



February 14, 2018

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and Committee Members:

On behalf of the hundreds of thousands of members of People For the American Way throughout the nation, we urge the Judiciary Committee not to report the nomination of Wisconsin's Michael Brennan for the Seventh Circuit Court of Appeals to the full Senate. Sen. Baldwin's opposition to the committee's moving on the nomination is enough cause by itself for opposition. But, as we set forth below, Brennan's record independently demonstrates that he should not be confirmed.

Brennan's record suggests he would be a rubber stamp for unlawful presidential overreach. In 2004, while serving as a state circuit court judge, he wrote a revealing letter to the *Wall Street Journal* about habeas corpus rights for people imprisoned indefinitely on Guantánamo. The headline alone was chilling: A Citizen's Freedom Is Bound by Allegiance.ⁱ He wrote:

[The] conclusion that Yaser Hamdi should enjoy the constitutional protection of habeas corpus does not take into full account the ancient Roman dictum "*inter arma silent leges*" – "in time of war, the laws are silent"

Notably, joined by Justice Stevens, Justice Scalia cited the same Latin expression and wrote that:

[T]hat view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.ⁱⁱ

Brennan's letter displays a belief that during a crisis or war, Americans' freedom is limited to the "freedom" to obey the government.

As the tension between civil liberty and order is litigated in *Hamdi* and other cases, the nature of "civil liberty" must be understood. The word "civil" has its root in the Latin term *civis*, meaning "citizen." A citizen is not just someone free from government restraint. Citizenship grants a person freedom for allegiance to an organized government. Hamdi's "allegiance" led him to fight for the Taliban against American soldiers in the combat zone of Afghanistan.

When our nation is genuinely at war—or is undergoing hysteria fanned by an administration without integrity—it is a judge's responsibility to maintain the rule of law. Anyone elevated to a lifetime position as a federal judge must be firmly committed to the idea that even in times of war, the laws and the Constitution must not be silenced.

A fair-minded constitutionalist must also recognize when our legal system fails to ensure equality and justice for all, but Brennan seems unwilling to accept that reality. Ominously, during his confirmation hearing, he repeatedly refused to acknowledge that there is at least implicit racial bias in our nation's criminal justice system. He even seemed unfamiliar with studies showing the terrible racial disparities throughout our criminal justice system.

Especially as someone who served as a state trial judge for many years, Brennan should know better. His evasions on this critically important issue going to the core of justice and equality indicate he would be ill suited to review criminal proceedings as a federal circuit court judge.

Brennan also seems to have a blind spot where LGBTQ equality is concerned. He chaired Gov. Scott Walker's Judicial Selection Advisory Committee (JSAC), which recommended potential state judges to the governor. One of them—Rebecca Bradley—had written extremely vitriolic articles about LGBTQ people and people with HIV in the 1990s, when she was in college. Although this was not reported until 2016, five months after she was elevated to the Wisconsin Supreme Court, Brennan's current explanation for his role in Bradley attaining a judgeship are dismissive and misleading.

In order to understand just how disqualifying Brennan's response to the discovery has been, it is essential to detail what she wrote in the past and what she said in the present when the columns were uncovered. The Capital Times reported:ⁱⁱⁱ

“One will be better off contracting AIDS than developing cancer, because those afflicted with the politically-correct disease will be getting all of the funding,” Bradley wrote in the November [1992] column about Clinton's election. “How sad that the lives of degenerate drug addicts and queers are valued more than the innocent victims of more prevalent ailments.”

Bradley argued in another column, referencing HIV and AIDS, that the “homosexuals and drug addicts who do essentially kill themselves and others through their own behavior deservedly receive none of my sympathy.”

Not surprisingly, Justice Bradley quickly apologized and disavowed her writings. Nevertheless, their extremism and callous disregard for people different from her shock the conscience even though they were written when she was in college.

In addition, her self-defense in the present raised new concerns. She claimed that the things she wrote “have nothing to do with the issues facing the voters of this state.”^{iv} In fact, hatred aimed at LGBTQ people and people with HIV has long had an enormous impact on the lives and legal rights of Wisconsin voters. To say that this is unrelated to what the Wisconsin Supreme Court does is to write entire groups of targeted people out of the state constitution. In addition, seething hostility to people who have become addicted to illegal drugs could unfairly tip the scales of justice in a criminal case. It is hard to imagine a litigant having confidence in a fair hearing from a judge who proclaimed that your very life is worth less than other people's.

Of most concern to this Committee, Brennan appears blind to the full impact of Bradley's writings, indicating that he lacks the qualifications to serve on the Seventh Circuit. His statements have been lackadaisical and misleading, not the reaction of someone who can be counted on to provide a level

playing field for everyone. In his response to senators' post-hearing written questions, he wrote that if the JSAC had known about Bradley's writings, it would have brought them to Gov. Walker's attention.^v This indicates he still would have forwarded her name to the governor for consideration. It seems that animus is not a disqualifying trait for a judge in Brennan's eyes.

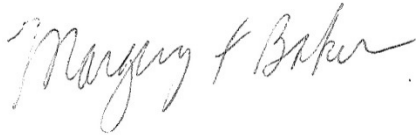
Brennan also repeatedly sought to evade responsibility for his recommendation. For instance:

[I]t is incorrect to say that I, or the Committee, recommended that Governor Walker appoint Rebecca Bradley ... to the Wisconsin Supreme Court. For each vacancy the Committee forwarded multiple applications to the Governor for his consideration and took no position with regard to which applicant the Governor should select from amongst those the Committee forwarded.^{vi}

Saying that this is not a recommendation contradicts the very purpose of the committee. The executive order creating the JSAC states plainly that it "*shall recommend* individuals to the Governor."^{vii} In addition, the press release announcing Brennan's replacement as chair of the committee states that "[t]he JSAC advises *and makes recommendations* on judicial appointees to Governor Walker."^{viii}

Michael Brennan's record demonstrates that he lacks the qualifications needed to serve on the Seventh Circuit Court of Appeals. The Senate should not confirm him.

Sincerely,



Marge Baker
Executive Vice President for Policy and Program

ⁱ Brennan, Michael B., "A Citizen's Freedom Is Bound by Allegiance," *Wall Street Journal*, May 3, 2004. <https://www.wsj.com/articles/SB108353132016199514>

ⁱⁱ *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting).

ⁱⁱⁱ "Rebecca Bradley called gay people 'degenerates,' 'queers' in college newspaper columns," *The Capital Times*, March 7, 2016. http://host.madison.com/ct/news/local/govt-and-politics/rebecca-bradley-called-gay-people-degenerates-queers-in-collegene newspaper/article_7b92ace5-d4d2-54af-a2de-54860858be47.html

^{iv} Id.

^v Brennan Responses to Questions for the Record, Senate Judiciary Committee, <https://www.judiciary.senate.gov/download/brennan-responses-to-questions-for-the-record>

^{vi} Id. at 34.

^{vii} Executive Order # 29, Relating to the Creation of the Governor's Judicial Selection Advisory Committee, May 11, 2011, https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/2011-29.pdf (emphasis added)

^{viii} "Governor Walker Appoints Andrew Hitt to Serve as Judicial Selection Advisory Committee Chair," Scott Walker, Office of the Governor, September 8, 2017, <https://walker.wi.gov/press-releases/governor-walker-appoints-andrew-hitt-serve-judicial-selection-advisory-committee> (emphasis added)