

Testimony of  
**The Honorable Orrin Hatch**

September 18, 2002

Statement of Senator Orrin G. Hatch  
Ranking Republican Member  
Before the United States Senate Committee on the Judiciary

Hearing on the Nomination of

Michael W. McConnell to be a Circuit Judge on the United States Court of Appeals for the Tenth Circuit

Thank you, Mr. Chairman. Before we begin, I want to thank Senator you personally for scheduling this hearing. Given that Professor McConnell is nominated to fill a Utah vacancy on the Tenth Circuit, I appreciate your holding this hearing, and I want you to know that.

Of course, I get in trouble every time I am nice to you in public. I get a flood of letters from conservatives telling me I should not make friends with powerful Democrats. Well, it is tough to teach an old dog new tricks.

Mr. Chairman, I am proud to be here today to introduce, and to reiterate my strongest support for, Professor McConnell, who enjoys support from lots of powerful people, Republican and Democrat, conservative and liberal, and men and women - notably including well-known law professors Laurence Tribe, Cass Sunstein, Akhil Amar and Walter Dellinger, who are certainly no strangers to this Committee or its Members.

Professor McConnell, in my opinion, can not be pegged as an ideologue in any sense of the word. He is an honest man. He calls it as he sees it, and is beholden to no one or no group. He has taken scholarly positions and has brilliantly argued on issues that, at times, have been opposed by conservatives and, at times, opposed by liberals. As the Committee knows well, Professor McConnell has: publicly opposed impeachment of President Clinton, testified against a school prayer amendment; represented, without charge, some left-of-the-center groups such as People for the American Way and Americans United for the Separation of Church and State; and has been described by Supreme Court Justice Antonin Scalia as "the most prominent scholarly critic" of Scalia's approach to the Free Exercise clause. He is also a brave man. He has criticized my Constitutional amendment on the flag.

He has taken these positions, and has earned the broadest respect of his peers, liberal and conservative, not to make friends, not to agree with any agenda, but to be honest intellectually. Few people will disagree that he is truly one of the most humble legal geniuses of our time.

Mr. Chairman and Members of the Committee, it is my high honor and privilege to introduce to

you Professor Michael McConnell, a Utahn and a scholar of the highest talent, the most profound integrity and supremely judicial temperament.

Professor McConnell holds the prestigious Presidential Professorship at the University of Utah College of Law, in Salt Lake City. He began his legal career at the University of Chicago Law School, where he graduated at the top of his class. Thereafter he served as a law clerk for two of the leading liberal jurists of the 20th century: Supreme Court Justice William J. Brennan, Jr. and D.C. Court of Appeals Judge J. Skelly Wright. I would like to acknowledge the presence here today of Judge Wright's widow, Helen, and her husband John Pickering. It is an honor to have you both here.

After completing those clerkships, Professor McConnell became Assistant General Counsel of OMB and then served as Assistant to the Solicitor General. He then joined the faculty of the University of Chicago Law School, where he was awarded tenure and later the prestigious William B. Graham Professorship.

Professor McConnell is an able and experienced appellate lawyer. He has argued eleven cases before the United States Supreme Court - and won nine of them. One of his presentations to the Supreme Court was named by the Los Angeles Daily Journal the "best oral argument" of the year. His clients include a wide range of entities, from Fortune 500 companies such as NBC and Ameritech, to organizations such as the United States Catholic Conference, to municipal authorities including the New York Metropolitan Transit Authority, as well as many individuals.

This combination of intelligence, skill and experience was very likely the reason that the American Bar Association rated Professor McConnell unanimously "well qualified" - its highest possible rating.

I could go on about Professor McConnell's outstanding record of achievement and his unsurpassed reputation, but so can so many friends of this Committee like Professors Sunstein, Tribe, Delinger or Kmiec.

Mr. Chairman, about the only opposition to Professor McConnell's nomination has come from the inside-the-Beltway advocacy groups. I must say, what I find striking is the stark difference between the evaluation provided to this Committee by his academic peers who know him best, and that done by those Washington interest groups.

In my view, Professor McConnell's excellence in scholarship, honesty in intellect, his defense of liberty, contribution to legal thought and precise understanding of the role of a judge show why he is one of the best nominees this Committee has evaluated in a long time.

In reviewing Professor McConnell's full record, one area of scholarship stood out for me: his contributions in protecting our Freedom of Religion. This is one that is important to me, and I know, from working on the Religious Freedom Restoration Act and the Religious Liberty Protection Act, all members of this Committee cherish dearly. As you know, Professor McConnell is widely regarded as modern America's most persuasive advocate for the idea that our government should ensure every citizen's right to worship - or not worship - in his or her preferred manner. Through his scholarship and advocacy in court, he has stood up for the rights

of all religious people - including members of some politically out-of-favor faiths - to worship free of government restriction or intrusion.

Many Americans believe that the freedom to exercise their own religion is the most profound and important idea on which this country and our government were founded. Many Americans feel so secure in this freedom that they have not personally felt the forces that were eroding it, or the tremendous success Professor McConnell's efforts have achieved in repairing that damage.

Before Professor McConnell began his prodigious scholarship in the area of the First Amendment's religion clauses, the idea was taking root that the government must disfavor religion in its policies. That is, judges and scholars believed that all groups must be treated equally except religions, which must be excluded entirely from any government program or policy.

Professor McConnell's scholarship served as a dramatic wake-up call. He researched the Founders' writings and presented with illuminating clarity that the point of free exercise is for government to remain neutral as between religions, and neutral as between religions and non-religions, and it must accommodate religious activity where feasible. He demonstrated there was no basis in the founding for the view that our government must be anti-religion. The persuasiveness of his writing reawakened American legal scholars and judges to the Founders' view that the First Amendment's purpose is to protect religion from government, not the other way around. His work has helped reinvigorate the healthy and dynamic pluralism of religion that has allowed all faiths to flourish in this most religiously tolerant nation in human history.

McConnell's views defy political pigeonholing. On questions of Free Exercise of Religion, he has generally sided with the so-called liberal wing of the Court, arguing for vigorous protection for the rights of religious minorities. In fact, as I said earlier, in one opinion, Supreme Court Justice Antonin Scalia described McConnell as "the most prominent scholarly critic" of Scalia's more limited view of Free Exercise rights.

On questions of Establishment of Religion, McConnell's view that religious perspectives should be given equal but not favored treatment in the public sphere has led him to testify against a school prayer amendment, while supporting the rights of religious citizens and groups to receive access to public resources on an equal basis.

Mr. Chairman, just as the pluralism of religious diversity has profoundly enriched the spiritual life of our country, so has the strong tradition of academic freedom and exchange of ideas allowed an astonishing creative explosion of ideas and achievement in America that has benefitted the people of the United States and around the world. Our First Amendment and our intellectual property laws strive to protect, stimulate and widely disseminate such thought and exchange.

Few people in modern America have contributed more to their area of expertise, and thus proven the value of academic freedom, than Professor McConnell. He has written over 50 articles in professional journals and books. He has delivered hundreds of lectures and penned many op-ed pieces. He has contributed an immeasurable amount to the discourse of legal ideas. As Professor Laurence Tribe has written to this Committee, "McConnell is among the nation's most

distinguished constitutional scholars and a fine teacher." Tribe further explained that he and McConnell "share a commitment to principled legal interpretation and to a broadly civil libertarian constitutional framework." Mr. Chairman, I ask that Professor Tribe's letter be included in the record.

The significance of Professor McConnell's contributions to the legal profession in part explains why 304 professors - ranging from conservative to liberal - have signed a single letter urging this Committee to confirm McConnell's nomination. When was the last time that 304 professors agreed on anything? I ask consent that this letter also be included in the record.

Professor McConnell's peers consider him one of the nation's foremost constitutional scholars and appellate advocates and as a person with a reputation for open-minded fairness. In addition to the professors I mentioned earlier, Professors Charles Fried, Akhil Amar, Larry Lessig, Sanford Levinson, Douglas Laycock, and Dean John Sexton have been among those who have praised McConnell's integrity, ability and fair-minded approach to legal issues. Mr. Chairman, I ask consent to include these letters in the record.

Over the years, many on both sides of the aisle have discussed the impact of this Committee's evaluation process on those who have added the most to the public discourse of legal ideas.

I think we should praise and encourage the prolific exchange of honest, and principled scholarly writing, assuming such scholars know the proper role of a judge, to interpret the law as written and to follow precedent - and I should say to leave the innovative scholarship at home once confirmed to the bench. However, if one was criticized for past scholarship and academic publishing, even where they fully understand the limited role of a judge, we would find ourselves in the unfortunate situation of having bright young people either stop writing or give up any hope of serving in the judiciary.

Mr. Chairman, as you know, one of the Senate's most important roles in exercising advice and consent on judicial nominees is to make sure that they are free from any bias - whether political, religious, personal or otherwise - that would endanger their ability to follow the law as written by the legislature and interpreted by higher courts. No one wants a judge who plays legislator from the bench. We want and expect judges who know their limited role and who will uphold the law regardless of their personal views.

On the issue of past academic exchange and the nominee's understanding of the proper role of a judge, it is important for me to address Professor McConnell's writings on abortion. In reviewing his record, I found the most important thing he has written on this topic is that U.S. Supreme Court precedent setting forth the basic abortion right is settled and secure. Indeed, he believes that lower court judges have a clear duty to follow and apply that case law, and he will do just that if confirmed.

Beyond that, Professor McConnell's scholarship on the subject defies standard stereotypes. His writings have focused on two questions. First is the methodology or legitimacy of the Court's reasoning in *Roe v. Wade*. Like many constitutional scholars - including prominent supporters of abortion rights such as Justice Ruth Bader Ginsberg - Professor McConnell has written that the Court in *Roe* overstepped the bounds of proper judicial decision making and has argued that,

when facing other issues of policy disagreement, the courts should not substitute their judgment for that of the legislatures.

The second area he has addressed is the possibility of middle-ground approaches to abortion that would find support even from many people who support abortion rights as a general matter - dealing with such issues such as counseling and support for troubled pregnant women. He has been critical of the extremes on both sides of the questions surrounding abortion.

Professor McConnell has also written in defense of the free-speech rights of abortion protestors.

The fact is Professor McConnell's writings show that he is indeed committed to the ideas of stare decisis and controlling legal precedent. He knows full well the role of a judge - to interpret the laws as written and interpreted by higher courts and to leave the politics to the people.

You don't have to take my word for it, . . . although I would hope you will give it great weight. Professor Cass Sunstein has told this Committee that McConnell is "the furthest thing from an idealogue." I ask that Professor Sunstein's letter be included in the record as well. Professor McConnell's nomination also has been praised by a number of former Clinton administration officials, including Solicitor General Walter Dellinger, Deputy White House Counsel William Marshall, Domestic Policy Advisors Bill Galston and Elena Kagan, and Associate Attorney General John Schmidt.

Listen to part of a letter I received from the Legal Director of the ACLU chapter in Utah. He wrote - in his personal capacity - to endorse Professor McConnell "enthusiastically and without qualification," saying that "there can be no doubt that [lawyers who appear before him] 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."

So, Mr. Chairman, these are the reasons why I am thanking you for holding this hearing and why I strongly believe that Professor McConnell is one of the very best people nominated to a judgeship. He is a defender of American freedom.

I am very much looking forward to hearing from Professor McConnell today, and to working with this Committee to obtain the Committee's positive recommendation to the full Senate and to the full Senate's confirmation.

# # # #

Statement of Senator Orrin G. Hatch  
Ranking Republican Member  
Before the United States Senate Committee on the Judiciary

on the Nominations of

Kent A. Jordan to be U.S. District Judge, District of Delaware;  
Alia Moses Ludlum to be U.S. District Judge, Western District of Texas;

William J. Martini to be U.S. District Judge, District of New Jersey;  
Thomas W. Phillips to be U.S. District Judge, Eastern District of Tennessee; and  
Jeffrey S. White to be U.S. District Judge, Northern District of California

Thank you, Mr. Chairman. In addition to the nomination of Professor Michael McConnell for the U.S. Court of Appeals for the Tenth Circuit, we have the privilege of considering five nominees to be federal district judges. This is truly a geographically diverse bunch: Both the east coast and the west coast of our great nation are represented here today, as well as the north and the south.

Kent A. Jordan, our nominee to the U.S. District Court for the District of Delaware, possesses the experience needed for handling the court's heavy caseload of intellectual property, government corruption, and corporate matters. In addition to private practice experience in these areas, Mr. Jordan has served as an Assistant U.S. Attorney for the District of Delaware, handling cases involving federal regulatory issues, drug trafficking and tax violations, and environmental crimes. He currently serves as Vice President and General Counsel for the Corporation Service Company, overseeing the firm's legal affairs.

Judge Alia Moses Ludlum is our nominee for the Western District of Texas. After her graduation from the University of Texas School of Law, she joined the Travis County (Texas) Attorney's Office as a law clerk. She performed so well that she was soon hired as an Assistant County Attorney. After four years of trying cases and arguing appeals, Judge Ludlum was hired to work as the sole resident Assistant U.S. Attorney in the Del Rio Division of the U.S. Attorney's Office for the Western District of Texas. She excelled in this position, ultimately being promoted to Chief of the Del Rio Division. In 1997, Judge Ludlum became a part-time federal magistrate judge, a position that she assumed full-time in 2000.

William J. Martini, who has been nominated to the U.S. District Court for the District of New Jersey, has solid prosecutorial and private practice experience. He has worked as an assistant prosecutor in the Hudson County (New Jersey) Prosecutor's Office and as an Assistant U.S. Attorney in Newark, New Jersey. Beginning in 1977, Mr. Martini worked as a sole practitioner, initially representing criminal defendants and later branching out into civil litigation. Following a term in the U.S. House of Representatives, he joined the firm of Sills Cummis Radin Tischman Epstein and Gross as partner, where he now focuses on governmental affairs/regulatory law and general litigation.

Judge Thomas Phillips is our nominee for Eastern District of Tennessee. His commitment to public service dates back to 1973, when he served as a Captain in the U.S. Army's prestigious Judge Advocate General Corps. Following his service in the Army, Judge Phillips entered private practice, where quickly rose through the ranks to become a partner at a number of firms, finally becoming Senior Partner at the law firm of Phillips and Williams. In 1991, he was selected to become a federal magistrate judge for the district to which he has now been nominated. His hard work and well reasoned legal recommendations were recognized by the district judges whose bench he will soon join when in 2000 they was selected him to be chief magistrate judge.

Jeffrey S. White, our nominee for the Northern District of California, has had a wide ranging legal career. Early in his career, he was recognized twice as an outstanding Assistant U.S.

Attorney. In private practice, he became a partner at the law firm of Orrick, Herrington & Sutcliffe, where he served as chairman of the litigation department for fifteen years. In addition to the demands of his law practice, Mr. White has taught civil trial advocacy for 22 years at Boalt Hall School of Law and was awarded the Roscoe Pound Foundation Award for Excellence in Teaching Trial Advocacy.

Mr. Chairman, I am confident that each of these nominees will bring excellency to the federal bench. I commend the President for selecting them, and I am proud to support their nominations.

# # # #