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January 30, 2012

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Senator Grassley:

I am writing this to express my strong support for the nomination of Paul Watford to the United States Court of Appeals for the Ninth Circuit. I have long been extremely impressed by Paul, since I first met him almost 20 years ago, when my then-boss Judge Alex Kozinski (now Chief Judge) was interviewing him as a law clerk.

As you know, Paul had a stellar academic career, graduating very near the top of his class at UCLA School of Law and then clerking for Judge Kozinski and Justice Ruth Bader Ginsburg. He has also earned tremendous respect as a practicing lawyer, both as a federal prosecutor and an appellate lawyer. He has all the qualities that an appellate judge ought to have: intellectual brilliance, thoughtfulness, fairness, collegiality, an ability to deal civilly and productively with colleagues of all ideological stripes, and a deep capacity for hard work. If confirmed, he'll make a superb judge.

Let me turn then to the question of ideology. In the overwhelming majority of cases that an appellate judge faces, the judge's legal philosophy is entirely or almost entirely irrelevant: The cases are either straightforward applications of clear and well-settled law, or, even if less than clear, involve highly technical legal questions that relate little to high-level philosophical debates. For those questions Paul's intellect, care, and legal craftsmanship will yield results that both liberals and conservatives should applaud.

At the same time, there is no doubt that some small but important fraction of appellate cases consists of matters on which liberal judges and conservative judges will reach different results. That is inevitable: Law is not mathematics. Some legal questions are unsettled and not answered by statutory or constitutional text, or binding precedent. And in the absence of a clear and obvious legal answer, different judges reach different results based partly on their philosophies. Paul is a moderate liberal; I am a moderate libertarianish conservative; I therefore expect that, if he is confirmed, there would be some future decisions of his with which I will disagree.

Yet our current President is President Obama, not Senator McCain. The American people spoke, and they elected someone who will not nominate judges with whom Republicans like me will always agree. So, respecting as I do the voters' choice in 2008 (though it was not my choice), I do not ask: Is this the sort of judge who shares my legal philosophy? Rather, I ask: Would he be the sort of judge whom I could respect intellectually? Would he be the sort of judge whom I could trust to be fair-minded and respectful of the legal rules that he is obligated to follow? Is he likely to be more on the moderate side rather than solidly on the left? For Paul, my answer to those questions is a definite yes.

When a Democratic President nominates a judge who is indeed well on the left, Republicans like me face a difficult question: Should we resist the nomination, or should we accept it so long as the judge appears to be excellent on the nonideological factors? I have not fully thought through this question.

But for the reasons I mentioned, that's a question that doesn't even come up for me in this instance. Paul is the sort of moderate Democratic nominee that moderates and conservatives, as well as liberals, should solidly support.

Sincerely,

A handwritten signature in cursive script that reads "Eugene Volokh". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

Eugene Volokh