICHAEL MCCONNELL

President Bush has nominated Michael McConnell to the U.S. Court of Appeals for the 10th Circuit, which covers Colorado, Nebraska, New Mexico, Oklahoma, Utah and Wyoming.

\* McConnell opposes the U.S. Supreme Court's landmark ruling that the federal government had the authority to withhold tax-exempt status from Bob Jones University because of its racially discriminatory policies.

\* McConnell has urged the courts to allow governments to directly fund religious organizations and to reject the principle that the Constitution gives taxpayers the right to prohibit the use of their taxes for religious purposes.

\* McConnell opposes the Fourteenth Amendment principle of "one person, one vote", which requires voting districts to be virtually equal in population so that states cannot dilute or enhance the voting power of certain groups.

\* McConnell believes that a "right to privacy" and to "personal autonomy" do not exist under the Constitution and supports overturning Roe v. Wade. He has also expressed admiration for a judge who refused to enforce the federal Freedom of Access to Clinic Entrances law and even suggested other ways for the judge to evade the law while not technically disobeying it.

#### JUDGE DENNIS SHEDD

President Bush has nominated Federal District Court Judge Dennis Shedd to a seat on the U.S. Court of Appeals for the 4th

Circuit, which covers Maryland, North Carolina, South Carolina, Virginia and West Virginia.

\* Judge Shedd's opinions indicate that he would severely limit the federal government's authority to protect Americans from invasions of privacy and sex discrimination. For example, Judge Shedd authored the original opinion in *Condon v. Reno*, in which he found that Congress did not have the power to require states to ensure that driver's license records remain private. His ruling was later unanimously reversed by the U.S. Supreme Court.

\* Judge Shedd's rulings and courtroom remarks show a high level of insensitivity to discrimination based on race, gender and disability. For example, Judge Shedd ruled against a woman who had brought a sexual harassment claim against her employer because he believed she had not provided any evidence that she "perceived the environment to be abusive." Evidence in the case, however, showed that the woman had been subjected to sexual comments by her supervisor on a daily basis, that she had told her supervisor these comments were offensive, that she and a female manager took steps to report the conduct to corporate headquarters, and that she resigned her job.

For more information on these and other judicial nominations, visit our Web site at:

<http://inv9.com/./2S28M06ZSC>

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- Michael McConnell Nominee.pdf - Michael McConnell What People Are Saying.pdf - Sunstein ltr2.pdf -

Wash Post Editorial re McConnell 9-20-02.pdf

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**Michael McConnell**  
**Nominee to the Court of Appeals for the 10<sup>th</sup> Circuit**

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**Michael McConnell, nominee to the 10<sup>th</sup> Circuit, has had a distinguished career that has earned him a reputation as one of the top legal scholars in the country. His nomination has received overwhelming support from across the ideological and political spectrum.**

- **Professor Michael McConnell has had a distinguished career as a professor, practicing attorney, and public servant.**
  - ✓ He is currently a Presidential Professor at the University of Utah College of Law, and has taught at the University of Chicago Law School and Harvard Law School.
  - ✓ Professor McConnell has served as the Chair of the Constitutional Law Section of the Association of American Law Schools, as Co-Chair of the Emergency Committee to Defend the First Amendment and as a member of the President's Intelligence Oversight Board.
  - ✓ He served as Assistant Solicitor General at the Department of Justice and Assistant General Counsel at the Office of Management and Budget.
  - ✓ Professor McConnell clerked for Supreme Court Justice William J. Brennan, Jr., and for Chief Judge Skelly Wright of the U.S. Court of Appeals for the D.C. Circuit – two of the leading liberal jurists of the 20<sup>th</sup> Century.
  - ✓ Professor McConnell has argued 11 cases before the United States Supreme Court and is a consultant to the appellate practice group at Mayer, Brown & Platt.
  
- **Professor McConnell is an outstanding and highly qualified candidate as evidenced by his professional and academic credentials.**
  - ✓ He graduated from the University of Chicago Law School at the top of his class and served on the University of Chicago Law Review.
  - ✓ The American Bar Association has *unanimously* rated Professor McConnell “well qualified,” its highest possible rating. Senate Judiciary Committee Chairman Patrick Leahy has referred to the ABA rating as the “gold standard.”
  
- **Professor McConnell has earned the reputation as one of the most outstanding constitutional lawyers in the country.**
  - ✓ He is widely regarded as one of the country's most distinguished legal scholars in the field of constitutional law and theory, particularly in the area of the religion clauses of the First Amendment. His writings are relied upon by legal scholars and courts alike.
  - ✓ Professor McConnell has earned the reputation of a fair and open-minded thinker who follows the law to its reasonable conclusion, not to a conclusion dictated by any personal view.
  - ✓ Professor Cass Sunstein has said of McConnell, “[h]e is one of the best legal minds I have ever encountered.” He added that, “McConnell combines strong convictions not only with an ability to respect opposing views but also with the capacity to listen carefully, and on occasion to change his mind.”
  
- **Professor McConnell's nomination has received overwhelming support from across the political spectrum.**
  - ✓ Over 300 professors and deans from law schools around the country have signed a letter to the Senate Judiciary Committee supporting Michael McConnell's nomination.
  - ✓ Noted “liberal scholars” such as Professors Cass Sunstein, Lawrence Tribe, and Sanford Levinson support Michael McConnell's nomination.

**What People Are Saying About Michael McConnell  
Nominee to the U.S. Court of Appeals for the 10<sup>th</sup> Circuit**

- “McConnell’s scholarly work has been path-breaking and influential. It has also been characterized by care, thoroughness, and fairness to opposing viewpoints. Both in person and in his writings, McConnell exhibits respect, gentleness, concern, rigor, integrity, a willingness to listen and to consider, and an abiding commitment to fairness and the rule of law. He provides a model of the wisdom, intelligence, temperament, craftsmanship, and personal qualities that can make a judge outstanding.” **Excerpt from letter signed by more than 300 law professors and law school deans sent to Senators Leahy and Hatch, July 9, 2001.**
  
- “I know McConnell well. He was a colleague of mine at Chicago for a number of years. In that time, I learned two things. First, McConnell is a person of exceptional ability. He is one of the best legal minds I have ever encountered. Second, McConnell combines strong convictions not only with an ability to respect opposing views but also with the capacity to listen carefully, and on occasion to change his mind. (In this way he is very different from another former colleague of mine, Antonin Scalia, who is able to listen, but who has some real rigidity.) McConnell’s nature is genuinely judicious. On issues ranging from free speech to affirmative action to sex equality to abortion, he is genuinely willing to think, and to go where the best arguments take him.” **Professor Cass Sunstein, The University of Chicago, Letter to Chairman Patrick Leahy.**
  
- Of course the question of Roe v. Wade looms in the background. I believe that McConnell thinks that the decision was wrong when decided. But I know that he would faithfully follow the law as it now stands. Certainly for a court of appeals nomination, it would be extremely peculiar to say that a belief in the initial correctness of Roe v. Wade is a precondition for confirmation. Many lawyers, on the left as well as the right, question Roe v. Wade. Open-minded, nonideological nominees should not be rejected for that reason. **Professor Cass Sunstein, The University of Chicago, Letter to Chairman Patrick Leahy.**
  
- In all that time, I never knew Michael to be anything other than thoughtful, open-minded, and even-handed in his approach to legal questions. There is no part of Michael that is activist or extremist. He is one of the most fair and scrupulous individuals I have ever encountered. I do not believe he ever would bend the law to get to a political result. **Professor Elena Kagan, Harvard Law School, Letter to Chairman Patrick Leahy, September 10, 2002.**
  
- In all of my encounters with Michael McConnell, I have found him to be a thoughtful and open-minded person whose own convictions, whether of substance or method, never blinded him to the strengths of conflicting positions or prevented him from searching for reasonable accommodations between competing views. I have not always agreed with Professor McConnell as to where, or how, the best accommodation might be reached, but I have never doubted his own good faith or commitment to the rational exploration of

differing – sometimes deeply differing – points of view. **Dean Anthony Kronman, Yale Law School, June 5, 2001, Letter to Senator Orrin Hatch.**

- Perhaps I could best state my support for Michael McConnell's nomination as follows. There is no issue, including those in which we have disagreed in law review commentary, that, if I were litigating, I would not welcome his sitting as a judge. I would know that he would weigh my arguments openly and completely. I would know that he fully appreciates the difference between arguing what the law should be and applying what the law actually is. **Professor William P. Marshall, Former Deputy Counsel to President Clinton, University of North Carolina, June 5, 2001, Letter to Chairman Patrick Leahy.**
- “Perhaps it is relevant to state at the outset that I am a strong Democrat, as well as a law professor that vigorously opposed the nominations of Robert Bork and Clarence Thomas for membership on the United States Supreme Court. . . . Why, then, would I be truly disappointed if the Democratic majority rejected Professor McConnell's nomination? The long and short of it is that I am convinced, as a result of interacting with him over the past decade, that he is a most unusual (and commendable) person. He possesses not only an uncommon intellect, reflected in his scholarly attainment, but also, and more importantly, an even more impressive (and sadly, equally uncommon) ability to take his opponents' arguments with complete courtesy and seriousness. **Professor Sanford Levinson, The University of Texas at Austin, June 13, 2001, Letter to Chairman Patrick Leahy.**
- I think he would quickly become one of those relatively few judges whose opinions would be widely read and analyzed (and learned from) by persons across the political spectrum, quite independently of the particular position that he would take in any given case. It is vital that the appellate judiciary be a place for truly substantial argument and the testing of new ideas, and I believe that Professor McConnell could play this role with distinction. **Professor Sanford Levinson, The University of Texas at Austin, June 13, 2001, Letter to Chairman Patrick Leahy.**
- [I]t is one thing to say that the Senate must be vigilant in opposing efforts to stack the bench, but quite another to say that any conservative nominee should be opposed. If give-and-take between the branches includes deference to some of President Bush's nominees, and it should, the country just cannot do better than McConnell. He is brilliant, but more importantly, he is honest and he has genuine integrity. He is, above all, a lawyer's lawyer. He cares about the law and the process of lawyering, and he is true to that process and honest with himself. His views are most decidedly conservative, but he will not make an argument unless he can support it properly, and when he cannot he admits as much and acts accordingly. We need judges like this – of every political stripe. **Professor Larry Kramer, New York University, June 13, 2001, Letter to Chairman Patrick Leahy.**
- I genuinely believe that Michael McConnell has the gifts and the capacity to reach the level of reputation as lofty as that occupied by Learned Hand, J. Skelly Wright (for whom

McConnell clerked), Richard Posner, and other giants of the Circuit Court bench. **Professor Ira C. Lupu, George Washington University, June 13, 2001, Letter to Senator Patrick Leahy.**

- More to the point, [McConnell's] substantive views are driven by a vision of the law as an instrument of fairness and civil liberties, not by ideology. **Professor Michael Dorf, Vice Dean of Columbia University, June 18, 2001, Letter to Senator Charles Schumer.**
- Legal talent of the sort that Michael possesses comes along only a few times in a generation, and you will never find a more decent human being. Supporting his nomination presents an opportunity for you to look beyond the politics of the moment and strengthen the federal judiciary. **Professor Douglas Baird, The University of Chicago, July 2, 2001, Letter to Senator Patrick Leahy.**
- If Prof. McConnell is confirmed, he will without question become one of the intellectual titans of the Courts of Appeals. He will be a judge whom people both on the left and the right will admire, just as he is now an academic whom people on both sides admire. **Professor Eugene Volokh, UCLA School of Law, July 13, 2001, Letter to Senator Orrin Hatch.**
- He believes fervently in the rule of law and in the importance of precedent. He would not be the kind of activist judge who reaches out to change the law. **Professor Geoffrey Miller, NYU, July 27, 2001, Letter to Senator Orrin Hatch.**
- "I was able to reassure them, at least with respect to Professor McConnell, that as long as we seek to ground our arguments in fundamental constitutional principles and put them forward with rigorous reasoning and a passionate commitment to justice, there can be no doubt that they will receive a fair and impartial hearing, thoughtful scrutiny and careful consideration toward a decision that will be based solely on the merits and not on any predetermined ideological or political agenda." **Stephen Clark, Legal Director of the ACLU of Utah, December 7, 2001, Letter to Chairman Patrick Leahy.**
- "It would an understatement to observe that McConnell and I differ profoundly in our political perspectives; I am a liberal Democrat. But I have always held the highest regard for McConnell's acuity and fairness. He is among the very finest scholars of constitutional law in the United States today. He is the very antithesis of an ideologue. If I were a party to case before the Tenth Circuit, I could not ask for a more insightful, objective, or trustworthy judge." **Professor Robert Post, University of California-Berkely (Boalt Hall), June 5, 2001, Letter to Senator Hatch.**
- "I have disagreed with Professor McConnell in the past and I anticipate that I will continue to do so. I have never questioned his commitment to the Constitution, however. I am uncertain as to how he will decide particular cases, but I am confident that he will studiously seek to act in a principled manner, regardless of political implications. It is little wonder, therefore, that Professor McConnell was willing to oppose the

impeachment of President Clinton and support the nomination of Stephen Breyer to the Supreme Court. He simply is and will remain above politics. . . .” **Professor Rodney K. Hatch, University of Memphis, June 28, 2001, Letter to Senator Hatch.**

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September 13, 2002

Senator Patrick Leahy  
Chairman  
Committee on the Judiciary  
433 Russell Senate Office Building  
United States Senate  
Washington, DC 20510

Dear Senator Leahy:

I am writing in support of Professor Michael W. McConnell, nominated by President Bush to serve on the United States Court of Appeals for the 10<sup>th</sup> Circuit. McConnell is conservative, but he is no ideologue. I believe that he would be a wonderful judge.

McConnell was a member of the faculty at Chicago for many years, and I was able to see him in a wide range of settings. He has an outstanding mind – one of the very best, I think, among the nation's law professors. He is also fair and open-minded, someone who marches to the beat of no political creed. For example, he was critical of the Supreme Court's decision to stop the Florida recount in *Bush v. Gore*, and he publicly opposed the impeachment of President Clinton. Working pro bono, and in an action of great current interest, he represented three former Democratic Attorneys General in opposition to an order of the first President Bush authorizing deportation of certain aliens, facing persecution in their home countries. This is a person of demonstrated independence of mind.

I know that many members of the Senate are concerned about the current tendency, within the federal courts, toward a kind of right-wing judicial activism. Indeed, the Rehnquist Court has struck down nearly thirty acts of Congress in the last seven years; the Senate is entirely right to attempt to protect its constitutional prerogatives through the confirmation process. Fortunately, McConnell is no activist. The best evidence comes from an excellent essay he wrote in the *Harvard Law Review*, in which he condemned the Supreme Court's unanimous decision to strike down the Religious Freedom Restoration Act. What makes this essay especially important is that McConnell

defends broad congressional power to respond to what, in the view of Congress, count as unacceptable intrusions on civil rights and civil liberties.

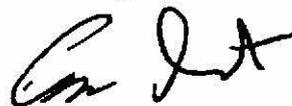
McConnell is certainly conservative, and he has taken a number of controversial positions. For example, he has been a strong critic of *Roe v. Wade*. But his criticisms of *Roe* should be placed in the context of his overall record, which demonstrates that he is hardly an ideologue, and that he is firmly committed to the rights of women and minorities. As you know, critics of *Roe v. Wade*, as a matter of constitutional law, are numerous and come from many sides of the political spectrum – including many people who are committed, as a matter of policy, to women's right to choose. It would send a strong positive signal to make clear, yet again, that if the lower court nominee's overall record shows that he is no ideologue, criticism of *Roe v. Wade* is not disqualifying and that there is no litmus test here. I might add that McConnell is a real lawyer -- someone who cares about following the law – and there is no doubt that as a lower court judge, he would respect the Supreme Court's refusal to overrule *Roe*.

In his academic writings, McConnell has argued that the Constitution requires "neutrality" toward religion – no special favors, but no special burdens either. McConnell's neutrality argument builds on the simple insight that the government may provide police and fire protection to churches and synagogues, no less than to grocery stores and corporate offices. McConnell has argued, controversially, that the same argument supports neutrality toward education, so long as the state is treating religious schools no better than secular ones. Many reasonable people disagree with McConnell; they think that his neutrality principle does not adequately separate church and state. But it is hard to argue that this principle, which has strong support in American history, disqualifies McConnell from the federal bench.

As you know, I believe that the Senate Judiciary Committee has been entirely right to insist on the relevance of judicial philosophy, or "ideology," in the confirmation process. So long as the President considers ideology, the Senate is entitled to consider it too. Moreover, it is extremely important for the Senate to attempt to promote a degree of intellectual diversity on the bench. Recent evidence underlines this point; it shows that a panel of three Republican appointees is likely to go to extremes. But McConnell seems to me to fit all of the criteria for confirmation. While he's conservative on many issues, he's both humble and judicious, and his record shows, beyond any doubt, that he is far from an ideologue. Confirming him would be good in itself. It would also send an excellent message to President Bush and to the country.

All best wishes.

Sincerely,

A handwritten signature in black ink, appearing to read "Cass R. Sunstein". The signature is fluid and cursive, with the first name "Cass" being particularly prominent.

Cass R. Sunstein

# The Washington Post

AN INDEPENDENT NEWSPAPER

## *Well Qualified for the Bench*

**B**Y ANY CONVENTIONAL measure, Michael McConnell is one of the best qualified nominees a president of either party has advanced for a court of appeals vacancy in many years. Mr. McConnell, a law professor at the University of Utah whom President Bush nominated to a seat on the 10th Circuit Court of Appeals, is both a highly accomplished lawyer who served in the solicitor general's office and one of the leading legal scholars of his generation. His scholarly work is widely admired across party lines. Liberal legal scholars Akhil Amar and Vikram Amar, for example, call him "perhaps America's pre-eminent scholar of religious liberty." And University of Chicago professor Cass Sunstein describes him as "one of the very best . . . among the nation's law professors." Mr. McConnell is a conservative, but he is not an ideologue. He opposes public school prayer, spoke out against the impeachment of President Clinton and criticized aspects of the Supreme Court's handling of the election controversy. He is, in short, the sort of person who would bring intellectual range, depth and independent-mindedness to the bench.

Yet Mr. McConnell, who had a hearing before the Senate Judiciary Committee on Wednesday, faces some serious opposition. For while many liberal academics support him, liberal advocacy groups are fiercely opposing him, largely because of his views on two subjects. The first is abortion, which Mr. McConnell opposes and has written about extensively and with passion. He has raised concerns about laws against blocking clinic entrances. So, to those for whom abortion is a litmus-test issue, the case against Mr. McConnell is simple: He's on the other side. But the fate of abor-

tion rights will not be decided by the 10th Circuit; the role of any circuit judge in abortion politics is limited. Mr. McConnell says he would faithfully apply Supreme Court precedent protecting abortion, and in the absence of any specific evidence suggesting otherwise, he should be taken at his word.

Mr. McConnell's work on religion has also drawn flak. But his views on this subject coincide neither with traditional conservative jurisprudence nor with traditional liberal views. He has advanced a vision of church-state separation that requires government "neutrality": Government may not advance religion, but neither may it place special burdens upon religious organizations. This idea, which has been influential in recent years in court cases, offends many advocates of purer church-state separation. Mr. McConnell's conception of religious liberty, moreover, is particularly broad. He has criticized the Supreme Court's decision to permit the tax-exempt status of Bob Jones University to be revoked because of the university's policy forbidding interracial dating. But Mr. McConnell's church-state writings—even where we disagree with them—are positive contributions to important debates, debates that are frequently too stale in the courts.

The ideological uniformity of the Bush administration's nominees is a legitimate cause for concern. And there are situations in which a nominee's prior writings create a compelling case against confirmation. But this isn't one of them. To reject someone who has written thoughtfully and constructively on a range of subjects would send a message to academics everywhere to avoid creative inquiry. Mr. McConnell should be confirmed.