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THE DISTRICT OF COLUMBIA CIRCUIT: THE IMPORTANCE OF BALANCE ON THE NATION'S SECOND HIGHEST COURT

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

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THE DISTRICT OF COLUMBIA CIRCUIT: THE IMPORTANCE OF BALANCE ON THE NATION'S SECOND HIGHEST COURT

TUESDAY, SEPTEMBER 24, 2002

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee convened, pursuant to notice, at 10:13 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Schumer, Chairman of the Subcommittee, presiding.

Present: Senators Schumer, Kennedy, Sessions, Hatch, and Kyl.

OPENING STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Chairman SCHUMER. The hearing will come to order. We are going to start. Jeff Sessions is on his way, but we have our Ranking Member, who can ably defend the other side. I would rather Jeff be here.

[Laughter.]

Chairman SCHUMER. Which is a compliment to Orrin and to Jeff.

I first want to thank everyone for joining us today in this important hearing on the unique role that the D.C. Circuit plays in our system of justice and the need for ideological balance on this vital court.

The D.C. Circuit is often called the Nation's second highest court, and with good reason. More judges have been nominated and confirmed to the Supreme Court from the D.C. Circuit than any other court in the land. The D.C. Circuit is where Presidents often look when they need someone to step in and fill an important hole in the lineup.

It is sort of like the bullpen court, having given us Supreme Court Justices like Scalia, Thomas, and Ruth Bader Ginsburg, not to mention Robert Bork, Ken Starr, and my good friend who is here today with us, the notorious Abner Mikva.

That was supposed to be funny, Orrin.

[Laughter.]

Chairman SCHUMER. He laughed. He was the only one.

Senator HATCH. I did laugh.

Chairman SCHUMER. I thought it was pretty good myself.

All other Federal appellate courts handle just those cases arising from within its boundaries. So, for example, the Second Circuit where I am from takes cases coming out of New York, Connecticut,

and Vermont. The Eleventh Circuit, where Senator Sessions is from, gets cases out of Alabama, Georgia, and Florida.

But the D.C. Circuit doesn't just take cases brought by the residents of Washington, D.C. Congress has decided there is value in vesting one court with the power to review certain decisions of administrative agencies. We have given plaintiffs the power to choose the D.C. Circuit, and in some cases we force them to go to the D.C. Circuit, because we have decided, for better or for worse, that when it comes to certain administrative decisions one court should decide what the law is for the whole country. It seems to me that makes sense.

So when it comes to regulations adopted under the Clean Air Act by EPA, labor decisions made by the NLRB, rules propounded by OSHA, gas prices regulated by the Federal Energy Regulatory Commission, and many other administrative matters, the decisions are usually made by judges on the D.C. Circuit.

To most, this seems like an alphabet soup court, since virtually every case involves an agency with an unintelligible acronym—EPA, NLRB, FCC, SEC, FTC, FERC, and so on and so on and so on. It leads to another set of letters to many, a long line of z's. Even my eyes glaze over and roll back in my head when you read down the list. But the letters that comprise this alphabet soup are what make our Government tick. This court is vital to the functioning and interpretation of how the Government works.

These are the agencies that write and enforce the rules that determine how much "reform" there will be in campaign finance reform. They determine how clean the water has to be for it to be safe for our families to drink. They establish the rights workers have when they are negotiating with corporate powers.

The D.C. Circuit is important because its decisions determine how these Federal agencies go about doing their jobs. And in doing so, it directly impacts the daily lives of all Americans more than any other court in the country, with the exception of the Supreme Court.

But we probably wouldn't be talking about this court today if it weren't for the political maelstrom brewing over a few of the pending nominations to it. So before any of the reporters here get too excited, I want to be clear that the witnesses with us today are not going to discuss Miguel Estrada or John Roberts. Those discussions are for another day.

That said, nominations to this special circuit merit special scrutiny. Anyone who thinks we should just blindly confirm any President's nominees to this all-important court needs to think again.

The goal of this hearing is to underscore what is at stake when considering nominees to the D.C. Circuit, how their ideological predilections will impact the decisions coming out of the court and why it is vital for Senators to consider how nominees will impact the delicate balance on the court when deciding how to vote.

Perhaps more than any other court, aside from the Supreme Court, the D.C. Circuit votes break down on ideological lines with amazing frequency. The divide happens in cases with massive national impact, and if anyone thinks the court's docket isn't chockful of cases with national ramifications, they ought to listen to this. Here are some examples.

When it comes to civil rights, the court plays a huge role. In *Hopkins* v. *Price Waterhouse*, the D.C. Circuit enforced the Civil Rights Act guarantee of equal treatment in the workplace by remedying blatant sex discrimination in a case where a woman was denied partnership at Price Waterhouse based on her gender alone.

When it comes to communications, the court plays an enormous role. It has exclusive jurisdiction over appeals from FCC decisions. That is a pretty big chunk of law with massive impact on American consumers. Just a few years ago, the Circuit upheld the constitutionality of the Telecommunications Act of 1996, guaranteeing more competition in the local and long-distance marketplaces, which in turn guaranteed better and cheaper phone service for most of us.

Even when it comes to defining our post-9/11 world, the D.C. Circuit plays a big role in interpreting and defining our anti-terrorism laws. For instance, in the ongoing case of *Holy Land Foundation* v. *Ashcroft*, the Circuit will be called upon to determine whether a charitable organization is really a charitable organization or a terrorist front whose assets can be frozen by the Federal Government.

When it comes to privacy, the court plays a big role. Earlier this year, the court was called upon to assess the FTC's power to protect consumer privacy when it comes to the private, personal information credit reporting agencies make public.

When it comes to consumers, the court plays a big role. Yesterday's blockbuster decision on the front pages of most of our national papers by the FERC that a major gas and oil company deliberately manipulated gas prices in California will undoubtedly end up before the D.C. Circuit.

When it comes to the environment, the court plays a big role. When Congress passed the Clean Air Act in 1970, we gave the EPA the authority to set clean air standards—the power to determine how much smog and pollution is too much. In 1997, having reviewed thousands of studies, the EPA toughened the standards for smog and soot. The decision was to have two primary effects.

First, it was going to improve air quality. But, second, it was going to force some businesses to spend more and to pollute less. Industry groups appealed the EPA's decision, and a majority-Republican panel on the D.C. Circuit reversed the EPA's ruling.

In doing so, the court relied on an arcane and long-dead concept known as the non-delegation doctrine. I remember studying this in law school 25 years ago, and they said even then it was on the way out. But it was a striking moment of judicial activism that was pro-business, anti-environment, and highly ideological.

While that decision ultimately was reversed unanimously by the Supreme Court, most other significant decisions of the D.C. Circuit have been allowed to stand without review. That is because the Supreme Court takes fewer and fewer cases each year, and, taking an increasingly ideological bent itself, many feel we can't rely on the Supreme Court to right the D.C. Circuit's wrongs.

Throughout the 1990's, conservative judges had a stranglehold majority on this court. In case after case, during the recent Republican domination of the Circuit, the D.C. Circuit has second-guessed the judgment of Federal agencies, striking down fuel econ-

omy standards, wetlands protection, and pro-worker rulings by the NLRB.

Now, for the first time in a long time, because of the resignation of two Republican judges, there is balance on the Circuit—four Republican judges and four Democratic judges. Some of us would like to keep balance on this all-important court, not giving either side an ideological edge.

I am not going to talk about how President Clinton's nominees were held up, Orrin.

Given the recent revelations of corporate irresponsibility, avarice, and greed, now more than ever we need to ensure that we will have balanced courts to ensure the law is enforced equally against all offenders. While politics isn't always the best predictor of how judges will vote, some recent studies of the D.C. Circuit pretty conclusively prove that ideology plays a big role in how the judges vote—huge differences when it is a Republican group and a Democratic group deciding the decision. Of course, that comes up by the way the wheel works.

One final note before I turn this over to Orrin. As always, I am grateful to Jeff Sessions as Ranking Member on this subcommittee. It is pleasure serving with him and his staff, especially Ed Haden, who once again have worked with us in a collegial and professional way to set up this hearing. We occasionally have our disagreements. If Jeff were here, he would probably say more than occasionally, but it is always a pleasure to work with him.

[The prepared statement of Senator Schumer appears as a submission for the record.]

Chairman SCHUMER. Now, let me turn this over to somebody who is admired by every member of this Committee. Sometimes we agree and sometimes we disagree, but he is always both a good friend and a worthy adversary, our Ranking Member, Orrin Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. I feel exactly the same way about you. I think you have brought a great dimension to this Committee, although you are wrong on some of these issues, and I am going to point that out in no uncertain terms.

Chairman SCHUMER. I have little doubt.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. We also welcome all of our witnesses here today. We appreciate you taking your valuable time and helping us here on this Committee.

Since the Democrats took over the Senate and the Judiciary Committee last June, my colleague and good friend from New York has been arguing that we on the Committee should be up front about our role in the advice and consent process, that we should not engage in the slight-of-hand of talking about one issue while voting on another. I agree with him to the extent that we should speak and act forthrightly and we should not stoop down to the politics of personal destruction in order to justify a vote that is based on something else.

Unfortunately, I think that is where our agreement ends. Several weeks ago on the floor, I had my friend from New York as a captive audience because he was serving as the presiding officer, and he

was very uncomfortable as I was speaking. I explained my view that being honest and open neither requires nor excuses the overt injection of raw politics into the advice and consent process.

I explained then my opinion, based on 26 years of experience, that the only way to make sense of this process is to begin with the assumption that the President's constitutional power to nominate should be given a fair amount of deference, and that we should defeat nominees only where problems are truly significant.

I believe that to the extent ideology is a question in judicial confirmations, it is a question answered by the American people and the Constitution when the President is constitutionally elected. The Senate's task of advice and consent is to advise and to query on the judicious character of nominees, not to challenge by our naked power the people's will in electing who will nominate.

The premise of this hearing reminds me of a nickname that some clever college freshman gave to one of his required first-year courses: Introduction to the Obvious. If the point of this hearing is to show that the D.C. Circuit currently includes four judges appointed by Republicans, then we hardly need to convene a Senate subcommittee to figure that out.

If the further point is made that adding one Republican appointee will result in five Republican appointees and four Democrat appointees, then I still can't imagine the hearing being disrupted by reporters running from the room yelling "stop the presses."

But I know that we are not here to explore the obvious with a sense of discovery. So I suppose the real question is, what should we do about this? How should the Senate act when faced with courts that have either a balance or an imbalance between the number of Republican and Democrat appointees?

Should we refuse to confirm any new judges to those courts unless they belong to the right political party? Should we wait until one of the judges steps down and then wait even longer for there to be a President who happens to belong to the same political party as the President who appointed that judge?

Well, these options seem to me to be perfectly ludicrous. The only possible answer is to accept the reality that Presidents have the power to appoint judges and that the balance in the judiciary will change over time as Presidents change, but much more slowly.

The variables of Presidential elections, judicial retirements, circuit size, and many other factors will mean that perfect balance will be achieved rarely, if ever. That is simply how the system works, and has worked since the Judiciary Act of 1789.

Our role of advice and consent is meaningful and we must take it seriously, but it was never intended as a power to second-guess the President or simply to substitute our judgment for his, and in so doing usurping the will of the American people.

Mr. Chairman, you know better than anyone that I am sincere about this and that my track record proves it. Your report issued last Friday to the press shows that I voted against only one nominee in the last 10 years. As a matter of fact, you could go back a lot farther than that because that is the only one for at least the last 22 years.

And to clarify, I did so not on the basis of politics or ideology, but rather out of respect for the traditional role of home State Sen-

ators in the selection of district court nominees. When both home State Senators of that nominee informed me that they were voting no, I felt I had no choice but to respect their judgment. And for what it is worth, I think that vote was quite an unfortunate episode, but I nevertheless acted in accordance with Senate practice.

In keeping with the spirit of openness and honesty, I must say this: Although I know how this hearing is being billed, I am left to wonder why we are not having a hearing about the dismal Ninth Circuit, or about the procedural scandals that are plaguing the current Sixth Circuit. Why, I ask myself, are we having a hearing about the D.C. Circuit just 2 days before the nomination of Miguel Estrada? Coincidence? Surely not.

When I was chairman, I ended the practice of having witnesses lined up to eviscerate good nominees. It was clear that the times had changed and that the base art native to the Potomac of destroying reputations had been too well perfected. I am glad that Chairman Leahy has concurred in this practice and I respect him for it.

I am disappointed that we are having this hearing because, to be frank, it strikes me that we are regressing, that this subcommittee is just a thinly veiled attempt to lay the foundation to oppose one of the most intelligent, accomplished, and respected lawyers ever named to the D.C. Circuit Court. It seems to me that it would have been more forthright to name this hearing what it is, the Contra Estrada hearing.

Now, let me express my very real concern for the buildup that I see happening to attempt to harm the nomination of this brilliant young man, who came to this country at age 17 from another country, knowing little English, and who has made his parents very proud and all of us who know him very proud.

In one sense, I agree that there should be concern for balance on the D.C. Circuit. As chairman and founder 12 years ago of the nonpartisan Republican Hispanic Task Force, which, despite the name, is made up of both Republican and Democratic members, I have long been concerned for the inclusion of Hispanics in the Federal Government.

Without trumpeting the over-used word "diversity," I have made it my business to support the nomination of talented Hispanics for my entire career in the Senate. I am sorry that not even the desire for diversity will trump the reckless pursuit of ideology in judicial confirmations.

I have a special affinity for Hispanics and for the potential of the Latin culture in influencing the future of this country. Polls show that Latinos are the hardest-working Americans, that they have strong family values and a real attachment to their faith traditions. In short, they have reinvigorated the American dream and I expect that they will bring new understandings of our nationhood that some of us might not see with tired eyes.

I also know that Hispanics come in many colors and that they have left behind countries filled with idealogues that would chain them to particular political parties. I know that they share a common-sense appreciation of each other's achievements in this country without any regard whatsoever to ideology, over which some Americans have the luxury of obsessing.

I am concerned with balance on the Circuit Court of Appeals for the District of Columbia, but of a real sort, not the kind to be discussed here today. Like President Bush, I think it is high time that a talented lawyer of Hispanic descent is represented on the second most prestigious court in the land. The D.C. Circuit hears Federal cases no other court hears, as the distinguished chairman has told us, and has a special role in the enforcement of the Voting Rights Act of 1965. Yes, I think it is time that a Hispanic sit on that court.

I also think it is time that we unmask the way that Miguel Estrada's nomination is being treated and the lengths that his detractors are going to place hurdles in his path. And I do not include the distinguished Senator from New York in that category. I respect him. We are dear friends, but Miguel Estrada has not been treated very fairly.

For months, I have been sounding the alarm of the influence of the special interest groups on this Committee. I have been increasingly ashamed of the axis of profits that demands that judicial nominees be voted down for a palimpsest of reasons. While the game plan is unvaried, the quarterbacks change, and now it is the liberal Hispanic groups that are on the field. They ought to be ashamed of themselves. They have sold out the aspirations of their people just to sit around schmoozing with the Washington, D.C., power elite.

I have repeatedly warned against what is going on behind the scenes, but I have done it so often that perhaps it is time to try it with a new word. Here is the Spanish word: the word is "confabular." Now, it means when one or more persons come together secretly to invent falsehoods about another. I am afraid that that is what we will see this week against Miguel Estrada. And I am sorry, Mr. Chairman, that this hearing may be viewed as part of that effort.

Again, the distinguished chairman of this subcommittee is very sincere in his belief that ideology is important. I don't quite agree with him on that, but at least I respect his sincerity. But what is even more important is that we have respect for the President's nominees, and unless we have very good reasons we should confirm those nominees.

Miguel Estrada has now sat here for 16 months, almost a year-and-a-half. Fortunately, he is going to have his hearing this Thursday. Will we get him through before the end of this session, and the others who also have had hearings? I think common sense, decency, honor, and integrity mean we should do that.

Now, I want to welcome today members of the Hispanic community who are wearing badges saying "Confirm Miguel." I could not agree more. We are very happy to welcome all of you. We are very happy to have you here and we hope that this Committee will listen to you.

Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator Hatch.

Now, let me call on Senator Sessions for an opening statement. As I mentioned, he has been a very, very strong and fair Ranking Member of this subcommittee. We don't agree on certain things, but we try to work with one another as best we can.

I thank you, Jeff.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator HATCH. Could I just interrupt for a second? I am on the Intelligence Committee, so I am going to have to leave, but I am going to leave it in your trusty two hands.

Chairman SCHUMER. Well, thank you. I was going to mention one thing to my good friend, Orrin, if I might, if Jeff doesn't mind, and that is again it bolsters my view that ideology does matter when Judge Paez was nominated, also Hispanic, of a different ideological view than Judge Estrada, he waited 4 years before his confirmation.

I don't accuse anybody of doing that because he was Hispanic. I accuse people of doing it—or not accuse, I just think it is because people thought the Ninth Circuit was out of balance and Judge Paez would have increased that lack of balance. In fact, we heard some members say that.

Senator HATCH. If the Senator would yield on that, I was intimately familiar with all of that and that wasn't the reason he was held up. But I have to say that I think the Senator realizes that I am the reason that he sits on the Ninth Circuit today, because I overruled a whole raft of people to be able to put Judge Paez on that court, and I am hopeful that he will do a good job.

Chairman SCHUMER. Let me say this to my good friend, the former chairman and now Ranking Member. I think if he were solely in charge of all of this, there would be less rancor, more fairness, and things would work out better for everybody concerned. I truly believe that.

Senator HATCH. We are going to work on that, and hopefully we can fulfill your prophecy here.

[Laughter.]

Chairman SCHUMER. When I say in charge, I was not of majority members; I was talking of higher up than that.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. Thank you, Senator Hatch. You have indeed given your best efforts for quite a number of years to improve our courts, and your leadership as chairman of the Committee was extraordinary. I appreciate your remarks. I think I will say something about Judge Paez, whom I felt was not a good nominee, and Senator Hatch disagreed. It was an interesting debate and he was confirmed.

Mr. Chairman, first let me say I appreciate you. You know, we don't agree on this ideology question. You have said, and I think it is true, that "gotcha" politics, hearings, and trying to catch somebody with some misstep in a career of law practice, is not a healthy way to do it. We ought to put the matter out on the table and discuss it openly if we have got a problem with a judge.

But, I think we need to have discipline in this approach and not suggest that a person's politics or their political beliefs qualify or disqualify them for the bench, whether it is pro-life or pro-choice, or whether it is for an expanded Government role or not an expanded Government role in the life of America. When a judge sits on that bench and makes a ruling, it shouldn't make a difference

whether they are Republican or Democrat, conservative or liberal, in my view. So this is an important matter.

I think this hearing is important for three reasons. First, it is the fourth hearing that we have had which I would interpret as an attempt to justify the use of a person's politics rather than their view of the proper judicial role as a legitimate reason to vote against a nominee.

Second, this hearing should shed some light on the historic slowdown in the circuit court confirmations that have occurred during the first 2 years of President Bush's term, as Senator Hatch mentioned.

Third, this hearing serves as an introduction to the nomination hearing for Miguel Estrada, who, if confirmed this year, would be the first Hispanic judge to sit on the D.C. Circuit.

As an additional matter, I would like to state again for the record that I agree with Democrats Lloyd Cutler and former Chief Judge of the D.C. Circuit Harry Edwards, and with Republicans Boyden Gray and retired Judge James Buckley of the D.C. Circuit, that a nominee's political ideology should not play a role in a judicial confirmation and should not play a role in judging by that judge.

Instead, I believe that nominees of Democratic Presidents, who will generally be Democrats, and nominees of Republican Presidents, who will generally be Republicans, should be treated the same in the hearing process. They should be confirmed if they have integrity, if they are qualified, and if they have a judicial temperament and appreciate that the role of a judge is to make fair findings of fact—I have seen judges who like to doctor the facts—and reasonable interpretations of valid sources of law, and not step outside these sources to advance a personal political agenda. That is when we have crossed the boundary.

If a nominee's record indicates a problem in an area like this, I may oppose them, Republican or Democrat, or else I will support them. Thus, on this score I disagree with my friend from New York's statement over the past one and-one-half years on the question of ideology, as we have discussed.

At our first hearing in June of last year of this subcommittee, we heard that the Senate had to reject nominees based on their politics because the Supreme Court was, they alleged, a right-wing court, an activist court. When we examined the current Court's decisions, however, we found that it had protected burning the American flag; had banned voluntary school prayer at football games; had stopped the police from using heat sensors to search for marijuana-growing equipment, which, as a prosecutor, I think was a bit of an alteration of current law in favor of civil liberties; had reaffirmed and expanded abortion rights; and had struck down a ban on virtual child pornography. These decisions don't indicate to me that the Supreme Court is in the grip of some sort of right-wing group.

At the September 4th hearing, we were told that because a nominee's politics mattered, the Senate now, for the first time, should shift the burden to these Republican nominees to prove their worthiness of confirmation beyond the paper record.

When we examined recent history, though, we found that, as Senator Hatch has consistently said, for Democratic nominees the burden was on the Senate to reject them. And when we examined more distant history, we found that during the first 130 years of our country's history, the Senate did not ask nominees any questions at hearings, probing or otherwise. Nominees did not appear regularly before the Judiciary Committee until John Marshall Harlan, II, in 1955. It would be difficult indeed for a nominee to bear some historical burden if they were not even coming to the hearing to submit to examination.

In the May 9th hearing, we heard about how bad the Republicans were for confirming circuit court nominees. Upon close examination, it was discovered that two of the four proffered examples of unfairly treated nominees lacked support from their home State Senators.

One was nominated approximately 4 months before the Presidential election, and the final judicial nominee had never tried a case in a courtroom, which isn't absolutely disqualifying, but in my view it takes some compensating factors of significance to overcome that lack.

Indeed, my colleagues across the aisle deemed the home State Senator support rule so important that now they have sought to guarantee the rule as part of our original negotiations to set how we were going to handle nominations.

So I shouldn't expect my Democratic colleagues to complain that when a home State Senator objected to a few nominees and they did not go forward, because they are, in fact, if anything, asking that the rule be strengthened now when they deal with President Bush's nominees.

Within the last few days, we have been treated to a press release with an accompanying chart purporting to offer new proof that the political ideology of nominees is routinely taken into account by the Senate. The chart, however, contains several errors.

First, the chart purports to count only the "no" votes of current members of the Senate Judiciary Committee, both Republicans and Democrats, who served on the Committee for at least 2 years of the Clinton administration. This is the chart, I believe, we have been presented with.

Chairman SCHUMER. You changed the color.

Senator SESSIONS. It is a pretty color there.

The chart excludes, however, the "no" votes of current Committee members Edwards and Cantwell, who did not serve on the Committee during the Clinton years. The chart includes, however, the "no" votes of current Committee members Brownback and McConnell, but Senators Brownback and McConnell did not serve on the Judiciary Committee while President Clinton was in office during the 105th and 106th Congresses. Thus, by its terms, the chart erroneously includes 25 "no" votes that should have been excluded.

Second, the chart displays an artificial disparity in the Republican "no" votes and Democratic "no" votes by showing four full years of Republican votes involving President Clinton's nominees, but only one-and-one-half years of Democratic votes against President Bush's nominees; thus, the visual misperception that Repub-

licans vote against Democratic nominees more often than vice versa.

I think, Mr. Chairman, you need to get your math right on this chart.

By looking at the percentages of "no" votes over the number of total votes of Committee members for nominees on the floor, a rough approximation on a percentage basis removes the mismatch of time periods.

I won't go into more of the mathematical argument on that, but I really think that chart is a bit off. This is where we think the numbers are, and it does appear that the Democrats have concerted their "no" votes on single nominees to defeat them on party-line votes, which was not done during the 8 years of President Clinton's presidency. Not one single nominee, to my knowledge, was killed in Committee, unless they perhaps had background problems or——

Chairman SCHUMER. That is because the ones you didn't like never got votes.

Senator SESSIONS. Well, Mr. Chairman, most of those that did not have votes either had a serious ethical problem, virtually all of them, or they had objections from home State Senators, a position you don't intend to give up on, I understand, but want to strengthen the power of a home State Senator to keep the Committee from voting.

I would ask you, you don't propose, do you, that if Senator Feinstein objects to a nominee that that nominee have a hearing?

Chairman SCHUMER. Let me just say no, of course not. But of the first ten who were "well qualified" by the bar association who were not given hearings, five of those, there were no objections from their home State Senators. And of relevance here, two of those were from the D.C. Circuit. There was a particular effort not to bring forward members of the D.C. Circuit who were nominated, including, I believe it was, Snyder and Kagen. And then the third who was confirmed had to wait a long time, Garland.

Senator SESSIONS. Well, I will tell you why we had a problem with those two judges for the circuit, and it accounts for the "no" votes. It is because the circuit had as a caseload about one-fourth the average caseload per judge. And the chief judge of the circuit said 10 judges is enough, instead of the 12. And actually I thought that was too many. I thought ten was too many.

The D.C. Circuit has the lowest caseload by far in the country per judge, and as a result of that I think it does not need as many judges. Now, we are below ten, so I think it is appropriate to move the court to ten. But I will oppose going above ten unless the caseload is up. In fact, it continues to drop. It dropped 15 percent the year before last. So that is why we had a problem with those nominees, Mr. Chairman.

Chairman SCHUMER. Would it be logical to make it even lower right now, if it is even a lower caseload than it was when you said it shouldn't get more than ten?

Senator SESSIONS. Well, when President Clinton was in office and I studied the issue, as this Committee did, because we studied caseloads throughout the country, I agreed that ten would be an appropriate number, Mr. Chairman, and I think we ought to be

consistent with that. I don't think we should go above 10, although the court is authorized 12.

Well, it is an interesting debate we are having.

Chairman SCHUMER. We have a good time debating it.

Senator SESSIONS. You are such a skilled advocate and a knowledgeable and fine lawyer and a fine, fine Senator. It is a pleasure to be with you.

The court process is something I have been involved with for a number of years since I have been in the Senate, almost 6 years, and had a prior involvement of unpleasantness with that process a number of years ago.

Chairman SCHUMER. Let the record show I was not on the Committee at that point in time. I maybe would have voted differently.

Senator SESSIONS. Well, I would hope so.

At any rate, we have a great country. Mr. Chairman, maybe it is good that we bring all this out and continue these kinds of hearings and debate. I just want to say to you it is nothing personal, but I really, as you know, am troubled by the thought of a political litmus test on judges, and so it is a very important issue to me. So let's have a great debate about it.

Chairman SCHUMER. Well, I want to sincerely thank my colleague, Jeff Sessions. We are from different parts of the country, and not only different parties, but clearly different ideologies, but he is always a gentleman. And we have come to agreement, I think, that these kinds of debates are very healthy, a lot better, as he mentioned earlier, as did Orrin, than the "gotcha" politics which just demeaned everything—the nominees, the Committee, the courts, the country.

I hope we can continue these debates in the spirit in which we have had them, which is sincere disagreements on these roles. Maybe this is overstating it, but if the Founding Fathers and those who thought about the judiciary—and we will probably even debate what they thought; we have before—looked down on this room, they would say this is what they wanted the Congress to do. So I appreciate that.

We have 6 minutes for the vote. We have great witnesses here, but I think rather than just starting and rushing our first witness, we will go vote and come right back, if that is OK with our witnesses here. I hope you have enjoyed a little bit of our interchange, as well, because we are going to enjoy yours. Thank you.

The hearing is recessed for—just one vote, so we are only going to recess for 10 minutes. Thanks.

[The subcommittee stood in recess from 10:51 a.m. to 11:14 a.m.]

Chairman SCHUMER. The hearing will resume and we will go right to our witnesses.

Let me introduce our first witness, and I think I will introduce the witness, let each witness speak, and then introduce the next. We don't have to do it seriatim.

Abner Mikva has had one of the most interesting careers in public service that anyone has had in modern American history. He has had a stellar career in all three branches of Government, having served as a United States Representatives in 1970's, Chief Judge of the D.C. Circuit Court of Appeals in the 1980's, and White

House Counsel in the 1990's. He is currently a visiting professor at his alma mater, the University of Chicago Law School.

There are few more knowledgeable, erudite, and articulate witnesses who appear before this Committee. He obviously has more than a passing familiarity with our subject today.

Judge Congressman, Counsel Mikva, thank you for being here today. Your entire statement will be read into the record and you may proceed as you wish.

STATEMENT OF ABNER MIKVA, PROFESSOR OF LAW, UNIVERSITY OF CHICAGO LAW SCHOOL, CHICAGO, ILLINOIS

Mr. MIKVA. Thank you very much, Mr. Chairman. I very much appreciate the invitation to appear before this subcommittee to talk about the Court of Appeals for the District of Columbia and the special need for ideological balance on that court.

I spent 15 years as a judge on that court, including almost 4 years as its Chief Judge. When I was practicing law, I did administrative law and I had considerable dealings with that court. When I was a member of the House Judiciary Committee, I helped to fashion some of the laws that account for some of the uniqueness of the D.C. Circuit. As White House Counsel, I helped in the nominating process of judges to that court, and teaching the legislative process and the law of the executive branch to law students, I spend a lot of time talking about the D.C. Circuit and its jurisdiction and its precedents. So I have looked at that court from just about every angle and it is very special, and the need for an ideological balance on that court is very special.

I guess every judge on every court would argue that his court is special, and they are, but the D.C. Circuit has some very special characteristics. The chairman has already referenced some of them and I will try not to repeat it, but it is rightly known as the "government court," not just because of that 10-square-mile geographical area that is its physical jurisdiction, but almost every Congress passes laws that produces cases for this circuit, sometimes, as you mentioned, in the case of the FCC, exclusive jurisdiction in this circuit.

Perhaps one of the most important areas where this circuit has a special role is where the two branches end up fighting with each other. The Nixon tape cases and other challenges to executive privilege come to mind. The D.C. Circuit is an important battle ground for those kinds of cases.

With all deference, I think one of the problems with measuring caseload for that circuit is that sometimes those cases are so huge—Federal Energy Regulatory cases or executive privilege cases—that they occupy an enormous amount of time and energy and resources. And to compare a caseload for the D.C. Circuit to a caseload for a circuit like my home circuit, the Seventh Circuit, which has a lot of diversity cases, fender-benders and others, is comparing apples and oranges. I have no particular views as to how many judges there ought to be on the court, but I am simply saying that caseload is not a very good measuring stick.

Now, obviously, the D.C. Circuit doesn't have any more finality than any of the other intermediate courts, the inferior courts that the Constitution describes should be established by the Congress.

But frequently that circuit ends up teeing up the important questions for the Supreme Court that it finally determines.

Not surprisingly, because so many of these questions are on the cutting edge of the law, the Supreme Court sometimes decides the question differently than the D.C. Circuit. I don't think our record matches that of the Ninth Circuit, but we have been reversed on numerous occasions. Our clerks used to sport t-shirts which said on the front "D.C. Court of Appeals," with the year of their service, and then on the back it would say "Reversed, U.S. Supreme Court" the following year.

Anyway, those are some of the reasons, and the chairman has referred to others, why the court is a unique one, and why it is especially important that the judges on that court avoid carrying a political agenda to the court. I claim a special qualification to speak to that subject, and I am sorry that Senator Hatch had to leave. He was the one member of the subcommittee that was here when I had my difficulties with confirmation when I went on that court.

There were some who said that because I had been a political activist as a Congressman, I would carry my unfinished causes to the court. The National Rifle Association was particularly active in the opposition, insisting that would try to effect gun control from the bench, even though I had failed in the Congress.

In fact, they acknowledged that they spent over $1 million, which was a lot of money in those days, to defeat my nomination. When my wife heard about that, she said, you know, if they were going to talk that kind of money, they could have talked settlement.

Well, it turned out that during the 15 years I was on the court, I had one case involving the National Rifle Association and gun control, and I ruled in favor of the NRA, to their surprise. But I had my share of critics who insisted that I was an activist judge. And all I can tell you is that I was conscious of that concern and tried to remember that I was neither elected nor anointed, or even final, and that my role was to apply the laws that Congress passed and Supreme Court precedents without regard to my personal views, whether it was on the death penalty or interpretations of the Fourth Amendment or criminal law.

Now, I don't suggest that the Senate only confirm judges that have never had any views on any important subjects of the day. Such a requirement for a tabula rasa, as Chief Justice Rehnquist once referred to it, would probably make for good little league umpires, but they hardly would bring the experience that is necessary to be a good judge.

But there is a difference between people who have views on a subject and those who have become zealots. I remember a political analyst once described one of the nominees who failed Senate confirmation some years ago as someone who felt he had a mission to educate the Senate to his point of view.

Well, I think that nominees who have missions to educate the political branches or the public or their colleagues should stay on the lecture circuit or should run for public office, because such missionaries don't represent the balance the discipline necessary to be a good judge on any court, and especially the D.C. Court of Appeals.

Balance and discipline will reflect how well the court shapes up and tees up those sharp questions for the Supreme Court to decide.

If the D.C. Circuit is anticipating the role of the Supremes, as it has on occasion, or rejecting the answers that it gets to those hard questions, as it does on occasion, then there is an overload.

That is particularly true when the court is being asked to resolve some of the conflicts that arise between the two political branches in executive privilege cases. That is particularly true when one of the divisive questions confronting the courts and the Congress is the extent of congressional power under the Commerce Clause or under the Tenth and 11th Amendments to the Constitution.

It is not for the intermediate courts, and especially not for the government court, to either ignore or extend the balance that the Supreme Court is striking on those hot issues. That is a drama that has to be played out between the main actors, the Congress and the Supreme Court, and it does not call for any understudies to take center stage.

Some academics recently wrote a letter to this Committee extolling the virtues of a nominee who is a law professor, and I would like to quote just briefly from that letter. They said that that particular nominee, quote, "exhibits respect, gentleness, concern, rigor, integrity, a willingness to listen and to consider, and an abiding commitment to fairness and the rule of law," end of quote.

Now, obviously those are good attributes for any judge, but they are especially needed for the D.C. Circuit. The barn-burners, the crusaders, the zealots are counterproductive to the task of maintaining that delicate balance that the chairman referred to.

Some believe that the best way to achieve that balance is to advocate bipartisan appointments. I confess when I was White House Counsel I did unsuccessfully urge the appointment of several Republican nominees, including one to the D.C. Court of Appeals. I didn't get past first base; it didn't pass the Presidential test.

It is not an easy advocacy at any time. Presidents as recently as Truman and Eisenhower did appoint persons of the opposite political party to the Supreme Court, but it is not a common occurrence to an appellate court, and it is not even common to the Supreme Court anymore. And as you elected officials know better than anybody, the words "liberal" and "conservative" vary from issue to issue and are in the eye of the beholder.

I think that the better way to find a balance on any court is to seek moderation within each judge. The words used to be—and I think Senator Sessions used them—"judicial temperament." They mean that the judge could hear with both ears, had not decided the case before hearing the evidence, could remain reasonable even when the juices were flowing all around. I hope those are the kinds of judges that the President nominates and the Senate confirms for the D.C. Circuit.

Thank you.

[The prepared statement of Mr. Mikva appears as a submission for the record.]

Chairman SCHUMER. Thank you. We very much appreciate your testimony.

Now, we will go to another distinguished member who has served in Government with great distinction, and that is Fred Fielding. Fred Fielding is a senior partner and the head of governmental affairs, business, finance, litigation and crisis management, and

white collar crime practice—that is a lot to do—at the law firm Wiley, Rein, and Fielding.

Mr. Fielding was counsel to President Reagan from 1981 to 1986, after first serving as an associate and deputy counsel for 4 years. He was also clearance counsel in the Bush-Cheney Presidential transition. Mr. Fielding served for 6 years on the ABA Standing Committee on Federal Judiciary, so he knows a little bit about nominating judicial nominees. He also serves on C. Boyden Gray's Committee for Justice, a group that is working to get all of the administration's judicial nominees confirmed.

Thank you very much for being here, Mr. Fielding. As with the other witnesses, your entire statement will be read into the record and you may proceed as you wish.

STATEMENT OF FRED F. FIELDING, WILEY, REIN, AND FIELDING, WASHINGTON, D.C.

Mr. FIELDING. Thank you, Mr. Chairman and members of the subcommittee. I am very grateful to have the opportunity to appear before the subcommittee. I sought the opportunity because the announced subject of this hearing, which is the D.C. Circuit and the importance of balance on the Nation's second highest court, implies a conclusion that I find inconsistent with my own experience and the strong feelings in regard to the nomination and confirmation process for the Federal judiciary in this circuit, in particular, and the Federal judiciary in general.

Mr. Chairman, I have been a practicing attorney for over 38 years now, and I have been admitted to practice and I am a member of this circuit for some 30 years and a member of the Judicial Conference of this circuit for over 25 years. In addition to that, as you have mentioned, I have some familiarity with the Federal judicial selection process, for the first five-and-a-half years of Ronald Reagan's presidency. Also, in that regard, I chaired that Administration's judicial selection panel within the Administration.

Second, as you mentioned, I did get a different perspective on the process, serving as the D.C. Circuit's representative on the ABA Standing Committee on the Federal Judiciary for 6 years. My service covered four-and-a-half years of the Clinton administration and a year-and-a-half of the present Bush administration.

Last, I served on the Miller Commission, of which I am sure the Committee is aware. That commission was co-chaired by former Attorney General Katzenbach, former Deputy Attorney General Howard Tyler, and its members included Howard Baker, Birch Bayh, Lovida Coleman, Lloyd Cutler, Judge Higginbotham, Judge Lacey, Judge Kimba Wood, and Professor Dan Meador. The study, reported in 1996, dealt with the issue this subcommittee is dealing with today and I will make reference to that later, if I may.

I give you this foregoing litany of experience, in addition to being a member of the bar of the circuit, only to emphasize the single point which I wish to make to the Committee today, and that is from each perspective which I was able to view the process, I strongly feel that probing a candidate's political ideology has no constructive place in the process. In my experience, it has not been a part of an administration selection process or the review process of the ABA.

For the Senate to now seek to use a test of political ideology in evaluating the merits of a nominee to the D.C. Circuit in order to effect this elusive standard of balance would be a step beyond any role played by any other party in the process. It would be a step that, in fact, is avoided by every other participant in the selection process because of the very serious implications and consequences that ideological screening would have on the independence of the Federal judiciary.

I would argue that the independence of our judiciary is what sets it apart from the political branches in the eyes of our citizens. Citizens need to know that the laws that are passed and enforced by the political branches will be adjudicated by an independent body of jurists.

Now, that is not to say for one moment that no inquiries should be made of the views of any nominee either by the President, the White House, the Judiciary Committee, or individual Senators. But such an inquiry should be directed to an evaluation of the nominee's integrity, abilities, and temperament, which are also the standards for the ABA analysis, and also his or her judicial philosophy.

Nor should anyone assume that a judicial candidate comes to the bench without some personal philosophical beliefs about certain issues. Former Chief Judge Irving Kaufman of the Second Circuit addressed this point in a letter in 1981 which we all had to study and read very carefully, which was entitled "An Open Letter to President Reagan on Judge-Picking."

If I can quote from him, he said, "I am not cautioning you against recommending candidates with a demonstrated commitment to issues of public importance or individuals who have taken sides in national debates on pressing issues. Participation in those debates does not augur bias, but rather a dedication to the commonweal that should be encouraged in all public officials, judges included." That is the end of the quote.

In addition to satisfying oneself that a nominee possesses the legal skills, temperament and integrity to face each case with an open mind, it is certainly legitimate to also inquire as to the individual's views of the role of the Federal judiciary, his or her conception of the judiciary's role in the separation of powers, if you will. But that inquiry is far different from seeking to determine if such a candidate brings a certain political ideology to the bench on a particular issue or issues, for the purpose of effecting a balance on that court, or for that matter an over-balance on any court.

I earlier mentioned the Miller Center report, and I would adopt as my own testimony the comments that are contained in that report on the role of ideology in the judicial selection process. If I may share them with you, "The Commission believes that it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts. Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of

impartial judging. Men and women qualified by training and experience to be judges generally do not wish to and do not indulge in partisan or ideological approaches to their work. The rare exception should not be taken as the norm."

Inquiring about an evaluation of a nominee's political ideology has no historic place in the evaluation process either. To the extent that it may have taken place in the past in isolated cases doesn't make it acceptable. In fact, as I have mentioned before, I don't believe it was practiced by past or present administrations, Republican or Democratic, and it certainly has no proper role in executive branch screening.

Likewise, this Committee's own questionnaire to judicial nominees asks, and I quote, "Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could be reasonably interpreted as asking or seeking a commitment as to how you would rule on such case, issue or questions," end of quote.

Thus, I must conclude that this Committee historically found such questioning to be unacceptable as well, and if this Committee now seeks this sort of probing of one's ideology in order to effect such a balance on the D.C. Circuit, it is destroying that precedent and, I fear, will be planting seeds that will bear bitter fruit in years to come.

It is my belief that if such a question is asked, shame on the questioner. And if it is answered, I must also seriously question the potential independence, and therefore the suitability, of the candidate who would be answering that question.

Such screening and selection of judges signifies that it is acceptable for judges as a pre-condition of their confirmation that they reveal how they would in the future decide a particular case or cases. That should be fear by all across the entire breadth of the political spectrum.

In conclusion, Mr. Chairman and members of the Committee, I would like to make two other observations. First, to the argument that ideological differences are a divisive element and a deterrent to the decisionmaking on the D.C. Circuit, and hence the need for the balance, may I respectfully direct the Committee's attention to an essay published in October 1998 in the Virginia Law Review by then-Chief Judge Harry Edwards. Chief Judge Edwards, who was a Democratic appointee, debunks—and that is his term—that myth, and also notes that over 90 percent of the cases in that court were decided unanimously.

My second observation is that when I was on the ABA Standing Committee, in addition to evaluating hundreds of candidates from all around the country over those 6 years—and they were the nominations of both Democratic and Republican Presidents—I also personally conducted the interviews of nine nominees to the courts of this circuit. In each investigation, I interviewed 35 to 55 individuals, judges, members of the bar, practicing attorneys within the circuit.

I can advise you that in all those interviews, there was never a complaint expressed to me by members of the bench or the bar of this court and this circuit as to the ideological balance or imbalance of the court. To the contrary, members of the bench and bar of the

D.C. Circuit are quite proud of the special reputation this court has for excellence and for its reputation as a principled body of jurists who rule on the law and the facts of a case and not on a personal set of political or ideological preferences.

I respectfully urge that in your deliberation you take care to avoid the unintended consequence of interjecting ideology into this court, and thereby destroying that pride and that reputation of this fine court.

Thank you.

[The prepared statement of Mr. Fielding appears as a submission for the record.]

Chairman SCHUMER. Thank you very much, Mr. Fielding, for your very thoughtful testimony.

We are now going to go to our third witness. We are running a little late here in time. I would ask each of the next witnesses to limit themselves not to the usual five, but to 7 minutes, if they could. I let the first two go as long as they wished. But if you could, it would be helpful to the subcommittee.

The next witness is Christopher Schroeder. He is Professor of Law and Public Policy and Director of the Program in Public Law and Co-Chair of the Center for the Study of Congress. Professor Schroeder has previously served as Acting Assistant Attorney General in the Office of Legal Counsel at the Department of Justice and as chief counsel to the Senate Judiciary Committee under Senator Biden's leadership. He coauthored a leading environmental law casebook entitled *Environmental Regulation: Law, Science and Policy*, and he is editor of a forthcoming resources for the future book evaluating the performance of the environmental Protection Agency.

Your entire statement, Professor Schroeder, will be read into the record and you may proceed as you wish.

STATEMENT OF CHRISTOPHER H. SCHROEDER, PROFESSOR OF LAW AND PUBLIC POLICY STUDIES, DUKE UNIVERSITY SCHOOL OF LAW, DURHAM, NORTH CAROLINA

Mr. SCHROEDER. Thank you very much, Mr. Chairman, Senator Sessions, Senator Kennedy, and thank you for the invitation to testify today.

I am going to be speaking about the impact of judges on the D.C. Circuit who come to this court with strong partisan and ideological commitments as it affects just a particular part of that court's docket, that is the administrative law part of the docket, and in particular the part of the docket that reviews decisions by the Environmental Protection Agency.

The bottom line of my testimony is simply that it appears that we have good evidence to believe that one of the consequences of staffing the D.C. Circuit with judges who have strong partisan or ideological commitments is a relative shift in the making of environmental policy away from the elected branches of Government, away from the Congress and the executive branch, and to the courts, because there is a tendency by judges, whether they be strongly partisan and ideological on the left or strongly bipartisan and ideological on the right, to supplant the decisions of the demo-

cratically elected branches of Government with greater frequency than I think would otherwise be the case.

Mr. Fielding referred to Judge Edwards' article in the 1998 Virginia Law Review. That was a response to a piece of work by now Dean Ricky Revesz at the NYU School of Law who analyzed environmental judicial decisionmaking on the D.C. Circuit and found some of the marked disparities that you mentioned in your opening statement, Mr. Chairman, between the outcomes of cases involving the Environmental Protection Agency when the panel was majority Republican versus when the panel was majority Democrat.

That study actually finds the most marked differences in cases that are somewhat different than the ones that we have been, I think, implicitly referring to so far, not the cases in which the D.C. Circuit reaches out to make some bold holding of law, but the cases in which the D.C. Circuit, as it must under our rules of administrative law and procedure, is trying to resolve disputes that raise questions of law that are much more vague, indeterminate, and lack sharp edges and clear, objective criteria for decisionmaking, such as the requirement that the Supreme Court announced in the State Farm decision of nearly 20 years ago that an agency has to have demonstrated a rational connection between the findings in the record and the conclusions it reaches in its regulation, or the requirement that if an agency is interpreting a statute that it develop a permissible or a reasonable construction of that statute, or whether there is adequate record evidence to support a conclusion that the agency has reached.

In these kinds of areas where the objective criteria for a legal determination are open-ended and require judgment and discretion, there is room for a judge, in all good faith, to come to those questions and resolve them or have a tendency to resolve them in the direction of their partisan and ideological commitments with respect to the outcome. And I mean in no way to attack the integrity of any judge on the D.C. Circuit or any other circuit when I make that claim.

I think the legal realists who were an important part of our American legal intellectual heritage 50 or 60 years ago had a theory of law that postulated that judges first figured out what outcome they would like and then they looked around for legal doctrine to justify that outcome.

That system of lawmaking, if you will, that model of lawmaking is always ridiculed whenever you talk to any sitting Federal judge or anybody who has clerked for any Federal judge, and frankly I think it doesn't reflect the way the judges make the vast majority of their decisions.

There is, however, a way in which ideology and commitment as to outcome can influence a judge's decision while that judge is exercising complete good faith, and I sketched a little bit of the approach in my written testimony and it is largely work that has been developed by people who study how we all reason and think.

The guts of it is that when you are dealing with questions of reasoning that have a number of decision junctures in them where you could go one way or another and reasonable people could disagree about which way is the right one to go, where you want to come

out ultimately has an influence on which choice you find more persuasive than the other.

So, for instance, if you have a general tendency to be skeptical that the Federal Government has gone too far in environmental policy and that any new rule or regulation from the Environmental Protection Agency, without knowing anything more about it, raises a certain skeptical gleam in your eye, you will tend to be more persuaded by the decisions you have to make in reviewing a record that will seem legally compelling to you that lead to the result that vindicates that skepticism.

Similarly, if you think the Federal Government hasn't gone too far in environmental policy, you will have a tendency to look more favorably at decisions that come to you where, say, EPA has lowered a standard and less favorably at decisions where, for instance, EPA has deregulated or raised a standard.

That is not to say you are figuring out the result first and reasoning backward to the conclusion. It is to say that in all good faith, in looking through the record trying to figure out what the right answer is, that motivation or direction that the cognitive theorists talk about will have or tends to be one of the contributing factors in what kinds of reasons you find compelling and what kinds of reasons you don't.

Now, I am not a cognitive theorist and I just wanted to warn you that I am sketching work that has been done by others. Unfortunately, they have never been able to work on judges, so all of this theory has been worked out in the context of other kinds of individuals doing other kinds of reasoning.

But there is no obvious reason to suppose that they haven't reached a kind of general explanation of the way we think through problems. This simply means that our partisan commitments, our values, if you will, are inevitably going to influence how it is we come out some of the time. It doesn't mean they will dictate it, but it will be a contributing influence.

Let me close simply by saying I think that asking what party a candidate belongs to is an awfully crude way at getting at the kinds of values and partisan commitments that may matter in trying to predict the general tendencies of a judge on the bench. It unfortunately is one of the more obvious ways, and so it is very often leaned on.

But if what you are really worried about is trying to figure out what a person's general political, philosophical orientation is and what his or her general judicial philosophy is, those are two questions that I think are entirely within the competence and responsibility of the Committee to ask about. They have an influence on the way people decide cases and they have actually been inextricably linked in our country from the beginning.

The first person to use political ideology as an aspect of their decisions as to whom to appoint on the Supreme Court was George Washington. There was a critical constitutional struggle just after the Constitution was ratified over how strongly or weakly the Constitution was going to be interpreted.

Now, he knew the people he was appointing intimately, or his colleagues did, and so they didn't have to have questionnaires and

they didn't have to have a lot of questions. But it is no accident that the Marshall Court was staffed with strong nationalists.

In fact, political parties started as a result of the debate over constitutional interpretation. The famous debate between Thomas Jefferson and Andrew Hamilton over the first national bank was a debate over the scope of Federal power, and it was Thomas Jefferson's defeat in that debate that led to his desire to create the Federalist Party, the first, nascent political party in the United States. So these two ideas have been part and parcel of our jurisprudence, our politics, and I think the confirmation process from the very beginning.

Thank you.

[The prepared statement of Mr. Schroeder appears as a submission for the record.]

Chairman SCHUMER. Thank you, Professor Schroeder, for your fine testimony.

We are now going to turn to Professor Clark. Professor Bradford Clark is currently a Professor of Law at George Washington University Law School. Before coming to George Washington in 1993, Professor Clark began his legal career clerking for Judge Bork and Justice Scalia. So he too knows something about the D.C. Circuit.

Professor Clark then worked as an attorney-advisor in the Department of Justice's Office of Legal Counsel before joining the law firm of Gibson, Dunn, and Crutcher.

Professor Clark, your entire statement will be read in the record, as with the other witnesses. You may proceed as you wish and if you can stay to the 7-minutes, which no one has so far, I must say, we would appreciate it.

STATEMENT OF BRADFORD R. CLARK, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, D.C.

Mr. CLARK. Thank you, Mr. Chairman, and Senator Sessions, Senator Kennedy. Thank you for inviting me to participate in this hearing today.

I teach in the areas of Federal courts and constitutional law, and I think the question raised by today's hearing is important, particularly because this idea of balance on the courts, and the D.C. Circuit in particular, raises a very delicate question of constitutional law and separation of powers—namely, what is the role of the President and the Senate in the appointments process and to what extent should these actors consider ideology in nominating or confirming judges?

With all due respect, I think this focus on ideology has the capacity to threaten the independence of Federal judges in the constitutional framework, and also to undercut public confidence in the judiciary.

Now, I should say at the outset that it is certainly appropriate for the President and the Senate to inquire into the general judicial philosophy of nominees. I think that has been standard practice for a number of years. Particularly, you will want to know is a nominee capable of performing his or her duties as a judge. Can the nominee approach the law fairly and decide according to the law, the Constitution, and judicial precedents?

As Lloyd Cutler testified before your subcommittee last year, this is the inquiry into judicial temperament. He defined that inquiry as asking whether a nominee "is even-handed, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result." I think all of that is fine when the President and the Senate are looking at judicial nominees.

On the other hand, for either the President or the Senate to go beyond these general inquiries threatens judicial independence. Let me explain. The Constitution goes to great lengths—and this is a great innovation of our Constitution over others in the rest of the world and throughout history—to separate the Congress, the President, and the judicial branch. The judges of the Federal judiciary are appointed for life, with salary protection. By design, they are to be independent of the political branches.

In particular, there is another provision that we sometimes overlook, the Incompatibility Clause of Article I, Section 6, clause 2, and this is the provision that provides "No person holding any office under the United States"—and that includes judges—"shall be a member of either House during his continuance in office." There, we have a specific separation, prohibition if you will, on commingling the legislative branch with the Federal judiciary. So this was a very important idea at the time of the Founding that goes to our constitutional structure.

Now, given that, I think it is important to conclude that potential judges should not be asked about their political ideology and they should not be asked to give specific representations as to how they would rule in particular cases. That would go too far into the area of judicial independence.

A nominee cannot answer these types of questions without effectively giving the political branches a pre-commitment inconsistent with judicial independence. And these political commitments would prevent judges from deciding important questions in their proper setting. Judges are supposed to decide these important questions in the context of deciding a case—that is, with adversary parties, full briefing and argument, considering the views of their colleagues on the court, and reconsidering initial views in light of experience, new arguments, and changed circumstances. Making judges precommit to the Senate or to the President would undermine their ability to perform their judicial role.

Now, in addition to undermining judicial independence, the Senate's attempt to question judicial nominees about political ideology could erode public confidence in the Federal judiciary. The public generally accepts decisions by unelected Federal judges precisely because Federal judges were designed to be independent and are perceived to be independent of the political branches.

If the Senate makes ideology a central focus of its confirmation hearings, the public might well conclude that judges no longer are above partisan politics. They may think that they are, as Judge Mikva once wrote, simply a Congress in black robes, and this shift could threaten our constitutional framework.

What, then, is the proper role of the Senate in considering judicial nominees? Well, Alexander Hamilton suggested an answer in Federalist 76. According to Hamilton, the requirement of Senate confirmation was meant to be a "check upon a spirit of favoritism

in the President, and would tend greatly to prevent the appointment of unfit characters," he said, through State preference or other improper favoritism. That should be the standard that the Senate uses to evaluate nominees. Is the nominee fit to sit on the bench? Do they have the experience, the background, the temperament to be an objective and fair Federal judge?

Now, the D.C. Circuit, in particular, presents a special question, I suppose. We have heard today how important the court is and I certainly wouldn't quarrel with that, having been a law clerk there. It is a very important court and it does hear a disproportionate number of administrative law cases, which I am sure are important to everyone here today.

But these types of cases are governed by a complex mix of constitutional, statutory, and judicial precedents developed over many, many years. We have heard reference to the essay by Judge Harry T. Edwards, of the D.C. Circuit, refuting the charge of political or ideological bias on the D.C. Circuit.

This is particularly important, I think, because Judge Edwards is there. He has been there for many years; he has been there for probably 25 years and he has great experience on the court. He says that in over 97 percent of the cases the court disposes of, ideology does not play a role.

This accords with my experience as a clerk on the D.C. Circuit, and I think Judge Mikva is a very good example of this because as he testified, he was perceived to be potentially an ideological nominee, but he worked very hard and I think succeeded in being a very excellent circuit judge.

One last point, since I don't want to go over my time. Pursuing ideological balance on the D.C. Circuit would necessarily misrepresent the work of the court and cast its decisions in ideological terms. As Judge Edwards warned, "giving the public a distorted view of judges' work is bad for the judiciary and the rule of law." The Senate should not risk undermining the legitimacy of the judicial branch by encouraging such false perceptions. I think the Senate should stick with the traditional view of evaluating nominees based on judicial temperament and general judicial philosophy.

Thank you.

[The prepared statement of Mr. Clark appears as a submission for the record.]

Chairman SCHUMER. Thank you, Professor Clark. You came the closest of anybody. You win the prize. Congratulations.

Our final witness is Professor Michael Gottesman. He served as an adjunct professor at Georgetown Law School from 1978 to 1988 and then joined the faculty as a full-time professor in 1989. Previously, Professor Gottesman practiced law with the Washington, D.C., firm Bredhoff and Kaiser from 1961 to 1988. He has written broadly on labor and civil rights law—some subjects of interest to us today—and has appeared as a practitioner on numerous occasions on the D.C. Circuit.

Like the other witnesses, Professor, your entire statement will be read into the record and you may proceed as you wish.

STATEMENT OF MICHAEL H. GOTTESMAN, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. GOTTESMAN. Thank you, Mr. Chairman. I am bound to win that prize. I am going to finish in that 7 minutes, I promise.

Congress works very hard to assure that the administrative agencies are themselves ideologically balanced. In many of the statutes that create these agencies, you have specifically directed that there be balance between the parties. And as you all know, I am sure, in your deliberations when you are confirming, you are very conscious of having slates of candidates who are going to fill these agencies who are balanced.

Now, there is a reason why you want that. You want balanced, mainstream administrative decisions. But all of that effort comes to naught if those decisions are then reviewed by a court that does not have ideological balance and that is prepared to aggressively overturn those agency decisions.

Sadly, that has been the case with the D.C. Circuit for roughly the two-decade period 1980 to 2000. It was an ideologically unbalanced court, and as I am going to suggest with a few statistics, it generated decisions overturning administrative agencies that were way out of the mainstream, as compared to the other circuit courts of appeals.

It wasn't always that way. If you go back—and I am going to use the Labor Relations Act as my example, although my statement has some others as well. If you look at the performance of the various circuit courts in 1980, the D.C. Circuit's rate of approving Labor Board decisions was virtually identical to that of the overall percentage for all of the circuit courts.

But if you then roll forward, as the appointments of what I would suggest were strongly ideological judges occurred, if you look at the period 1985 to 1989, less than a decade later, here is what the statistics show. The Labor Board's decisions were affirmed in full—if you look at all the circuits, they were affirmed in full 78 percent of the time.

Now, look at just those cases that came to the D.C. Circuit. The Labor Board was affirmed in full only 53 percent of the time—78 percent; more than three-quarters versus 53. And even that doesn't state the full extent of the disparity because the 78 includes the D.C. Circuit. If you took them out, the rate in all the other circuits was well over 80 percent affirming the National Labor Relations Board.

Well, that is just 1 circuit of 11, right? So we get skewed decisionmaking in 1 circuit out of 11. But the stark reality is that the D.C. Circuit controls the fate of administrative rules, and it does so because it is the one circuit that anybody unhappy with an administrative agency's ruling can come to, and this is true of virtually every administrative agency.

So let's just take hypothetically a Labor Board rule that says employers are not allowed to do "x." Eleven circuits may agree with the Labor Board and say that is well within your authority. But if the D.C. Circuit disagrees, the Labor Board is going to get reversed a hundred percent of the time on that issue. Why? Because the employers know they can come to the D.C. Circuit.

And, indeed, that is what they have been doing. Here, to me, is the most interesting statistic. The employers have a choice between the D.C. Circuit and other circuits. Back in 1980, when the D.C. Circuit's approval rate was the same as all the other circuits, only 3 percent of the appeals from Labor Board decisions came to the D.C. Circuit. In the year 2000, 18 percent—six times as many—came to the D.C. Circuit. Why? Because employers knew this is where we can get the Labor Board reversed and we can't do that in the other circuits because they still approve the Labor Board decisions.

Now, my statement describes similar phenomena in the areas of civil rights and environmental law, but to stick to my time, I won't mention those. The rate of Labor Board success in the D.C. Circuit has gotten somewhat better in recent years because as there have been retirements of some of those most ideological judges, the court has come into somewhat more balance.

In 1998, when we weren't yet at the balance we have today, the difference, which had been 25 percent between the D.C. Circuit and all the other circuits in affirming the Labor Board, had been reduced to 13 percent, half as much imbalance.

I would assume that if we had statistics for the last year or two, it would be even closer because the court is now more of a mainstream court. And it would be sad, now that it has become a mainstream court, and given its unique position as the universal recipient for anybody who is unhappy with an administrative agency—it would sad if it now fell out of balance, as well.

Now, there are, of course, two ways to assure that if there are going to be more appointments that this current state of balance be achieved. One would be to appoint by looking at the parties of the various candidates, and indeed there is a recent article in the Washington Lawyer quoting a former general counsel of the Republican National Committee who has suggested that that is something to be considered.

The other way is to allow Presidents to do what they normally do, appoint members of their own party, but insist that those people be mainstream judges who are not going to be skewed. And this involves, it seems to me, attention not only to what their ideology is—that is, how would they vote if they were on an administrative agency—but also to what extent do they respect the Supreme Court's command that courts are supposed to give broad deference to the rulings of administrative agencies.

It is absolutely clear that the D.C. Circuit has not been giving deference over the past 20 years if it is only affirming the Board half the time. That is what anybody would expect to get. That doesn't show deference.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gottesman appears as a submission for the record.]

Chairman SCHUMER. Well, not only have you given excellent testimony, Professor, but you have indeed won the prize. Congratulations.

I want to thank all five witnesses. Actually, every one of you has won a prize in the sense that your testimony was excellent, obvi-

ously conflicting. That is what we would like on this subcommittee and we thank you.

What I am going to do is delay my time in questioning. Senator Kennedy was nice enough to come to the hearing and has another engagement, and so I am going to give my time to Senator Kennedy. Then I will call on Senator Sessions and I will go last.

Senator Kennedy?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Senator Schumer, and thank you for having this hearing. I welcome all of our panelists. I particularly want to welcome Ab Mikva. I was listening to the references to Ab Mikva's confirmation and I remember very clearly all those—the NRA—who were gunning for Ab Mikva at that time. And now to find out from his own testimony that he decided for the NRA, after all this time, it is too late to have reconsideration.

[Laughter.]

Senator KENNEDY. I want to thank him for his very distinguished career. Many of you have, but I know in particular of his past history and commitment and the good work he does with young people out in Chicago, too. We had an opportunity to meet with a number of these young people fairly recently, and it is a wonderful thing that you continue to do.

I was having difficulty in listening to our discussion about appointing judges with political philosophy and idealogy because we have a President of the United States who said that he wants to appoint judges in the line of Scalia and Thomas. If you ask the average American, that is sending a pretty clear message of the type of individual they are trying to support on this.

So the mark has been out there and the statements by the White House are clear. I agree myself that we obviously are not looking for narrow partisanship, but when the administration has indicated that that is going to be narrow in their criteria, it is a disappointment.

I think we have a responsibility to make sure that people are going to have a core commitment to the fundamental values of the Constitution. I think that that is a perfectly reasonable test to take, because we have seen over the period of time where nominees have been coached and tested. We have had nominees who have been up before this Committee who gave the exact same answers to questions because they were told by the Justice Department, if you give that same answer, you are not going to get in trouble. So we have to use our own judgment.

With all respect to our history, the appointment power, until the final weeks of the Constitution, was in the Senate of the United States. It was only decided later that it was going to be a shared power, so we are not a rubber stamp. We have a real responsibility to go ahead.

Former Judge Mikva mentioned two excellent recommendations: moderation and judicial temperament. Just very quickly because I have limited time, judicial temperament, I imagine, is even more important in the circuit court because it is smaller, would you say, Judge Mikva? The collegiality and the ability to work together to

try and work through various issues—of particular importance and relevancy?

Mr. MIKVA. It is very important. It is a small court and it is all in one place; it is all in Washington. Many other courts are diffused all over the map. This court sits only in Washington, D.C. The colleagues have a lot to do with each other and there can't be the intercourse that is necessary to find moderation if somebody comes in with a strong agenda and says it is going to be my way, I want to be in such-and-such an image.

Senator KENNEDY. It has been mentioned here about the NLRB and the cases that have been now brought to the circuit court. I saw a chart here about the NLRB cases that were brought and heard, and the small percentage number going back to 1980 and how that has escalated.

As you correctly pointed out, in 1980 83 percent were affirmed, and now it is 50 percent affirmed and the numbers have really skyrocketed. I think you stated that one of the reasons you believe that to be so is because now the district court is giving less adherence to the time-honored concept of supporting administrative agencies and are now using different judgments in terms of reaching conclusions.

Do you think this is true? This is the chart which sustains that position. What about OSHA, what about EPA? There is the notorious case obviously of American Trucking and EPA. But do you find that this has been true on OSHA? Has it been true in other regulatory agencies? Can you reach the same kinds of conclusions when it is in regard to workers' rights and protection of consumers?

Mr. GOTTESMAN. I haven't personally studied them all. One of the problems we have with the environmental statutes is that the D.C. Circuit's jurisdiction is exclusive. So we can't compare its performance to that of other circuits because people can only come to this circuit.

With OSHA, that is not the case; that is, employers can go to other sectors or to the D.C. Circuit. The fact that the D.C. Circuit generates such a large percentage of the review cases of OSHA standards, and has, is a reflection, I think, that when people want to challenge an OSHA standard, they believe that the D.C. Circuit is going to be a more sympathetic forum for them.

While I don't have statistics—there aren't as many of those cases as there are labor cases because there is a finite number of OSHA standards that have been challenged—but certainly my sense of it from having some experience in this field, having been a labor lawyer in a prior life, is that indeed the D.C. Circuit was one that we, the people who were supportive of the OSHA standards, feared.

It was a court that we thought we were less likely to get affirmance of the agency than others, but I can't cite statistics on the comparative performance because there are, I think, just too few cases of OSHA standard review.

Senator KENNEDY. Well, there has been a constant effort to dismantle OSHA since its enactment and it continues.

Let me ask a question. Maybe you would comment, Professor Schroeder, on EPA and American Trucking and its conclusions. As I understand it, in arriving at its holding the panel resurrected the

non-delegation doctrine which was used in the 1930's. We are talking about being able to set health standards for air pollution.

Everyone obviously is interested in making sure that their children are going to breathe clean air. Its health implications are profound. As one who is the father of a chronic asthmatic, I see it in spades. The fact is we are doubling the number of children actually that are dying from asthma today. It is one of the areas of children's diseases that is going right through the roof. It is up to 18,000 children a year that are dying. This is enormously important.

The court reached the decision in its holding and resurrected the non-delegation doctrine which was used in the 1930's to limit the power of Federal agencies during the New Deal. Cass Sunstein called the court's ruling a remarkable departure from precedent which, if taken seriously, brings much of the activity of the Federal Government into question. Fortunately, the Supreme Court overruled the decision in a unanimous holding.

Your views, Professor Schroeder? Was this a reach? How did this come to pass, and if that holding had stood, what would have been its implications in terms of health standards and other protections that are there in the agency?

Mr. SCHROEDER. Well, Senator Kennedy, you are right. It was a resurrection of a theory that hasn't been used to strike down an Act of Congress since the 1930's. Not only that, but it was an application in a manner that no court had ever attempted in the United States.

In other words, the D.C. Circuit did not hold the Clean Air Act unconstitutional, which is what you would expect if it actually was a violation of Congress actually delegating legislative authority to the agency without any standards. The remedy for that is to strike down the Act that you have passed, but that is not what the court did.

The court said the problem is that the agency hasn't given us a clear understanding as to how it reached the decision it did in a way that we can replicate and test. In other words, what it wanted was a kind of objective formula where you could plug in health, uncertainty of the medical research, number of people affected, costs, and then just read out the answer at the end.

EPA has never done its standards in that way. Eventually and ultimately, the Administrator has an awesome responsibility to make a judgment because this is a matter of public health protection, but it is also a matter that we all realize is terribly expensive to implement.

This was the tenth or eleventh ambient air quality standard change that we have made since the 1970 Act was passed. None of them would have survived what the D.C. Circuit did. If the D.C. Circuit opinion were law, all of those ambient air quality standards and very many of all the other standards that EPA writes would be invalid until such time as an administrative agency makes a decision like what is the value of a human life, or what is the value of an asthma attack avoided, what is the value of emphysema and how is that to be evaluated in terms of when do you have enough medical evidence to make the judgment that that is the health effect that is going to be suffered. And tell me how you are going to

decide that question in advance so that I know exactly what to look for when you ultimately do make the judgment.

That is the kind of complex social public health judgment that we have always trusted the agency, with professional guidance, with testimony by all interested parties, with medical evidence, to make, trying to figure out what the wisest thing to do at the time is.

Then Congress has the opportunity, if it disapproves of the action or thinks that the agency now has found a way to do its job that it disapproves, to interject its own evaluation of the agency's work. But to place that responsibility on the court and say that unless you can come up with a formula in which we can put all of these different and complicated considerations together and read out the answer at the end or you can't implement a standard at all would have worked a really radical change in the law.

In a unanimous opinion authored by Justice Scalia, the Supreme Court said to the D.C. Circuit you have got this all wrong, this is not the way our law works. It is about as pregnant an example of the D.C. Circuit reaching out for a novel theory of law as you can find, I think.

Senator KENNEDY. Mr. Chairman, my time is up. I thank you for having these hearings. As we have seen, the implications of this court and its impact in terms of real people and their lives are often missed. I think we have highlighted the importance of this court, and I am very grateful for the hearing and I thank the Chair for having it.

Chairman SCHUMER. Thank you for coming, Senator Kennedy.

Senator Sessions?

Senator SESSIONS. Thank you.

Judge Mikva, you have been someone I have admired. You have been a real advocate. I think if we applied Senator Schumer's standard of moderation, you may not have made it on the bench, but you proved that you could be a good judge.

I remember one person that wanted me to consider them for a Federal judgeship said, you know, I don't even give contributions to candidates and I am not a Republican or a Democrat. And I said, well, I don't know that this is necessarily a high advantage on being a judge if you don't care enough about the political process to even be involved and take positions. I tend to respect people who do take positions, who love the law and respect the system, care about it, have views about it, advocate and debate. But when you put on the robe, we need to know that they can call it fairly.

I know Lloyd Cutler, who also served for a time as President Clinton's White Counsel, as you did, stated before this subcommittee not too long ago, quote, "It would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one."

In 1985, you wrote, and appeared to be consistent with Mr. Cutler and Judge Edwards, who is also a Democratic appointee—you wrote in 1985, "What the Senate ought not to do is determine through questioning a nominee's views on emerging issues of constitutional doctrine or on issues likely to face the court in the future. Why? Because these questions are really a signal to the nomi-

nee that he will become a judge only if he promises to be obsequious, to be a 'yes' man to the powers that be."

You have said some other things along that same line. I won't go into them, but I think you are warning us that we need not politicize this process, are you not?

Mr. MIKVA. That is what makes your job so hard, Senator Sessions, because it is wrong, as I think everyone up here would agree, for you to try to exact a commitment from a nominee about how he is going to vote on a future case.

You can ask congressional candidates how they are going to vote on a bill, but it is wrong to ask a judge how he is going to vote on a case that he has not yet heard, where the facts have not been presented, where the legal arguments have not been presented.

But what makes it hard is not those 97 percent of the cases on which there is unanimity on the court, but those 3 percent that are the cutting edge. How do you find out where a nominee's general philosophy is, what his judicial temperament is, how much of a cause is he carrying with him on some of these issues?

Let me be specific: the issue of what the breadth and extent of the Commerce Clause power is in Congress. This is an emerging issue. Obviously, if you ask a nominee how are you going to vote on whether or not a statute that allows control of guns near schools is constitutional or not, that is asking for a commitment that you shouldn't do. But shouldn't you want to know, as one of the oversees of the judiciary—and you are that—what a nominee's general philosophy is about deference to Congress, about deference to the agencies?

Two of the most collegial colleagues that I had on the court—I can say this because neither of them are there as active judges anymore—were Judge Buckley and Judge McKinnon. The reason I found them so collegial is that we had one thing in common. We had all served in the Congress and we had a deference for the way you reach decisions. We had a deference for the process by which Congress comes to decisions—and none of us voted to strike down laws because we didn't approve of the way you did your work. Those, it seems to me, are legitimate concerns that you as the oversees have to have when you confirm. How you reach that balance I don't know, Senator.

Senator SESSIONS. I was going to ask Mr. Clark and he had to go, but I think it is quite appropriate, particularly if a nominee has demonstrated strong convictions in a given area, to inquire to determine whether or not those convictions might influence their objectivity on the bench. I mean, you would agree with that.

Mr. MIKVA. Absolutely.

Senator SESSIONS. So I think that is perfectly appropriate. I remember I was criticized after I had voted for quite a number of ACLU members, some of which were officers and board members of the American Civil Liberties Union. I took to asking them did they agree with the ACLU board position for legalization of drugs, that child pornography could not be controlled under the Constitution, and several of those positions that I thought were extreme.

They either said they personally did not or assured me it would not influence their decision, that they would enforce a different law in existence, and I think I voted for virtually all of them. When I

am voting for an ACLU person as a prosecutor who disagrees with some of their views on drug and child pornography, in particular, I am asking and confident that they are going to enforce the law even if they disagree with it.

Isn't that the real test?

Mr. MIKVA. Yes, absolutely, absolutely.

Senator SESSIONS. With regard to this Revesz study, Professor Schroeder, let's talk about it a little bit. It dealt only with the judge's rulings on procedural environmental issues. Is that correct?

Mr. SCHROEDER. Senator, that is right. With respect to the figures that we have been discussing today, those refer to cases in which—the cases excluded are statutory interpretation cases.

Senator SESSIONS. So it was environmental cases. It didn't deal with agriculture or the IRS or the Trade Commission or criminal cases.

Mr. SCHROEDER. Exactly.

Senator SESSIONS. And they found no significant difference in Republican and Democratic voting patterns on statutory environmental cases.

Mr. SCHROEDER. That is correct.

Senator SESSIONS. And they found no favoritism by Republicans in procedural environmental cases in seven of the ten time periods investigated. Isn't that correct?

Mr. SCHROEDER. Senator, you have me there. I don't have the studies sufficiently memorized to recall, but that sounds right to me.

Senator SESSIONS. Also, my staff's review of the study finds that they found no group favoritism for the activist plaintiffs in these cases by Democrat judges in procedural environmental cases in four out of the ten time periods involved. So it seems to me that this is a pretty thin reed.

I know liberals believe in civil liberties and First Amendment rights. Procedure is as utterly important as substance almost. Procedure is a big part of the law, and I think that agencies need to follow the procedures. So I don't know that that is very much proof of any kind of bias here.

You talk about the legal realist school. We also have the critical legal studies school that seems to believe that law is just a way to oppress the poor by those in power.

Mr. SCHROEDER. I don't agree with them either, Senator.

Senator SESSIONS. I don't either, but that has some basis in this country, in the law schools of America, which I am not favorable to.

Mr. Gottesman, I am not surprised. You indicated you were a labor lawyer, but the Labor Board can overreach, also. With regard to these cases, isn't it essential that an unelected agency be able to articulate what they are doing and that their actions be consistent with the regulations that Congress has passed?

Could the fact that the Labor Board was having problems in court indicate that they had been overreaching? Isn't it just as logical that that is so as that the court had overreached?

Mr. GOTTESMAN. Well, Senator, sure. Any agency can overreach, but it seems that it is only the D.C. Circuit that finds that they have overreached so often because as I mentioned, the Board is af-

firmed only 53 percent of the time by the D.C. Circuit. Of all the other 11 circuits, the next one up after the District of Columbia was 72 percent during that same period. So why is it, if the Labor Board is overreaching so much, that only the D.C. Circuit is noticing it?

Senator SESSIONS. Well, I don't know that that is a huge difference. It depends on how the cases come out.

Mr. GOTTESMAN. But this pattern reveals itself over a 20-year period. It is always the D.C. Circuit that is overturning the Labor Board most, whereas the other circuits are approving the Labor Board most often. No circuit is approving them a hundred percent of the time. Sure, agencies sometimes issue decisions that courts think are out of line, but the D.C. Circuit thinks the Labor Board is out of line 50 percent of the time. That is a fairly stunning reversal rate.

Senator SESSIONS. I would just say that ultimately they are answerable to the Supreme Court. In the last 4 years, 1997 through 2001, the D.C. Circuit reversal rate is only 26 percent, whereas the Ninth Circuit has a 67-percent reversal rate. I don't think this circuit is out of step at all.

Mr. Fielding, on March 16, 2001, the chairman of the full Committee and the chairman of this subcommittee sent a letter to President Bush in which they stated, quote, "ABA evaluation has been the gold standard by which judicial candidates are judged," close quote.

In examining a nominee's qualifications, does the ABA look at their temperament? Is that one of the factors?

Mr. FIELDING. Yes, there are three areas that we look at. Temperament is one of them.

Senator SESSIONS. And when the ABA examined Mr. Estrada—and they interview numerous lawyers that know them, do they not, in that process, and they interview judges and people that have worked with them? They would have examined the nominee's temperament, would they not?

Mr. FIELDING. Yes. The purpose of the investigation is to review potential judicial temperament which, of course, is temperament, legal ability, and competence. And in each investigation and in the Estrada investigation, there were some 45 to 55 people interviewed. They were people that were judges, they were people that were coworkers with him in all aspects—practitioners, people that had cases with him, people that worked in the trenches with him in Government.

Senator SESSIONS. And, of course, it is no secret that Republicans and President Bush have felt that the ABA has tilted somewhat to the left in their evaluation of nominees. I have respected the ABA a lot and feel like they ought not to be given power to say yea or nay, but I believe the ABA does deserve respect.

Is it a Committee of 15 that does the final vote? Is that what it is?

Mr. FIELDING. There is a representative for each circuit. There are two for the Ninth Circuit because of the diversity and the travel in Hawaii and all the other issues there. And they are the ones that vote. That includes the Federal Circuit as well.

Senator SESSIONS. Well, when they voted, how did they vote on Mr. Estrada?

Mr. FIELDING. I think it has been announced publicly that it was a unanimous "well qualified" vote.

Senator SESSIONS. Which is unanimously voted the highest possible rating, and that includes evaluation of temperament.

Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, Jeff. Let me go to my questions, again thanking the panel.

Over the course of the last year, I have spoken out about my belief that we should have more open, honest, and legitimate discussions about judicial nominees. My argument has boiled down to this: ideology. You can call it judicial philosophy, you can call it what you will. It is not what party you are a member of; it is your views on the big issues, not on specific cases—I couldn't agree more with the panel—but on the big views.

You don't want to ask about schools and guns in a specific case, but you might want to ask how far the Second Amendment goes. Is it a right to bear arms? Is it militia-related? That is my obligation in terms of these, and I think as Professor Schroeder pointed out, the first judge—we talking about the Founding Fathers; I think Professor Clark did. But those very same Founding Fathers turned down Judge Rutledge, I believe it was, for the Supreme Court because of his views on the Jay Treaty, a pretty specific view.

So this idea that ideology, philosophy, even specific views on specific issues was not intended by the Founding Fathers is simply belied by history.

But I want to talk a little bit about the D.C. Circuit here, again this idea that both Mr. Fielding and Professor Clark seem to profess all of a sudden, and that is that, well, everyone will see the law once they look at it in exactly similar ways that ideology shouldn't matter. Well, if that is the case, then when there are three Democrats on the D.C. Circuit panel or three Republicans or two and one, you should get about the same spread of the rulings because you are just examining the law as a priest of the law.

We all know that is hogwash. That has never happened, and it doesn't, and I think people cloak it. So let me just ask for this chart here. These are some environmental cases, and I don't know who put together these rulings, but these were rulings in favor of industry challenges.

When you get all-Republican panels, 3 judges, 80 percent in favor of the industry. Professor Sunstein, of Chicago, who has testified here and is very well-respected—in fact, he was quoting by my Republican friends in his support of Mr. McConnell at the McConnell hearing—made up this chart. Majority-Republican panels, 48 percent; minority-Republican panels, 27 percent; all-Democratic panels, 20 percent in favor of industry.

So who are we kidding? Ideology doesn't matter? Philosophy doesn't matter? Then you would get 50, 50, 50, 50, or at least the average of all those panels spread equally out. So, of course, it makes a difference.

Let me show you another one, the same type of thing. This is on the Chevron cases, very important. They are charged with uphold-

ing agency interpretations of the law so long as they are reasonable. I think some of my friends here would like us to say, well, "reasonable" has nothing to do with ideology; "reasonable" should just be a legal standard.

So that would mean that a Democrat and a Republican, or a liberal and a conservative if you don't want to look at party, should interpret "reasonable" exactly the same way, right? Again, a huge disparity. An all-Republican panel upholds the agency action in only a third of the cases. For a two-to-one Republican panel, it is 62 percent. Evidently, the Democratic nominee has some leavening there, whether you like the leavening or not.

A three-zero Democratic panel, 71 percent. Actually, a two-to-one Democratic panel is 86 percent. How do you explain that little anomaly? I think one way to explain it, the way the professor who put this together, Sunstein, said that when you had three of the Democrats on, they tended to be more moderate and didn't do much differently than when one Republican was added on the panel. But that is small.

Of course, ideology mattered in the D.C. Circuit cases. So I would like to ask the panel—I wish Professor Clark were here so you are not alone, Mr. Fielding—what do you have say about numbers like this? I don't have to ask Professor Schroeder or Professor Gottesman because their testimony was pretty much along those lines.

If we are not supposed to look at any views on anything, why is it that there is such disparity of the views of the people once they get to the courts? If we are all priests of the law and it doesn't matter if we are on the far left or far right and we would interpret it the same way—we don't. Do you want to say anything to that?

Mr. FIELDING. Yes. The point I was trying to make is that I don't think that this panel at this Committee should be making judgments that are based upon somebody's personal ideology. I also am troubled, to repeat my testimony, that there is an objective of finding a finite balance which is elusive. We know historically a lot of times somebody goes on a bench and doesn't turn out to be the way everyone thought they would anyway.

Chairman SCHUMER. That occasionally happens, but we know it to happen.

Mr. FIELDING. My concern is that once you talk about balance in the way that it has been discussed, in all candor, it politicizes this whole process.

Chairman SCHUMER. Well, I would say that this chart argues that the process has politics in the warp and woof of it from start to finish, not politics, but ideology—I think the two words are different—from the start. That is what it is; it is there.

Let me ask you another question. I would ask this to Mr. Fielding. Here is what we think we are faced with, those of us on this side. We think we are faced with a President, as Senator Kennedy said, who has injected ideology into his selections. He said it, judges in the mold of Scalia and Thomas.

Senator SESSIONS. That is not ideology.

Chairman SCHUMER. OK, philosophy. We can quibble about words, but it is not about judicial temperament because it is not that Scalia and Thomas represent different judicial temperament

in how they get along with their colleagues than the others. They are neither more popular nor less popular. They are the most conservative. I would say ideological, I would say way out there, but let's just say conservative, not to be confrontational of those two people. The President is looking for conservative nominees.

I guess what I would ask Mr. Fielding is if the President isn't doing this, can you name me five liberals that Ronald Reagan nominated when you were—forget whether they were Democrat or Republican—that Reagan nominated when you were counsel?

Mr. FIELDING. I hope not.

[Laughter.]

Chairman SCHUMER. There you go. I agree with you and I appreciate your candor, and you are a fine man, but of course he didn't. I would argue, even though maybe philosophically he is not as conservative as President Reagan, that judges nominated by President Bush are the most far over of any we have had. I don't see many moderates.

I would argue, and some might disagree with me—and Jeff is right; this depends on where you look at it. But I would argue that President Clinton did not nominate as many to the far left as President Bush is nominating to the far right. President Clinton tended to go not for ACLU lawyers. Those were small.

Senator SESSIONS. There were quite a number of them.

Chairman SCHUMER. Well, not too many. It was mostly partners in law firms, prosecutors, et cetera.

But in any case, that is the point. The point is it is not Chuck Schumer, Patrick Leahy, or the ten Democrats on this Committee who started making ideology count here. It is not even President Bush, although he is more ideological than we are, I would argue in this. It has been part of the warp and woof of it, and we ought to just come clean about it, particularly on the D.C. Circuit.

Fred Fielding was honest. If we were just looking at judicial temperament, as Professor Clark seemed to indicate—how they get along with their colleagues, how they conduct themselves on the bench—then each President should nominate an equal number of Democrats and Republicans or an equal number of liberals and conservatives, unless you have the view, which I don't, that one side or the other tends to have better judicial temperament. It doesn't happen.

All we are trying to do here is seek some balance, and so I am going to let any of you have the last word here. I have said my piece and I think the argument is virtually unassailable, and I think those arguing against it are not admitting the truth, which is the President is being every bit as ideological, if not more, than anyone on this panel when he makes nominations, and it is our job to bring the balance.

Judge Mikva?

Mr. MIKVA. Senator, I think that is what makes your job so hard, is that we don't have the proper vocabulary to describe what is the Senate's role. I fought that Senate role because I was a semi-victim of it. I had a protracted confirmation battle and, sitting as a nominee, I thought the Senate was being very political at the time, and they were. They were voting on what they thought my ideology was.

Chairman SCHUMER. Were they voting on your judicial temperament?

Mr. MIKVA. No.

Chairman SCHUMER. Did the Republicans think you were a less nice guy or less distinguished?

Mr. MIKVA. No. There was a certain member, still of the Senate, who told me how much he liked me as he voted no, and what a great temperament I had.

Chairman SCHUMER. He was voting about your ideology, whether they admit it or not?

Mr. MIKVA. Absolutely, and I think what makes it so hard is that, as you pointed out, historically that has always been the Senate's role. When they voted down Mr. Rutledge for the Supreme Court, they were voting politically. You are a political body, you are elected as a political body.

The difficulty arises, as it does currently, where the Senate has a majority of one political party persuasion and the President is of the other, and it has been that way since the beginning of the Republic. Now, maybe it is important somehow to disguise what the Senate is doing, as they sometimes have done.

But I have to say I admire the candor with which you have viewed this difficult task, Senator Schumer.

Unfortunately, this President isn't going to nominate many Democrats. As Fred Fielding very candidly said, they didn't during the Reagan administration, and Bill Clinton didn't during his administration.

Chairman SCHUMER. Bill Clinton didn't nominate many Republicans.

Mr. MIKVA. Right. As I said, I tried on two occasions to get him to consider Republicans. It was rejected.

Chairman SCHUMER. You know, Judge, I would say something else. When Clinton did nominate people, we can argue where they were, but it is clear, especially during the times when the Republican Party controlled the Senate, they tried to be a moderating force, and I didn't see anything wrong with that.

Mr. MIKVA. I had many conversations with members of this Committee during that period.

Chairman SCHUMER. Right. Our chart over there doesn't talk about total nominations, but it talks about when you vote no. Why is it, if ideology doesn't matter, Democrats are always voting no, whether it is 63 or 87? Democrats are always voting no on Republican judges, not on most—Jeff Sessions, to his credit; Democrats, maybe to our credit. We only vote against a small number, but when we vote no, when we use that significant and large power to block a President's nominee, ideology is a big factor on both sides.

Senator SESSIONS. Well, Mr. Chairman, that chart there is so bogus, you really ought to take it down.

Chairman SCHUMER. Why? Tell me why it is bogus.

Senator SESSIONS. The one on the other side of it is more accurate than that one.

Chairman SCHUMER. Let's take not this one, because this to me has no relevance. Both parties vote no on a small number. It is when they vote no. Let's just assume it is 63; it still makes our case.

Senator SESSIONS. This is 4 years. This is just less than two.

Chairman SCHUMER. Double ours. It is still the same. Make them four and two.

Senator SESSIONS. Fifty-four to 63 was what that would say.

Chairman SCHUMER. No, no, no. You have got to make four and two. That is what you double.

Senator SESSIONS. That chart is bogus.

Chairman SCHUMER. OK. I would respectfully beg to differ.

Any other comments on what I said? Then I am going to let Jeff have the last word, since I was so vehement here.

Mr. FIELDING. Mr. Chairman?

Chairman SCHUMER. Yes, Mr. Fielding.

Mr. FIELDING. I would again just say to you I think it has become very obvious in our discussion that a lot of the problems we have are definitional, because where you sit is where you stand a lot of times.

Of course, President Reagan didn't appoint any liberals to the bench, nor did President Clinton appoint any conservatives to the bench.

Chairman SCHUMER. Correct.

Mr. FIELDING. I don't think there is an evil in that. My concern, and I will repeat it again at the risk of becoming ad nauseam, is that for the Senate to announce and specifically try to balance by rejecting people that a President sends up on that basis—not an extreme person, not a zealot, but somebody who happens to be a Republican or happens to be a conservative—is wrong and it is dangerous and it is deleterious to this court.

Chairman SCHUMER. I would agree with you on that. I would just say this: first, I don't think you have heard anyone here, when the nominees come up, inquire about their party or care about their party. We voted for—I don't know how many judges I voted for, 60-some-odd. My guess is the vast majority, if not all of them, are Republicans. So I wouldn't ask that.

Second, we don't ask about specific cases. I think that is a very accurate and right thing to do, but we do ask about views to determine if they are out of the mainstream. You know, some might say Justice Scalia is bringing America back to the mainstream and others might say that he is taking America out of the mainstream.

But that is why we have a Senate and that is why we elect a Senate, and I think those are relevant questions to ask. But I appreciate very much your saying ideology is different than party, and I think that is what we are looking at here.

Did you want to say something, Professor Gottesman?

Mr. GOTTESMAN. Yes.

Chairman SCHUMER. Then I am going to turn to Jeff Sessions and then we will have to conclude.

Mr. GOTTESMAN. When the Founding Fathers decided to give the confirmation power, they didn't give it to a body of psychiatrists to judge people's temperaments. They didn't give it to law professors to judge their credentials. They gave it to a political body, and it seems to me that the practice in those early years simply confirms what the plan was, which is, of course, this is a political process and that we don't want the President's views about ideology to go unchecked. We want the people's elected representatives in the

Congress to have a voice, as well, in making sure that the people chosen have an acceptable ideology to all.

Chairman SCHUMER. I would just say one thing. There have been times in our history where it has mattered less, when there have been moderate Presidents. In the Eisenhower era, they sort of got away from ideology because he really did nominate sort of moderates. He nominated people of both parties.

Then what happened is some of those moderates became very liberal—Earl Warren—and the conservative movement said, wait a minute, they are taking it away from the people and away from us. I had sympathy with that. I mean, I remember arguing in college during the radical days of the 1960's that it should be the Congress that ought to make most of these decisions, not the courts. So I understood where they were coming from.

It is just that since maybe 1970, we have not had that moderation and ideology has mattered both to Presidents on whom they nominate and to the Senate. The only thing—and Jeff and I agree on this—when we didn't do ideology, for a period we devolved into the "gotcha" politics which I talked about for a while, and that was awful and it has been done to Democrats and Republicans.

When you go ask if somebody smoked marijuana 30 years ago, all the Democrats thought that was horrible and disqualifying and all the Republicans thought that was forgivable. And then you asked if somebody went and got the wrong kind of movie out of the movie shop, and all the Democrats thought that was terrible and the Republicans—or vice versa. It was all code. Code is bad. The public likes us to say what we think.

With that, I am going to let Jeff Sessions have the last word, as excited and eager as I am to talk about this subject on and on and on.

Senator SESSIONS. You know, Mr. Chairman, as we go along and we get right down to it, we are probably not as far apart as our words make us sound to be.

I would note Senator Grassley has a statement for the record, and Senator Kyl did come by when we had a recess and he had the Intelligence Committee that he is on that is doing important work now, and so he apologized.

Chairman SCHUMER. Does he have a statement, as well?

Senator SESSIONS. I don't think he did, but he is prepared to offer one consistent with my views.

Chairman SCHUMER. We will still allow the record to stay open for Senator Kyl's views. We ask unanimous consent that Senator Grassley's statement be added to the record.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman SCHUMER. Why don't we let the record stay open for a week so that others can submit their statements?

Senator SESSIONS. Just in summation, I think Mr. Clark had it right that if we tell the people of the United States that a Federal judge is nothing more than a political product, that we don't respect the fact that they have to make legal decisions, and that we somehow believe that their decisions are consistently political, which some do—in fact, Laurence Tribe when he testified here said

that we need to abandon the, quote, "Olympian ideal" of non-political justice. That is what I am concerned about.

I believe, having practiced law in Federal courts for many, many years, that consistently, day after day, Republicans and Democrats, liberals and conservatives, if they are good lawyers and men and women of integrity who are committed to the law, come out pretty close to the same thing.

Now, you might find on procedural matters and environmental cases some class in which a person might be a little different than another one. But, fundamentally, we ought not to send a message, I would say, that would suggest that.

Judge Mikva left the bench and went to be the White House Counsel to President Clinton, one of the most skilled politicians, I guess, of the century. You helped him, from just reading the newspapers and things that I saw, and gave him good advice. But you also did a good job on the bench. Because a person has strong political views does not mean they can't be a good person on the bench.

I would repeat Mr. Cutler's comments. Mr. Fielding, the Miller Commission report that we had a hearing on—and I believe Lloyd Cutler talked about it then—was really a classical study of the proper relationship. I think your conclusion of a bipartisan commission and the conclusion they reached about how we ought to evaluate judges was sound.

I do believe it would be a tragedy to make ideology an increasing part of our confirmation, and I would quote Mr. Cutler, President Clinton's counsel: "To make ideology an issue in the confirmation process is to suggest that the legal process is, and should be, a political one." That would be a dangerous message for us to send.

So as we talk about it, yes, I think we have a right to ask them about their views, particularly if they have written or talked or advocated certain views, just like it would be fair to ask Judge Mikva—you have spoken on gun control—will you follow existing law. That is appropriate. But if they answer and we believe them, and we believe they are men and women of integrity and they will follow existing law, they ought to be given the benefit of the doubt and be confirmed.

Chairman SCHUMER. With that, we will close the hearing, but only after thanking our witnesses for what I thought was an excellent discussion. Thank you.

We will insert into the record a letter and a paper submitted by various environmental groups into the record.

The hearing is adjourned.

[Whereupon, at 12:52 p.m., the subcommittee was adjourned.]

[A question and answer and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTION AND ANSWER

Following is Mr. Fielding's response to Senator Session's question:

In an answer to a question posed by Chairman Schumer, you stated that you hoped that President Reagan had not appointed any "liberals" to the federal courts. By this did you mean that President Reagan intended to appoint judges who would make decisions that were politically conservative?"

"No, not at all. Democratic presidents almost always appoint Democrats and politically liberal men and women to the courts, just as Republican presidents almost always appoint Republicans and politically conservative men and women. For example, President Clinton appointed Ruth Bader Ginsburg and Stephen Breyer to the Supreme Court, and President Reagan appointed Antonin Scalia and Anthony Kennedy to the Court. This historic reality, however, does not mean that a president should legitimately expect his appointee to rule in the favor of his party or any political ideology. Instead, once the appointment is made, presidents should expect the judges to rule in accordance with the Constitution and statutes regardless of the political popularity of the ruling. While judges may differ in their approach to the law -- their judicial philosophy -- in the weight they give to the text, the original intent, and the precedents, they should not differ in their exclusion of politics from the decision-making process. To do otherwise would degrade our courts into political chambers akin to those in countries who do not enjoy the American tradition of an independent
federal judiciary."

SUBMISSIONS FOR THE RECORD

STATEMENT OF JUDGE JAMES L. BUCKLEY
Before the Subcommittee on Administrative Oversight and the Courts
Committee on the Judiciary
"The DC Circuit: The Importance of Balance on the Nation's Second Highest Court"
September 24, 2002

Mr. Chairman, members of the subcommittee: By way of background, I was appointed to the Circuit Court of Appeals in 1985 and became a senior judge in 1996. I continued to hear cases on a part time basis for four additional years, after which I hung up my robe and retired to Connecticut. In an earlier incarnation, I was privilege to serve in this body for six years as the Junior Senator from New York.

I appreciate the opportunity to comment on the proposal that the balance of "ideologies" on the Court of Appeals for the D.C. Circuit be taken into account when considering candidates for that court. To be candid, I can think of nothing more subversive of the rule of law, which is based on an understanding that the laws of the United States are capable of objective application and that the function of the federal judiciary is to do precisely that: to apply the laws of the land objectively. That is the duty of a federal judge; and any candidate for the judiciary who is incapable of distinguishing between the legislative function of formulating public policy and the judicial one of implementing it is by definition unqualified for the job. If the proposal were to be adopted, however, it would feed the cynical view of the judiciary as merely the third political branch of our federal government and encourage future appointees to act as if it were.

I respectfully submit that in assessing the merits of a judicial nominee, the

Judiciary Committee's exclusive concern should be with his or her professional competence, personal integrity, understanding of a federal judge's constitutional role, and, most importantly, judicial temperament. If those criteria are met, the strength or nature of a candidate's political views are irrelevant because, if confirmed, the candidate can be counted upon to make an objective assessment of the relevant law's meaning and apply it fairly to the facts of the case at hand.

The notion that the judges on the D.C. Circuit (or of any other circuit) must reflect some sort of ideological balance flies in the face of experience. I say this on the basis of my fifteen years of hearing cases as a member of that court. During those years, I served with men and women of great professional competence and strong views on questions of public policy that spanned the ideological spectrum. Yet, as our former Chief Judge Harry Edwards has documented,[1] our decisions have been unanimous the vast majority of the time despite the complexity of much of the court's workload. This reflects the fact that, regardless of our personal views as to the merits of the laws we were called upon to apply in a particular case, we employed the same legal principles in construing the controlling statutes and came to the same conclusion as to how the case should be decided. We also understood that whether or not we agreed with a particular Supreme Court construction of the Constitution, it was our duty to apply it - and we did.

I recognize that a small category of cases does exist where standards established by the Supreme Court invite the application of an essentially subjective judgment, such as a determination of when a government interest is sufficiently

compelling to justify a restraint on speech. Honest judges can and do differ on such judgment calls; but while this may say something about the criteria to be applied, it does not constitute a rampant problem that would justify the use of ideological litmus tests in the confirmation process. I also recognize that judicial wildcards have given rise here and there to what may be legitimate claims that laws are being bent in pursuit of political goals, whether they be of the right or the left. The solution, however, does not lie in seeming to condone any such practice by seeking ideological balances on a court; it lies in the careful screening of candidates for the judiciary to ensure that those confirmed understand the nature of the duties they are about to assume and are capable of putting their own views of sound policy aside, however strongly held.

That, by the way, is not all that difficult to do. While in the Senate, I had strong views on questions of public policy and tried my best to persuade my colleagues of their merit. But I have had no trouble, as a judge, in faithfully applying laws which I fought on the Senate floor and still believe to be wrong-headed because I know the huge difference that exists between Congress's authority to fashion laws and a court's duty to apply them. There is nothing unusual of heroic about this. It represents nothing more than an elementary understanding of the responsibilities that the Constitution has assigned to each branch of our government together with a willingness to take seriously the obligations that a judge assumes on taking the oath of office.

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1. "[O]ver each of the last three years, there have been dissents in fewer than 3% of all dispositions." Harry T. Edwards, Collegiality and Decision Making on the D.C. Circuit. 84 Va. L. Rev. 1335, 1338 (1998).

STATEMENT OF RONALD A. CASS
SUBMITTED TO THE SUBCOMMITTEE
ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
OF THE SENATE COMMITTEE ON THE JUDICIARY

"The DC Circuit: Considering Balance on the Nation's Second-Highest Court"

Tuesday, September 24, 2002

Thank you, Mr. Chairman and Committee members, for giving me the opportunity to submit testimony on this important issue. Let me begin by emphasizing that this testimony reflects only my own, personal views, not those of Boston University or any other entity.

Personal Qualifications.

I am presently the Dean of Boston University School of Law and the Melville Madison Bigelow Professor of Law at Boston University. I have been a lawyer for more than twenty-five years. I have been a judicial clerk, practiced law in Washington, D.C., and have served in the federal government as an attorney and as a presidential appointee, gaining first-hand experience in one version of the Senate confirmation process.

I also have taught and written about constitutional law, administrative law, the judicial process, and the performance and selection of judges. I have authored more than 70 books, articles, and chapters in anthologies. Some of these articles and one recently published book, *The Rule of Law in America* (Johns Hopkins University Press, 2001), deal at some length with the manner in which judicial decisions are made and the relation between judicial decision-making and political decision-making.

I am a member of the bars of the District of Columbia, the D.C. Circuit, and the United States Supreme Court, among others. I am a past President of the American Law Deans Association, past Chair of the Section of Administrative Law and Regulatory Practice of the American Bar Association, a former member of the ABA's House of Delegates, and a member of the American Law Institute.

These comments draw on my experiences in these different capacities but reflect only my own judgments. They have not been screened by and are not endorsed by any organization with which I am associated.

The DC Circuit's Importance and the Question of Balance

There is good basis for concluding that the United States Court of Appeals for the DC Circuit is an important court, one of the nation's most important courts. But there is little basis for jumping from that conclusion to an examination of ideological or political balance on that court.

The DC Circuit has jurisdiction over a wide range of appeals from administrative decisions and also has jurisdiction over suits challenging, and petitions for review of, other important governmental actions. As with other circuits of the court of appeals, few of its decisions are likely to be reviewed critically by the Supreme Court of the United States, the only court superior to the court of appeals. The nomination and confirmation of judges to the DC Circuit, and to all the circuits of the court of appeals, must be given the most serious and thoughtful attention.

The question focused on in this hearing, however, in a very fundamental way misdirects the attention of this Subcommittee and of the Senate. That is not to say that there is no basis at all for asking the question. Indeed, it is a question that has occupied a great deal of attention from academics, commentators in the popular press, and casual observers of the American legal system. It is important to understand both the general argument that this question addresses and the specific context of the DC Circuit.

The General Argument: Ideology versus Interpretation

The question about what role ideology *should* play in selecting judges is parasitic of the question what role ideology *does* play in judicial decisions. The latter question arises in large part because there is a genuine lack of clarity about what explains judicial decisions in difficult cases.

Before addressing the hypotheses that explain difficult cases, it is essential to note that most cases are not difficult. That is a very important fact, and one that needs to be underlined. Indeed, it is the most important observation one can make about judging, in America generally, the federal courts generally, and the DC Circuit specifically. Knowing why a case would be seen as "not difficult" is the key to understanding why the ideology-driven explanations of judging are off the mark. This is a matter that I will return to below.

Yet there are difficult cases. Some observers have proposed the hypothesis that a judge's ideological commitments, political connections, or the influence of political oversight exercise significant influence – perhaps even dispositive influence – on such decisions. Some of those who have espoused this view reason from their observation of decisions by particular, individual judges. Some proponents of this position induce the thesis from observing divisions among judges on specific (generally controversial and highly contested) decisions.

The argument between those who adopt one of the variants of the "ideological judging" perspective and those who adopt more law governed perspectives has been

carried on for a long time. At the most general level of abstraction, ideology proves a remarkably unhelpful explanation for what judges do. Doubtless, there are some judges who use ideology as an element in their decision-making, and there are some decisions that are affected by judges' views on matters that cannot be described as technical, interpretive issues. But these are not the ordinary occurrence. They are unusual, and we should not design our procedures with respect to the selection and confirmation of judges as if this aberration were the norm.

The evidence supporting the ideology argument is remarkably weak. If the argument is understood as a general statement that ideology provides a dominant explanation for judicial decisions, there is almost no credible evidence to support it. Start with the fact that most legal actions – about 1.2 million in federal courts each year – are settled by the parties without a judge's decision. That occurs in large measure because the parties can predict what legal rule the judges will apply and, once they have discovered the factual predicates to which the legal rules will apply, parties commonly can agree (within fairly tight limits) on the likely outcome of the case.

The cases that federal judges actually decide will be cases that have less easily predicted outcomes. But, even for these cases, the reason the outcome will not be readily predictable is more likely to be that the parties disagree about the factual basis for the litigation rather than because they have different views of the law. For the same reason, debate over the propriety of district court decisions is more likely to focus on arguments about the court's factual determinations than its decisions on issues of law. Because of that – and because appellate courts defer to lower court findings of fact – relatively few cases disposed of at the district court level are appealed.

Among the cases that are appealed – the real outliers in terms of predictability of the legal rules – there still is remarkable agreement among the judges and most observers about the content of the relevant legal rule. Consider, for example, that almost 80 percent of the cases decided by the U.S. Court of Appeals are disposed of without published opinion, indicating agreement that these are fairly simple decisions. For the remaining fifth of appellate cases that generate published opinions, the vast majority are unanimous decisions. Even where judges think an issue is important and not settled, they tend to agree on the correct outcome. The argument from ideology simply cannot explain the incredibly high level of agreement among U.S. Court of Appeals judges from different backgrounds, different political affiliations, and different asserted ideologies. An explanation that gives primacy to technical skills of legal reasoning is a far better fit with the facts.

The DC Circuit and the Argument from Ideology

Does the DC Circuit differ from the general case of the court of appeals? Does ideology play a more prominent role in decision-making in that circuit?

The evidence available strongly suggest that the answer to both of these questions is "no." Look first at the incidence of division among the judges of the DC Circuit. Some commentators assert that this court has the most pronounced ideological division of any federal court other than the US Supreme Court, a division reflected in constant argument among the judges on the proper disposition of important cases. On examination, these assertions turn out to be false. In fact, the DC Circuit has a very low rate of division among judges. During 1999, for instance, the court disposed of 1,253 cases and generated only 22 dissents. That translates to a dissent rate of 1.8 percent. This is not an aberrant year. The dissent rate for the three-year period 1997-1999 is almost exactly 2 percent, representing 76 dissents out of 3,740 decisions.

No reasonable view of these statistics can be made consistent with the picture of a court riven by – and driven by – ideology. Yet serious scholars have drawn just such a picture of the court, and serious students of the courts have drawn conclusions from this picture about what must be done in the confirmation process.

One possible reason for the contrary conclusion is that the scholars who have advanced such views have tended to look at very narrow categories of cases. In many areas of academic inquiry, a narrow focus allows one to identify patterns that might not appear if a broader set of events is examined. Sometimes in science and social science studies such patterns in fact are suppressed in the broader sample, but are nonetheless important – as with the adverse reactions of some subjects to drugs, reactions that are rare but significant. More often, however, too narrow a focus overselects the experiment's or inquiry's subjects, causing false correlations to appear that would be rejected on examination of a broader or more randomly selected set. As I explain below, that is what has happened here.

It could be argued that the right set of cases to examine here is not the full set of decisions by the DC Circuit, but only those that generate published opinions. That argument should be rejected, because it is essentially asking how commonly judges disagree by focusing solely on the cases in which they expect the greatest likelihood of disagreement. The fact that so few cases generate that expectation is more important than the fact that some disagreement occurs. But even if one narrows the ambit of inquiry, the image of the ideologically riven court still is a manifestly inaccurate picture of the DC Circuit. Again, take the years 1997-1999 (years for which data are readily available for the full set of decisions by the court and for the divisions relevant to this hearing). During that three-year period, the DC Circuit judges agreed unanimously on more than 90 percent of their decisions in published cases. There were 76 dissents filed in 786 cases with published opinions.

A different argument is that, although dissent is not terribly common on this court, that the cause of dissent is very important, and that the cause is difference in judicial ideology. That suggestion is pressed vigorously by some academicians who have studied particular slices of the DC Circuit's caseload. Again, however, the selection of the particular cases carries considerable risk if one is trying to gain an objective sense of

how this court actually works. Not only does a narrow focus bias the outcome by looking only at cases most likely to produce a given result. It also carries a more general risk of distortion by so limiting the pool of cases that small, random variance can have substantial impact on the patterns the researcher will perceive. The statistics for the entire caseload continue to tell a different story. The definition of ideology-driven difference most commonly used by academics who engage this inquiry is the difference in party affiliation of the judge's appointing president. In other words, those judges appointed by Republican presidents are supposed to be motivated by different ideologies than judges appointed by Democrats. That is the basis for the conclusions of ideological decision-making. But in the years 1997-1999, dissents across all categories of cases were *less* likely to come from judges of different ideology (using this standard) than from judges sharing the *same* ideology. Of the 76 dissents, 29 represented a difference between judges appointed by presidents of different parties, while 47 represented differences among judges appointed by presidents of the same party. That means a disagreement *within* an ideological grouping (as assessed by those who would make the case for ideology's dominant role) was more than 50 percent more common than a difference between ideological groupings.

When all is said and done, any objective look at the full set of decisions of this court compels the conclusion that the DC Circuit functions by deciding cases on some basis other than ideology. Whatever leads to differences among judges, politics is not the evident answer.

US Supreme Court – and the Still-Troubled Argument from Ideology

The problem with the argument from ideology can be seen when the argument is examined in the context where it is most often – and most rightly – used. That is, in reference to the Supreme Court of the United States. That court culls its caseload of 70-100 cases a year (a mere eight one-thousandth of one percent of the total number of legal actions each year in the US) from thousands of petitions to select the most important and legally indeterminate cases. If any set of cases in any court in the nation is to provide evidence to support the ideological dominance claim, this should be it. And, no surprise, is some sense, this is where a case can be made.

Yet, even here any strong form of the ideology explanation falters. If ideology dominates other decisional factors, why is the Supreme Court unanimous in more than 40 percent of its cases for a typical term? Why is there so little dissent in so many cases, with two-thirds to three-quarters of the Supreme Court's decisions generating two or fewer dissents?

There is a less aggressive argument for the role of ideology which is more plausible, but it still does not provide a good basis for abandoning the general understanding of what courts do. This less aggressive argument is that judges principally decide cases on the basis of technical considerations respecting legal authorities. They endeavor to make sense of the language used in statutes, constitutional provisions, and

judicial precedents, using rules of construction that are relatively free of ideological freight. But, the argument goes, inevitably in some instances this approach has leeway for different outcomes – there is space left among the legal authorities for different conclusions about the exact shape of the rule that governs a particular conflict. When that happens, judges must attempt to divine what is most reasonable, what best harmonizes the different strands of authority. That task ineluctably leads to consideration of policy issues, of values to be placed on different results, of weights to be given to competing interests. In that setting, even judges attempting earnestly to give a reasoned interpretation to legal texts will be influenced – perhaps subtly, perhaps not – by their ideology.

Of course, aspects of this version of the ideology argument must, on some level, be correct. The less certain the outcome of a legal dispute governed by ordinary interpretive techniques that command widespread adherence, the more likely it is that other factors will come into play. The more the issue at hand requires consideration of factors that will receive different evaluations – factors that cannot be subjected readily to objective tests – the more likely it is that the judge's own subjective evaluation will be described as influenced by ideology.

That, however, does not get the ideology proponents where they need to go. The explanation seems plausible in large part because it recognizes what should be evident to all observers of judicial decision-making: that the dominant influences on judicial decisions are the quality of the legal authorities and the competence of the decision-maker, not the decision-maker's political or other inclinations. The explanation, in other words, gains force largely because it adopts the position *opposed* to ideological dominance as its base. Moreover, the argument that is left now from the proposition that ideology governs judicial decisions is the tautological observation that when the usually dominant technical considerations don't give a clear answer, the answer will not rest purely on technical considerations. That is so, but so what? Almost any life experience of a decision-maker may exercise some influence over decisions that in some respect are "up for grabs," but unless there is a clear and direct connection between some specific, discernable influence and a significant set of outcomes, there is little to be gained by pursuing the various possibilities. Any inquiry in this vein is apt to be more theatrics than analysis.

Perhaps most critical to the flaw in the ideology argument is this: efforts to make judicial decisions seem the product of ideology must provide oversimplified definitions of ideology if they are to work. The effort is to tie judges to a political party or a specific perspective that can be defined in linear fashion – this judge has Republican or Democratic leanings, that judge is liberal or conservative, and so on. These characterizations may work tolerably well over a set of issues, but only as rough proxies for a more complicated set of views that do not graph cleanly in a linear mode. Consider, for example, Supreme Court Justice Antonin Scalia, frequently caricatured as the epitome of the ideological, conservative jurist, deciding that the Fourth Amendment to the Constitution prohibits police from conducting warrantless, thermal-image searches of

homes. Or consider Justice David Souter, often described by conservative commentators as reflexively liberal, deciding in the same term to allow police to arrest and jail a woman whose children, in violation of the law, were not wearing seatbelts in their car. Neither of those votes fits the simple liberal-conservative stereotype (much less the simple Democrat-Republican stereotype) because the stereotype does not really explain the considerations that inform the justices' decisions. And it surely does not explain the considerations that typically inform other judges' decisions, even in difficult matters not covered by well-defined legal precepts.

Once you abandon the fiction that the linear description actually tells you what is going on, however, the already weak argument for ideology's influence becomes much weaker. The more complicated set of views that may affect the judges' decisions will not look so much like ideology because it is complex. The complexity means that judges do not simply act on the basis of beliefs that fit readily with the sort of politically charged description of views that usually gets referred to as ideology – not even as a prompt for decision-making in difficult cases with open-textured legal authorities. They evaluate the pros and cons of arguments according to an enormously rich set of understandings of facts and values that cannot easily be conflated to an ideological bias. Even where judges must bring something to bear other than mere technical legal skills to generate a decision, ideology will be a poor explanation of their decision processes.

Senate Confirmation, Ideology, and the Rule of Law

When the work of federal judges in general and those of the DC Circuit in particular are examined dispassionately, it is plain that the judges are not moved primarily by ideology. That conclusion in turn strongly indicates that a focus ideology would both misdirect the Senate's attention and harm the courts.

Despite the public attention focused on a small number of controversial decisions, the job of a federal judge almost entirely consists of the resolution of well-defined conflicts over the meaning of reasonably determinate legal authorities. Federal judges are not given a wide-ranging mandate to announce rules of their own choosing. They are instructed to decide which of two (or several) possible interpretations of law – of statutory directives, of constitutional provisions, or of prior judicial decisions – fits better with the governing legal authorities. And that, in fact, is what they do. Evaluation of the work of federal judges strongly suggests that they primarily (without exaggeration one might say almost exclusively) are engaged in the application of sound technical legal skills – the skills of reading, parsing, and interpreting legal authorities – to a shifting set of controversies.

This is not necessarily a simple task. It can, in fact, be quite difficult. That is why you want judges with demonstrated competence at the skills that are needed for legal interpretation. That is why we care whether judges have been successful as scholars and lawyers in showing the ability to perform the interpretive task at the heart of the judicial

enterprise. But there is incredibly widespread accord among judges that this is indeed what judges do.

If judges generally base their decisions on sincere efforts to interpret governing legal authorities but at times cannot perform that task without importing other factual and normative assumptions, what should the Senate do in assessing judicial nominees? The first and most obvious lesson is that senators should pay careful attention to the technical legal qualifications of nominees. You should assure yourselves that judicial nominees have the skills they will be called upon to exercise on the bench and that there is a likelihood they will use these skills to perform the necessary interpretive tasks. Nominees who have had lackluster careers, who have not demonstrated a facility for legal analysis, or who have personal characteristics that will impede such analysis should be turned down. So, for example, in addition to assessing competence, senators might inquire whether nominees are unwilling to listen to others, for example, or have demonstrated biases that make it unlikely that some individuals will get a fair hearing.

Surely, however, the President who nominates judges will care about their views and will endeavor to select judges whose views are sympathetic in some respect. Shouldn't the Senate seek the same assurances? Even if judges' decisions are not primarily – even if they are not significantly – the products of ideology, shouldn't senators have the right to "level the playing field" by keeping presidential prerogatives within bounds?

First, one predicate for the questions presented above is undoubtedly correct: even if everything argued above about the extremely limited role of ideology in judicial decision-making is true, the presidential nomination process will be tilted toward people who generally share the President's outlook and inclinations. Those are the people who will always be most congenial to a President and who will have the greatest likelihood of sharing connections to people whose judgment the President trusts. Further, a President may care particularly about a set of views and endeavor to select nominees who share those views. A President who believes, for example, that the death penalty is a strong deterrent to the most abhorrent crimes well might endeavor not to appoint judges who are vehemently opposed to the death penalty. There is nothing untoward about this aspect of presidential selection of nominees. It is understood as part of what we get when we elect a President. Fear that a President may have views and associations too far from the comfort level of most Americans is frequently used as an argument against a particular candidate. Election certifies that the fear is not so widespread as to be a serious problem.

The fact that the President's selections will have been screened in some respect for their views does not mean that the Senate must play the role of counterweight. To start, it is wrong to believe that the Senate gives the President a free hand in selecting nominees who will advance his interests if it forswears inquiry into such matters. Serious tests for competence and temperament rule out those nominees most likely to depart from straightforward application of governing law. Indeed, serious tests for competence and temperament are most likely to assure all parties that the judges who are confirmed,

however they have come to be selected, will serve public interests over the long term, interests that are defined by our governing legal authorities.

Note, too, that even if the President wants to select judges whose views are compatible with his on some margin, it is very difficult to do that in a way that will predictably affect judicial decisions. It is difficult because, as explained above, things other than a judge's personal views dominate judicial decision-making. It is difficult because it is not a simple matter to project current views to future decisions (witness the selections of Chief Justice Earl Warren and Associate Justice William Brennan by President Eisenhower). It is easier to screen out people with well-established views contrary to the President on some matter than to "screen in" people with compatible views. Even that limited screening, however, is not easy. Presidential viewpoint screening also is difficult because the more the selection process focuses on personal views, the more it creates disincentives for prospective nominees to be fully candid – disincentives that operate throughout the appointments process. Presidents with well-known perspectives on particular issues will induce more potential nominees to profess accord with those interests. The standard check on the bona fides of such statements is whether associates of the President who know the candidate will vouch for him. While standard, this is both a very poor check on the candidate's views and very largely redundant of the process that would be used in all events.

Senatorial efforts to screen nominees' views are not likely to be very effective. The same problems that affect presidential screening affect senatorial screening. And the President, as the first-mover in this game, can continue to eliminate nominees who are thought most likely to disagree with the President on important matters.

Second, and more important, the effort to check a candidate's views is fraught with peril. Most obviously, it leads almost inevitably to a more strategic and more hostile set of interactions between President and Senate. Although proponents of such screening commonly assert that it need not be so, those proponents – whether Republicans opposing a Democratic President or Democrats opposing a Republican President – seldom have standing as voices of moderation. It is typically those who are most committed to opposition who suggest this tack while maintaining that it can be done in a collegial manner. The now long-running argument about who first de-railed a nomination of a well-qualified candidate and who did it to how many more or less is evidence of this problem.

Further, the effort to check nominees' views compromises the Senate's ability to check nominees' legal competence and temperament. Not only will the effort to check views take time and energy away from other screening; it also will color other screening efforts. Once ideology becomes the focus, any discussion will be seen through that lens. Objections to competence will be less likely to be credited as sincere. And that will further undermine the Senate's ability to focus clearly and cogently on that issue.

Perhaps most problematic, the process of publicly focusing on personal views will have adverse consequences for the legal system. It will convey to the public the false impression that ideology dominates judicial decision-making, which over time will undermine confidence in and respect for our legal system. That is not to anyone's advantage. Worse yet, the process also will induce judicial nominees to follow one of two routes, neither of which is attractive. One possible response is to duck – to avoid really saying anything about any issue. That almost surely will be seen as dissembling. The alternative is to try and have developed positions on the most important issues that might come before the nominee when on the bench. Of course, the nominee would then be making public statements about views on exactly the range of cases that are most politically sensitive – and that we most want judges to think hard about in the context of particular cases and arguments. We will be setting judges up either to make pronouncements they do not later follow or to make decisions in the wrong way about the issues we traditionally have entrusted to a case-by-case decision process that has served us well. These are bad alternatives. And they are the most likely alternatives. Grilling prospective judges about their views may look good at the time, but it has terrible effects on our legal system.

Conclusion

The Senate's advise-and-consent role with respect to federal judges is a weighty one. It should focus on assuring that our judges have the legal skills and the temperament necessary to the tasks of legal interpretation that we have entrusted to our judiciary. The Senate should not attempt to divine a nominee's personal views, positions on legal issues, or ideology. It should not attempt to secure "balance" among judges based on an assessment of their supposed ideological, political, or personal views. Not on the DC Circuit or on our other courts. That is not likely to be a useful role for the Senate and is very apt to have untoward consequences for our judicial system.

I appreciate the opportunity to submit these remarks and would be happy to expand on any issue that interests the Committee.

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Commentary

Living in a state of constitutional denial

Jonathan Turley
Jonathan Turley teaches constitutional law at George Washington University

Liberal Democrats appear these days to be slowly moving through the stages of loss first defined by psychiatrist Elizabeth Kubler-Ross: denial, anger, bargaining, depression and acceptance. A recent proposal by University of Chicago law professor Abner Mikva would suggest that some Democrats remain mired somewhere between denial and bargaining.

Mikva recently put forward a theory that has the hearts of many die-hard Democrats racing with anticipation: President Bush should be barred from filling any vacancies to the U.S. Supreme Court during his current term. Cloaked in constitutional and historical arguments, Mikva insists that any Supreme Court appointments should be delayed until the next presidential election in two years.

With Bush's popularity at a historic high, Mikva appears to be moving from denial to anger to bargaining. Mikva grudgingly accepts that Bush is president, though in a Washington Post commentary he emphasizes that Al Gore won the popular vote. This is suggested as somehow significant despite the facts that the popular vote margin was statistically razor thin; that previous presidents have been elected on the electoral but not the popular vote; and that, in our constitutional electoral system, popular vote is legally meaningless. Yet this image of an election stolen creates a useful appearance of victimization for Mikva and others in advancing this proposal. It is not that we are trying to subvert the constitutional process, we have been injured and deserve recourse. Otherwise, Mikva's proposal is nothing more than a raw partisan shutdown of the president's prerogative to fill Supreme Court vacancies.

The real motivation for this proposal, however, lies elsewhere. Mikva notes that the Supreme Court could easily have as many as three vacancies during Bush's term and he asks menacingly: "What kind of person would President Bush nominate?" Clearly, not a person to Mikva's liking.

The solution for Mikva is simply to divvy up powers with Bush like hostile roommates locked into a multiyear lease: Bush can continue to wage war and enjoy the trappings of office but the Supreme Court would be off-limits. His reasons are many but few withstand serious

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review. First, Mikva argues that nothing in the Constitution requires nine justices and that historically there have been long periods of delay in the confirmation of nominees. This ignores that modern delays in confirmation have been due to concern of an individual's qualifications, not some categorical denial of the right of a president to place qualified people on the court.

Mikva also argues that it would be unseemly to allow the president to add to a court that "itself made the final decision as to who should be president."

Mikva again chooses to ignore that voters chose this president through our constitutional electoral system. As it turns out, the people of Florida and the rest of the country made the final decision as to who should be president. Mikva simply notes that "there is still unhappiness" about the court's decision, an empirical observation apparently based on his conversations with other unrequited Gore supporters.

Mikva labels the current Supreme Court as an "activist" court that only needs a couple of new votes to reshape laws in an image that Mikva finds unacceptable. He apparently prefers his own image. For years, conservatives criticized **Mikva** as one of the most **liberal** members of Congress when he represented the 10th Congressional District and later as one of the nation's most **liberal** judges in Washington D.C. Long accused of continuing his legislative career from the bench after leaving Congress, **Mikva's** labeling of any court as activist is rather disorienting.

Mikva's suggestion would seriously weaken our constitutional system by creating ambiguities in authority or questions of legitimacy. Mikva would create a precedent for members of Congress to categorically refuse nominees by presidents under certain undefined circumstances. It is not simply a bad idea, it is a dangerous one. The sooner this bizarre theory is put to rest the sooner Mikva and others may reach the stage of Kubler-Ross that most voters reached last January: acceptance.

---- INDEX REFERENCES ----

NAMED PERSON: KUBLER-ROSS, ELIZABETH; MIKVA, ABNER J

ORGANIZATION: UNIVERSITY OF CHICAGO; SUPREME COURT-US

KEY WORDS: ISSUE; FEDERAL; OFFICIAL; CANDIDATE; COURT OPPOSITION DECISION

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STATEMENT OF BRADFORD R. CLARK
Before the Subcommittee on Administrative Oversight and the Courts
Committee on the Judiciary
"The DC Circuit: The Importance of Balance on the Nation's Second Highest Court"
September 24, 2002

I. Introduction

Good morning Mr. Chairman and members of the Subcommittee. My name is Brad Clark, and I am a law professor at George Washington University Law School, where I have taught Constitutional Law, Federal Courts, and Civil Procedure for the past ten years.

I received my B.A. in Political Science from Florida State University in 1981, and my J.D. from Columbia Law School in 1985. After graduating from law school, I served as a law clerk to the Honorable Robert H. Bork on the United States Court of Appeals for the D.C. Circuit. Following my clerkship, I worked as an Attorney-Advisor in the Office of Legal Counsel at the U.S. Department of Justice. I subsequently clerked for Justice Antonin Scalia on the Supreme Court of the United States during the October 1989 Term. Before becoming a professor, I practiced law for several years in the Washington, D.C. office of Gibson, Dunn & Crutcher, where I specialized in appellate litigation. This is my tenth year as a professor at George Washington University Law School.

As a law professor, I teach and write in the area of separation of powers, including the constitutional independence of the federal judiciary from Congress and the President. Appreciation of separation of powers, including the doctrine of judicial independence, is essential to understanding the proper role of the President and the Senate in the process of appointing federal judges.

II. Judicial Independence and Public Confidence in the Judiciary

The name of this hearing is "The DC Circuit: The Importance of Balance on the Nation's Second Highest Court." By "balance," I take it that at least some members of the Subcommittee are referring to "ideological" or "political" balance. With all due respect, focusing on ideology threatens to compromise the constitutional independence of federal courts and could undermine public confidence in the judiciary.

Of course, it is appropriate for the President and the Senate to assess a nominee's general judicial philosophy to ensure that the nominee would perform his or her duties with proper respect for the Constitution and Laws of the United States, as well as pre-existing judicial precedent. In other words, it is proper to inquire into a nominee's "judicial temperament." As Lloyd Cutler testified before this Subcommittee last year, this inquiry essentially asks whether a nominee "is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result." (Testimony of Lloyd N. Cutler, June 26, 2001, at 1.) In short, the President and the Senate should inquire whether the nominee is prepared to assume the role of a judge.

On the other hand, for either the President or the Senate to go beyond such general inquiries threatens judicial independence. The Constitution takes great care to ensure such independence. Federal judges are appointed for life and their salaries may not be reduced during their tenure in office. (U.S. Const. Art. III, § 1.) Such judicial independence was designed to insulate judges from political pressures and permit them to serve as a check on Congress and the President. Judicial independence was one of the great innovations of the Constitution. Indeed, separating the legislative and judicial branches is such an important feature of the Constitution that it includes a specific provision prohibiting members of Congress from simultaneously serving in Congress and the judicial branch. (U.S. Const. Art. I, § 6, cl. 2.)

Requiring judicial nominees to give advisory opinions as part of the confirmation process would threaten this important feature of the

constitutional structure. As Judge Mikva explained in 1985, neither the President nor the Senate should ask a nominee how he or she would decide a specific legal question. (Abner J. Mikva, *Judge Picking*, 10 Dist. Lawyer 37, 40 (1985).) Moreover, if asked, a nominee should refuse to answer. (*Id.*) The reason is simple. A nominee cannot answer such questions without effectively giving the political branches a pre-commitment inconsistent with judicial independence. Such political commitments would prevent judges from deciding important questions in their proper judicial setting (including full briefing and argument), reconsidering preliminary views in light of experience, deliberating with colleagues, and considering changed circumstances. In addition, the ability to extract such commitments would give the political branches undue influence over the judicial branch. As Judge Mikva explained: "The Constitution clearly does not permit the judiciary to be a subdivision of the Senate, nor judges to serve as inferior officers of the President." (*Id.* at 39.)

The threat to judicial independence arises even with respect to well settled questions of law. If the Senate disagrees with a judicial decision (however well settled), it could simply insist that nominees give their opinion of the decision and then refuse to confirm nominees who express the "wrong" view. Over time, the Senate could exercise significant (and constitutionally troubling) control over the judicial branch by using this technique. Consider the flag burning cases. The Supreme Court invalidated the Texas statute under the First Amendment in *Texas v. Johnson*, 491 U.S. 397 (1989). Congress subsequently enacted a federal flag burning statute by overwhelming majorities in both Houses. Nonetheless, the Supreme Court again invalidated the prohibition in *United States v. Eichman*, 496 U.S. 310 (1990). Although the issue is well settled, judicial independence would be threatened if the Senate required judicial nominees to opine on the correctness of these decisions, and then rejected nominees who agreed with the Court.

Conversely, if the Senate wished to preserve a particular ruling, it could simply insist that judicial nominees state their views regarding the decision in question. Suppose, for example, that in the 1940s and 50s the Senate had

refused to confirm nominees unless they expressly agreed with the Supreme Court's notorious decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding "equal but separate accommodations" for railroad passengers of different races). Such a course would have undermined judicial independence and could have prevented the Court from subsequently overruling *Plessy* in *Brown v. Board of Education*, 347 U.S. 483 (1954).

More broadly, the Senate's attempt to question judicial nominees about political ideology could erode public confidence in the courts. The public generally accepts decisions by unelected federal judges precisely because they were designed to be—and are perceived to be—above partisan politics. If the Senate made ideology the central focus of the confirmation process, the public might well conclude that judges are nothing more than politicians with life tenure and salary protection. If this impression took hold, citizens might wonder why federal judges do not periodically stand for election rather than receive lifetime appointments. Such a shift could threaten our constitutional framework and the protections it affords. Again, as Judge Mikva pointed out, "if the Court is viewed as simply a Congress in black robes, the Court's ability to perform it constitutional function is threatened." (*Id.*)

What, then, is the proper role of the Senate in considering judicial nominees? Alexander Hamilton suggested the answer in *Federalist* 76. According to Hamilton, the requirement of Senate confirmation was meant to be a "check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." (*The Federalist* No. 76.) Using this standard, the Senate may, when circumstances warrant, conclude that a nominee lacks the necessary qualifications—such as education, experience, and temperament—to be a federal judge. Although Hamilton predicted that such rejections would be rare, he thought that the confirmation process itself would have a powerful, if largely silent, effect of discouraging the President from nominating "unfit characters" to the bench.

III. Ideological Balance and the D.C. Circuit

Using an ideological litmus test to evaluate nominees to the D.C. Circuit would be particularly problematic. Because of its location and its specialized jurisdiction, the D.C. Circuit hears a disproportionately large number of cases challenging actions taken by administrative agencies. These cases are governed by a complex mix of constitutional, statutory, and regulatory doctrines developed and refined over many years by judicial precedent. Judge Harry T. Edwards, a Carter-appointee to the D.C. Circuit, has explained that in recent years over 97 percent of the court's decisions have been unanimous, regardless of the composition of the panel or the political affiliation of the President who appointed the judges. (*See* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 Va. L. Rev. 1335, 1343 (1998).) Judge Edwards believes that the court achieves such a high level of unanimity because "'members of the federal judiciary strive, most often successfully, to decide cases in accord with the law rather than with their own ideological or partisan preferences.'" (*Id.* at 1364.) This accords with my own impressions as a law clerk on the D.C. Circuit.

Judge Edwards' conclusions are supported by several features of the judicial decision making process that make it difficult for judges to simply follow ideology rather than law and precedent. First, appellate judges decide cases sitting in panels of three. The use of panels requires judges to deliberate and persuade others of their views in order to prevail. Appeals to ideology not only would fail to persuade other judges, but would severely undermine a judge's reputation in the broader legal community. Second, when D.C. Circuit judges decide questions of law, they "are tightly constrained by precedent and statutes." (*Id.* at 1362.) As Judge Edwards points out, "[t]hese formal constraints are augmented by techniques of textual interpretation and legal reasoning that are broadly shared by the interpretive community of judges and legal practitioners." (*Id.*) Third, judges generally write opinions explaining their decisions. To be persuasive, these opinions must be based on careful application of law and precedent rather than ideology or political preferences.

Apart from these constraints, there is a more fundamental point about

judicial decision making that distinguishes it from the exercise of political discretion. The cases that federal courts decide are often highly complex and require careful attention to legal details, such as the record, the facts, and the law. It caricatures the work of the D.C. Circuit to evaluate its decisions in purely ideological terms. The relevant question is not whether the court reached a "liberal" or "conservative" result in a given case, but whether it decided the case fairly and impartially according to the facts and the law. Whether politicians agree with the results reached is basically irrelevant to the judicial enterprise. Judges do not have the discretion or the right to decide cases according to their political preferences or those of anyone else. Whatever judges or Senators think about flag burning as a political matter, judges must resolve the constitutionality of flag burning statutes based on the Constitution and relevant precedent. This is what Alexander Hamilton meant in *Federalist* 78 when he said that the judiciary has "neither FORCE nor WILL but merely judgment."

Pursuing ideological "balance" on the D.C. Circuit necessarily misrepresents the work of the court and casts its decisions in ideological terms. As Judge Edwards warned, "[g]iving the public a distorted view of judges' work is bad for the judiciary and the rule of law." (Edwards, *supra*, at 1339.) Judge Edwards made these comments in the process of criticizing several articles by academics that he thought could mislead the public "into thinking that judges are lawless in their decision making, influenced more by personal ideology than legal principles." (*Id.* at 1337.) Judge Edwards refuted these charges in part because "[i]t matters what the legal community and the public think about the way judges do their job." (*Id.* at 1369.) As he warned: "If the public develops a false perception of our actions or our intentions, there will eventually be consequences for the legitimacy of our legal system." (*Id.*) The Senate should not risk undermining the legitimacy of the judicial branch by encouraging such perceptions.

In addition to undermining public confidence in the judiciary and the rule of law, using ideology in the confirmation process could deprive the courts of service by outstanding jurists. I have in mind two former members of the D.C. Circuit: Ruth Bader Ginsburg and Robert H. Bork. These judges

were nominated by Presidents of opposing parties, and had background experiences suggesting different ideological perspectives. Yet Judges Ginsburg and Bork voted together in the vast majority of cases they heard together, and were held in high esteem by both bench and bar. As a law clerk, I remember being impressed by their sincere and meaningful collaboration on the D.C. Circuit. Indeed, in one case heard while I was clerking, these two judges worked so closely that they took the unusual step of issuing a joint opinion, styled an "Opinion of the Court filed by Circuit Judges Ginsburg and Bork." (*See* Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986).)

If Senators want to minimize the effects of ideology on judicial decision making, they should not emphasize ideology in the confirmation process. Rather, as Alexander Hamilton suggested, they should seek to ensure that the President nominates highly qualified individuals. Such individuals—by virtue of their background, training, and experience—will understand that the proper role of a judge is to decide cases fairly on the basis of the facts and the law rather than on the basis of ideology or partisanship.

Statement of Bruce Fein
Addressing
"The D.C. Circuit: The Importance of Balance on the Nation's
Second Highest Court
Submitted to the Senate Judiciary Subcommittee
on Administrative Oversight and the Courts
September 24, 2002

Mr. Chairman and Members of the Subcommittee:

I previously served as Associate Deputy Attorney General and General Counsel to the Federal Communications Commission in the Reagan Administration. I am now in private practice in Washington, D.C.

I am grateful for the opportunity to share some observations on a topic pivotal to an enlightened federal judiciary wedded to the rule of law and checking (not reinforcing) the excesses of the political branches of government.

Who would dispute that the task of a judge is to interpret the law according to time-honored legal conventions which custom has accepted as constitutionally legitimate, i.e., examining the text, plain meaning, purpose, intent, and legal history?

The objective is to "get the law right" irrespective of popularity or partisan ramifications. Disagreements emerge because judges give different weights to the array of legitimate interpretive instruments. Some will stress text and plain meaning, whereas others will emphasize purpose and discernments from penumbras and emanations. In the vast majority of cases, however, the result is the same no matter what interpretive methods predominate, which explains the customary unanimity in decisions by panels of the courts of appeal.

As Alexander Pope put it, to err is human, and thus federal judges occasionally err in their interpretations. The Supreme Court has overruled

hundreds of cases, some centuries old and others barely days old. As Justice Louis Brandeis amplified in Burnet v. Coronado Oil and Gas (1932): "The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." Trial and error works best, however, with keen judicial intellects capable of challenging prevailing legal orthodoxies which persist from blind imitation of the past. Just as Newton's laws of motion were not off limits to Einstein, so Supreme Court precedents should not yield Pavlovian reverence if enlightened law is to evolve. Judicial nominees should not be rejected because they think too much, but because they think too little. Only the former can prevent the law from becoming a petrified forest.

I am not suggesting that district or circuit judges should defy Supreme Court case law. That would make for legal anarchy and judicial lawlessness. The Supreme Court is quite clear that only it is empowered to overrule itself. But subordinate judges may legitimately write opinions that point out perceived deficiencies in Supreme Court doctrines and suggest the propriety of reconsideration. Such lower court analyses fuel, not thwart, the enlightened evolution of law.

By constitutional design and venerated tradition, the judicial branch is distinct from the political branches. Federal judges are to administer impartial justice unswayed by partisan concerns, special interest groups, or public adulation. Their chief mission is the blunting of majoritarian excesses or folly through case-by-case implementation of the countermajoritarian Constitution, especially the Bill of Rights. That is why they enjoy life tenure and are appointed and not elected. A strong professional ethos keeps the overwhelming percentage of federal judges from substituting a personal political agenda for conventional interpretive tools in deciding cases. The exceptions capture sensational headlines, but can be counted on one or two hands with several fingers left over.

Evaluating the judicial selection process makes sense only when measured against the interpretive tasks of federal judges, including an

avoidance of doctrinal ossification. I respectfully question whether the idea of "balance" is relevant to the evaluation of judicial nominees.

An initial problem is defining the term because judicial balance, like beauty, is in the eye of the beholder. For instance, there may be some on this Subcommittee who would not denounce the Supreme Court as imbalanced when it was packed with eight of President Roosevelt's ardent New Dealers and champions of his revolutionary court packing fiasco: Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert Jackson, James Byrnes, and Wiley Rutledge. Ditto for the United States Court of Appeals for the District of Columbia Circuit when dominated by the likes of liberal judicial icons David Bazelon and J. Skelly Wright. And perhaps a Subcommittee Member believes that the Warren Court was profitably "balanced" with the Chief Justice and Justices Brennan, Black, Douglas, Clark, Stewart, White, and Goldberg on one side of the ideological spectrum opposed by lonely Justice John Harlan.

Even assuming balance could be defined, it should not be celebrated unless it occasions superior judging and more enlightened legal doctrines. To my knowledge, the proponents of balance have proffered nothing remotely persuasive on that score. They have not pointed to a single case either in the D.C. Circuit or other federal circuit which demonstrates an interpretive error because of judicial imbalance. So why should anyone care about balance as conceived by its exponents?

I would respectfully suggest on the basis of circumstantial evidence that judicial balance is a euphemism to disguise an overriding objective of annexing the federal judiciary to the political agenda of one branch of Congress; and, that the halo of balance will disappear like the Cheshire cat if both the Senate and White House are controlled by Democrats.

Finally, I submit it would be the death of an independent and esteemed federal judiciary, the crown jewel of our Constitution, to conceive the judicial function as dispersing litigating wins and losses to special interest groups to achieve some mathematical parity. Lawyers would no

longer argue law to the federal courts, but whether their clients deserve a win because a string of previous defeats, and let the law be damned!

STATEMENT OF FRED F. FIELDING

BEFORE THE
SUBCOMMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

COMMITTEE ON THE JUDICIARY

"THE D.C. CIRCUIT: THE IMPORTANCE OF BALANCE ON THE NATION'S SECOND HIGHEST COURT"

September 24, 2002

Mr. Chairman, Members of the Subcommittee:

I am grateful and honored to be granted this opportunity to appear before your Subcommittee. I have sought this opportunity because the announced subject matter of this hearing – "The D.C. Circuit: The Importance of Balance on the Nation's Second Highest Court" – implies a conclusion that I find inconsistent with my experience and strong feelings in regard to the nomination and confirmation process for the federal judiciary, in this Circuit in particular, and for the federal judiciary in general.

Mr. Chairman, I have been a practicing attorney for over 38 years, have been admitted to practice and am a member of the bar of the United States Circuit Court for the District of Columbia Circuit for about 30 years and have been a member of the Judicial Conference of that Circuit for over 25 years.

In addition, I am also familiar with the federal judicial selection process from several perspectives. First, for the initial five and ½ years of Ronald Reagan's presidency, I had the responsibility for the judicial selection process within the White House and chaired that Administration's judicial selection committee. In that capacity I had the privilege of working closely with this Committee for the years 1981-86. Second, I gained a different perspective on the process for the 6 years that I served as the D.C. Circuit's member on the ABA Standing

Committee on Federal Judiciary, my service covering the last 4½ years of the Clinton Administration and the first 1½ years of the Bush Administration.

Lastly, I served as a member of a national commission exploring ways to improve the nomination and confirmation process for federal judges, sponsored by the Miller Center of Public Affairs at the University of Virginia. That Commission was co-chaired by former Attorney General Nicholas Katzenbach and former Deputy Attorney General Harold Tyler, Jr. and its members included Howard Baker, Birch Bayh, Lovida Coleman, Lloyd Cutler, Leon Higginbotham, Judge Frederick Lacey, Professor Daniel Meador and Judge Kimba Wood. Its study of the process, reported in 1996, dealt at length with the issue this Subcommittee is discussing today.

I recite the foregoing litany of my experience with the judicial selection process, in addition to being a member of the bar of the Circuit, only to emphasize the single point I wish to convey to this Committee: From each perspective from which I was able to view the process, I strongly feel that probing a candidate's political ideology has no constructive place in the process and in my experience it has not been a part of an Administration's selection process or the review process by the ABA. For the Senate to now seek to use a test of political ideology in evaluating the merits of a nominee to the D.C. Circuit, in order to seek an elusive standard of "balance," would be a step beyond any role played by any other party in the process. It would be a step that is, in fact, avoided by every other participant in the selection process because of the very serious consequences that ideological screening has on the independence of the federal judiciary. And, I would urge, that independence of our judiciary is what sets it apart from the political branches in the eyes of our citizens, who need to know that the laws passed and enforced by the political branches will be adjudicated by an independent body of jurists.

This is not to say for one moment that no inquiry should be made of the views of a nominee, either by the President, the White House, the Senate, the Judiciary Committee or an individual Senator. But such an inquiry should be directed to an evaluation of the nominee's integrity, ability, temperament – which are the three areas investigated by the ABA Standing Committee, as well – or that of his or her judicial philosophy.

Nor should anyone assume that a judicial candidate comes to the bench without some personal philosophical beliefs about certain issues. Former Chief Judge Irving Kaufman of the Second Circuit addressed this point thoughtfully in an article he authored in 1981 entitled "An Open Letter to President Reagan on Judge Picking." He wrote:

> "I am not cautioning you against recommending candidates with a demonstrated commitment to issues of public importance or individuals who have taken sides in national debates on pressing issues. Participation in those debates does not augur bias, but rather a dedication to the commonweal that should be encouraged in all public officials, Judges included."

In addition to satisfying one's self that a nominee possesses the legal skills, temperament and integrity to face each case with an open-mind, it is certainly legitimate to also inquire as to the individual's view of the role of the federal judiciary – his or her conception of the judiciary's role in the separation of powers. But that inquiry is far different from seeking to determine if such a candidate brings a certain political ideology to the bench on a particular issue or issues – for the purpose of effecting a "balance" on that court, or for that matter, to create an "over-balance" on a court.

I earlier mentioned the Miller Center report. I adopt as my own testimony its comments on the role of ideology in the judicial selection process:

"The Commission believes that it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts. Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of impartial judging. Men and women qualified by training and experience to be judges generally do not wish to and do not indulge in partisan or ideological approaches to their work. The rare exception should not be taken as the norm."

Inquiring about an evaluation of a nominee's political ideology has no historic place in the evaluation process. To the extent it may have taken place in the past in isolated cases does not make it acceptable. In fact, as I noted above, I do not believe it is practiced by past or present Administrations, Republican or Democratic; and it certainly has no proper role in the Executive Branch screening. Likewise, this Committee's own questionnaire to judicial nominees asks "Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question as a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue or questions?" Thus, I must conclude that this Committee historically found such questioning to be unacceptable. And if this Committee now seeks this sort of probing of one's ideology in order to effect "ideological balance" on the D.C. Circuit, it is destroying that precedent and, I fear, planting seeds that will bear a bitter fruit in years to come.

It is my belief that if such a question is asked – shame on the questioner. If it is answered, I must seriously question the potential independence and therefore the suitability of the nominee. And such screening and selection of judges signifies that it is acceptable for judges, as a precondition of confirmation, to reveal how they would in the future decide a particular case or cases. That should be feared by all, across the breadth of any political spectrum.

In conclusion, may I make two final observations? First, to the argument that ideological differences are a decisive element and a deterrent to the decision-making on the D.C. Circuit, and hence the need for "balance," may I respectfully direct the Committee's attention to an essay published in the October 1998 Virginia Law Review, by the Chief Judge, Harry Edwards. Chief Judge Edwards, a Democratic appointee, "debunks" (his word), that myth and also notes that over 90% of the cases in that Court are decided unanimously. My second observation is that while I was on the ABA Standing Committee, in addition to evaluating hundreds of candidates over the six years – the nominations of both a Republican and a Democratic president - I personally conducted the investigation for 9 nominees to the this Circuit. In each investigation I interviewed some 30-50 practicing attorneys and judges within the D.C. Circuit. I can advise you that in all of those interviews there was never a complaint expressed to me by members of the bench or the bar of this Circuit as to the ideological balance of the Court, to the contrary, members of the bench and bar of the D.C. Circuit are quite proud of the special reputation the Court has for excellence, and its reputation for being a principled body of jurists who rule on the law and the facts of the case, not on a personal set of political or ideological preferences.

I respectfully urge that in your deliberation you take care to avoid the unintended consequence of interjecting ideology into the Court and thereby destroying that pride and the reputation of this fine Court.

Thank you again for the opportunity to be heard; I will be pleased to take any questions.

Testimony of Michael H. Gottesman
Professor of Law
Georgetown University Law Center
before the
Senate Subcommittee on Administrative Oversight and the Courts

September 24, 2002

Chairman Schumer and members of the Subcommittee:

I am Michael Gottesman, a Professor of Law at the Georgetown University Law Center. I appreciate the opportunity to appear before you today to talk about the unique importance of the U.S. Court of Appeals for the District of Columbia Circuit, and the crucial need to restore and retain balance on that court.

By way of background, prior to becoming a full-time law professor I specialized in trial and appellate advocacy, primarily in the areas of labor, employment, and constitutional law, and primarily in the federal courts. Since becoming a full-time academic, I have maintained an active role in appellate litigation, arguing numerous cases before the U.S. Supreme Court and courts of appeals. My testimony on the D.C. Circuit, therefore, is informed by my experience as a litigator before that and other courts, as well as my academic perspective.

It is hard to overstate the importance of the D.C. Circuit's role in shaping American law. The D.C. Circuit is widely regarded as the second most important court in the United States, behind only the U.S. Supreme Court. The location of the court in the nation's Capitol and the jurisdiction bestowed upon the court by Congress means that critical cases involving separation of powers, the role of the federal government, the privileges of federal officials, and the authority of federal administrative agencies are decided by the D.C. Circuit. Perhaps because of the central role that it plays in American jurisprudence, the D.C. Circuit has produced more Justices of the

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[1] Susan Low Bloch and Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the*

U.S. Supreme Court than any other circuit court.[1] Three of the nine current Justices -- Justices Scalia, Thomas, and Ginsburg -- came from the D.C. Circuit.

Many federal statutes provide for direct judicial review by the D.C. Circuit of the actions of administrative agencies. The court thus plays a unique role in the area of administrative law.[2] The court regularly is called on to decide important cases involving environmental protections, labor and employment law, civil rights, communications, energy law, health and welfare, and many other vital areas of the law. Over the past 20 years, the D.C. Circuit has consistently reviewed a significant percentage (15-25%, sometimes more) of all agency decisions challenged in federal court.[3] Nearly half of the D.C. Circuit's caseload consists of appeals from regulations or decisions by federal agencies.[4] Because the Supreme Court grants review of only a small number of appellate court decisions, it has eventuated that much of what we know as administrative law is determined finally by the D.C. Circuit. In addition, the court is called upon to decide a wide range of statutory and constitutional questions that affect core values and rights

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Federal Courts of the District of Columbia, 90 Geo. L. J. 549, 564 (2002).

[2] The D.C. Circuit has been established by Congress as the exclusive forum in which to seek initial review of numerous rules and orders, including decisions or orders of the Federal Communications Commission, 47 U.S.C. § 402(b), challenges to regulations under the Resource Conservation and Recovery Act, 42 U.S.C. § 6976(a)(1), challenges to regulations under Superfund, 42 U.S.C. § 9613(a); challenges to national primary drinking water regulations, 42 U.S.C. § 300j-7(a)(1), nationwide standards adopted under the Clean Air Act, 42 U.S.C. § 7607(b)(1), rules of "general and national applicability" promulgated by the Federal Energy Regulatory Commission, 15 U.S.C. § 766(c), and challenges to agency rules promulgated in violation of the "sunshine" provisions of the Administrative Procedures Act, 5 U.S.C. § 552b(g). Other statutes establish the D.C. Circuit as an alternative forum -- in addition to the circuit in which the petitioner resides -- to which those displeased with an administrative ruling may appeal. Statutes of this type empower the D.C. Circuit to hear appeals of, for example, regulations or orders of the Food and Drug Administration, 21 U.S.C. §360, decisions by the National Labor Relations Board, 29 U.S.C. §160(f), and standards promulgated by the Occupational Safety and Health Administration, 29 U.S.C. §665(f).

[3] Data from Administrative Office of the U.S. Courts.

[4] United States Courts, District of Columbia Circuit, 1998 & 1999 Report, at 31.

and define who we are as a nation.

Given the D.C. Circuit's central role in shaping the law that so directly affects the lives of all Americans, it is essential that the court reflect a balance of judicial philosophies and outlooks. In numerous contexts, Congress has stressed -- indeed, it has required by legislation -- that government agencies, committees, and panels must contain a balance of perspectives.[5] This balance helps ensure that a single point of view or extreme ideology does not dominate or determine the decisions of governmental bodies. The same should be true for the court reviewing the decisions of these administrative bodies. For if the reviewing court aggressively overturns the rulings of these carefully-balanced administrative agencies, the balanced decisionmaking Congress sought to achieve in designing the agencies will be rendered meaningless in the end.

Unfortunately, for much of the past two decades, the D.C. Circuit has not enjoyed the type of balance so important to the careful and steady performance of the judicial role. In the 1980s, this court began an ideological swing to the right that has significantly affected the court's

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[5] Examples of boards and commissions for which Congress has mandated parity in membership include the Federal Election Commission, 2 U.S.C. § 437c (no more than 3 of 6 commissioners may be members of the same party), and the National Railroad Adjustment Board, 45 U.S.C. § 153(a) (board shall be comprised of equal numbers of labor and management representatives). Numerous other commissions are permitted to have a simple majority of members from one party, but Congress has prohibited by statute the commissions' membership from becoming further skewed. For example, the Federal Communications Commission, 47 U.S.C. § 154(b)(5), the Nuclear Regulatory Commission, 42 U.S.C. § 5841(b)(2), the Federal Trade Commission, 15 U.S.C. § 41, the Consumer Product Safety Commission, 15 U.S.C. § 2053(c), the Federal Energy Regulatory Commission, 42 U.S.C. § 7171, the Securities and Exchange Commission, 15 U.S.C. § 78d(a), and the National Transportation and Safety Board, 49 U.S.C. § 1111(b), may have no more than a simple majority of members from a single political party. Still more boards and commissions -- such as the National Labor Relations Board, the Occupational Safety and Health Review Commission, and the Mine Safety and Health Review Commission -- have had balance in appointees, not by statute, but by longstanding tradition.

approach to crucial issues such as standing, the degree of deference to be afforded administrative agencies on decisional and regulatory matters, affirmative action, and a host of other critical questions. The upshot has been an unprecedented disregard for the deference owed to administrative decision-making that the Supreme Court has declared to be the judiciary's proper stance.[6] Indeed, in several high profile cases, the D.C. Circuit has staked out positions so extreme that a conservative Supreme Court has rejected the court's rulings, sometimes unanimously.

I would like to turn to some specific examples of this swing of the ideological pendulum in the areas of labor law, civil rights, and environmental law. Similar stories could be told about other areas of the law, as well.

Labor Law

The National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, guarantees workers the right to form and join unions without discrimination or reprisal by their employers, and to bargain collectively with their employers over the terms and conditions of employment. The Act is enforced by the General Counsel of the National Labor Relations Board who, acting on charges filed by affected workers or their representatives, issues unfair labor practice complaints and prosecutes unfair labor practice cases before Administrative Law Judges and the Board.[7] ALJ decisions may be appealed to the full National Labor Relations Board. Parties can then seek review of NLRB decisions in the circuit where the unfair labor practice is alleged to have occurred, the circuit where the employer resides or transacts business, or in the D.C. Circuit. 29 U.S.C. § 160(f). Thus, the D.C. Circuit is always available as a forum to challenge decisions of

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[6] *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

[7] The NLRA also prohibits unfair labor practices by unions, but the vast majority of unfair labor practice complaints concern employer practices. The same enforcement mechanism applies to union ULP cases.

the NLRB.

The National Labor Relations Act gives the NLRB the authority to interpret and enforce the NLRA, subject to only limited judicial review. As with decisions by other administrative agencies, the decisions of the NLRB are to be given deference by the courts. If the NLRB's decision is supported by substantial evidence, the courts are to uphold it.[8]

Until the 1980's, the D.C. Circuit was in the mainstream in its review of NLRB decisions and in the degree of deference it afforded the Board. For example, in 1980, NLRB decisions were affirmed in full by the courts of appeals in 64.8 percent of cases overall; the D.C. Circuit affirmed the Board in full in 62.5 percent of the cases it heard that year.[9] But in the ensuing years, with an ideological shift in the Court's composition, the D.C. Circuit became notorious in its unwillingness to defer to the agency's decisions and its propensity to reverse or remand the Board's rulings. For example, between 1985 and 1989, the D.C. Circuit affirmed only 53.6 percent of the NLRB decisions challenged in that court. The overall affirmance rate for all courts in that period was 78.1 percent. This trend has eased somewhat in recent years, but the D.C. Circuit continues to affirm the Board in lower numbers and remand in greater numbers than average.[10] In fiscal year 1998, the last year for which statistics are available, the D.C. Circuit's affirmance rate was 20 percent lower than the national average -- 52 percent affirmance in the D.C. Circuit vs. an overall affirmance rate of 65.3 percent.[11] Recent studies have documented the

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[8] *See Universal Camera Corp v. NLRB*, 340 U.S. 474 (1951).

[9] 45th Annual Report of the National Labor Relations Board, Table 19-A.

[10] In addition to its low affirmance rate, between 1985 and 1989, the D.C. Circuit remanded the NLRB's decisions in 21.7 percent of its cases, compared to a national average of 6.2 percent. 55th Annual Report of the National Labor Relations Board, Table 19A. Between 1993 and 1997, the D.C. Circuit's affirmance rate remained significantly lower than the national average, at 52.3 percent compared to an overall affirmance rate of 68.3 percent. 63rd Annual Report of the National Labor Relations Board, Table 19A.

[11] 63rd Annual Report of the National Labor Relations Board, Table 19A.

D.C. Circuit's hostility to the determinations of the NLRB and the D.C. Circuit's place on the low end of the enforcement scale.[12]

These statistics send a clear message of the D.C. Circuit's eagerness to overturn NLRB decisions. Not surprisingly, that message has been heard by employers wishing to overturn NLRB decisions finding that they have violated federal law. Whereas in 1980, the D.C. Circuit heard only 3.2% of challenges to NLRB decisions heard by circuit courts -- placing the D.C. Circuit next to last of all the circuits -- by the year 2000, the D.C. Circuit ranked first among all circuit courts in the percentage of NLRB cases heard by the court. That year almost one in five cases -- 18% -- were filed in the D.C. Circuit, virtually all of them by employers.[13]

The hostility of the D.C. Circuit to the decisions of the NLRB is of national significance. If the D.C. Circuit overturns a Board interpretation of the NLRA in one case, every subsequent employer to whom the NLRA applies its interpretation is able to seek review in the D.C. Circuit. This fact makes the D.C. Circuit's willingness to overturn the agency particularly destructive.

Some illustrative cases follow. In *Pacific Micronesia Corporation v. NLRB*, the court overturned the NLRB's determination that pervasive publicity about legislative initiatives to restrict the rights of nonresident workers prevented a free election among a group of (largely nonresident) workers in Saipan.[14] In *Freund Baking Co. v. NLRB*, the D.C. Circuit reversed the NLRB and set aside a union election because the court thought a wage and hour lawsuit brought on behalf of several workers shortly before the election interfered with a fair election.[15] In

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[12] James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N. Car. L. Rev. 939, 987 (1996); Brudney, *et al*, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 Ohio State L. J. 1675, 1732 (1999).

[13] Data from Administrative Office of the U.S. Courts.

[14] 219 F.3d 661 (2000) (D. Ginsburg, J., joined by Williams and Silberman, JJ.).

[15] 165 F.3d 928 (1999) (D. Ginsburg, J., joined by Silberman and Randolph, JJ.).

International Paper Co. v. NLRB, a panel of Reagan-Bush appointees overturned the NLRB's decision and ruled that the company's permanent subcontracting of employee's jobs during a lockout was not an unfair labor practice.[16] In *Detroit Typographical Union v. NLRB*, a panel of Reagan-Bush appointees overturned the NLRB's determination that the Detroit News and Free Press had committed an unfair labor practice when they unilaterally implemented a merit pay proposal immediately prior to the beginning of a 19-month strike by newspaper employees.[17] In *Mathews Readymix, Inc. v. NLRB*, the court overturned an NLRB determination that an employer illegally withdrew recognition from an incumbent union based on information from decertification petitions that were tainted by the employer's earlier unfair labor practices.[18] And finally, in *Pall Corp. v. NLRB*, the court overturned the Board's determination that it was an unfair labor practice for an employer to unilaterally revoke contract language providing a means for the union to obtain recognition at other facilities.[19] These are but a small sample of an ocean of such cases.

The D.C. Circuit has refused to defer to the Board's expertise in other areas as well. For example, the National Labor Relations Act gives the NLRB authority to determine the scope of an appropriate bargaining unit. Yet the D.C. Circuit frequently refuses to defer to the NLRB's bargaining unit determinations and reverses its decisions.[20]

As this discussion demonstrates, the ideological shift on the D.C. Circuit has resulted in a

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[16] 115 F.3d 1045 (1997) (Henderson, J., joined by Williams and Randolph, JJ.).

[17] 216 F.3d 109 (2000) (Silberman, J., joined by Sentelle and Buckley, JJ.).

[18] 165 F.3d 74 (1999) (D. Ginsburg, J., joined by Henderson and Buckley, JJ.).

[19] 275 F.3d 116 (2002) (D. Ginsburg, J., joined by Henderson and Williams, JJ.).

[20] *See Willamette Industries, Inc. v. NLRB*, 144 F.3d 877 (D.C. Cir. 1998) (Silberman, J., joined by Ginsburg and Buckley, JJ.), where the court paid lip service to the deference due the Board but overturned the NLRB's certification of a bargaining unit of maintenance employees; *see also Bentson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991) (Randolph, J., joined by Buckley and Williams, JJ.).

court that is all too happy to substitute its judgment for that of the NLRB, and in a manner that undermines the rights of workers and unions to form and join unions -- the essential rights that the NLRA was enacted to protect.

Civil Rights

Until the 1980's, the D.C. Circuit was at the forefront in protecting civil rights.[21] The court now takes a much narrower view of civil rights protections. Several illustrative examples follow.

One notable case involved the availability of punitive damages under Title VII of the Civil Rights Act, as amended. In *Kolstad v. American Dental Association*, the D.C. Circuit held that a plaintiff may only be awarded punitive damages in a Title VII case if she can prove that the employer engaged in "egregious conduct."[22] Finding no statutory support for this heightened standard, the Supreme Court, in an opinion by Justice O'Connor, reversed. The Court held that a plaintiff may recover punitive damages where the employer "discriminate[s] in the face of a perceived risk that its action will violate federal law."[23]

The D.C. Circuit has broken new ground in striking down equal opportunity regulations adopted by federal agencies. In 1998, in *Lutheran Church-Missouri Synod v. FCC*, the court invalidated equal opportunity regulations by the Federal Communications Commission, becoming the first circuit to apply strict scrutiny to a program which did not involve racial

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[21] *See, e.g., Laffey v. Northwest Airlines,* 567 F.2d 429 (1976); *Thompson v. Sawyer*, 678 F.2d 257 (1982) (Equal Pay Act requires equal pay for "substantially equal" positions, not just identical jobs).

[22] 139 F.3d 958 (1998) (en banc) (Williams, J.; Randolph, J., concurring; Tatel, J., dissenting, joined by Edwards, Wald, Rogers, and Garland, JJ.), *reversed in relevant part*, 527 U.S. 526 (1999).

[23] 527 U.S. 526, 536 (1999).

[24] 141 F.3d 344 (1998) (Silberman, J., joined by Williams, J. and Sentelle, J.). Judges Edwards, Wald, Rogers and Tatel dissented from the court's six to four decision not to rehear the case en banc. *See* 154 F.3d 494 (1998).

classifications but rather barred unlawful discrimination and required an EEO outreach program.[24] This ruling marked a new apex in the rollback of civil rights protections. And again in 2001, the court struck down another FCC equal employment opportunity regulation which called on licensees to conduct "broad outreach" when hiring new employees.[25]

On an issue increasingly at the forefront of civil rights law, moreover, the court shows a troubling disregard for the rights of non-English speakers. In *Franklin v. District of Columbia*, 163 F.3d 625 (1998), Spanish-speaking prisoners brought a class action lawsuit claiming that the District of Columbia had violated their constitutional rights by failing to provide qualified interpreters during medical treatment. The court rejected the Spanish-speakers' claim, finding no "deliberate indifference" on the part of the District. Judges Wald and Tatel dissented from the denial of en banc review. *See* 168 F.3d 1360 (D.C. Cir. 1999). Their dissenting opinion noted that the panel had ignored extensive factual evidence of deliberate indifference, relying on the District of Columbia's written policies rather than on its actual practices. In one striking example, the dissenting judges pointed to record evidence that Spanish speakers "who are prescribed medication do not receive instructions regarding the administration of that medicine or about the potential side effects in Spanish." *Id.* at 1361. The panel's decision in *Franklin*, finding no constitutional problem with the denial of adequate translation services for medical care, again highlights the court's ideological imbalance.

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[24] 141 F.3d 344 (1998) (Silberman, J., joined by Williams, J. and Sentelle, J.). Judges Edwards, Wald, Rogers and Tatel dissented from the court's six to four decision not to rehear the case en banc. *See* 154 F.3d 494 (1998).

[25] *MD/DC/DE Broadcasters Assoc. v. FCC*, 236 F.3d 13 (D.C. Cir. 2001). The court believed that because the regulation requires broadcasters to "redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates," some prospective non-minority applicants might not hear of the job postings. This, according to the court, was unconstitutional. Judges Edwards, Tatel, and Rogers issued a strongly-worded dissent from the court's denial of the suggestion for en banc review.

Environmental Law

Congress has provided the D.C. Circuit with exclusive jurisdiction over challenges to regulations promulgated under certain environmental statutes.[26] In other situations, Congress explicitly permits, but does not require, that cases be brought in the D.C. Circuit.[27] Congress has further increased the probability of review of environmental regulation in the D.C. Circuit by vesting the District Court of the District of Columbia with exclusive venue over regulations promulgated under certain environmental statutes.[28]

The ideological swing on the D.C. Circuit has had dramatic effects on the chances that an environmental regulation will survive judicial review, and on the ability of environmental groups to pursue their claims. A recent study shows that between 1987 and 1993, panels that included a majority of Republican appointees reversed the EPA in 54-89% of the cases at the behest of an industry challenger, while panels with a majority of Democratic appointees reversed EPA in only 2-13% of such cases.[29] Similarly, between 1993 and 1998, Republican-appointed judges on the D.C. Circuit denied standing to environmental plaintiffs in 79.2% of standing cases while

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[26] Challenges to *any* regulations promulgated under the Oil Pollution Act of 1990, 33 U.S.C. § 2717(a) (1994), the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6976(a)(1), and the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. § 9613(a) must be filed in the D.C. Circuit. For other statutes, the D.C. Circuit has exclusive venue over challenges to regulations promulgated under certain sections of a statute. For example, under the Safe Drinking Water Act, the D.C. Circuit has exclusive venue over "actions pertaining to the establishment of national primary drinking water regulations," 42 U.S.C. § 300j-7(a)(1), and under the Clean Air Act, 42 U.S.C. § 7607(b)(1), it has exclusive venue over regulations with nationwide scope or effect.

[27] *See e.g.*, Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(b)(2); Toxic Substances Control Act, 15 U.S.C. § 2618(a)(1)(A).

[28] *See e.g.*, Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1276(a)(1).

[29] Richard J. Pierce, Jr., *Is Standing Law or Politics?* 77 N.C. L. Rev. 1741, 1763 (1999), citing Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997).

[30] *Id.* at 1760.

Democratic-appointed judges denied standing to environmental plaintiffs in only 18.2% of cases.[30]

In two recent cases, the D.C. Circuit has seen its environmental law decisions reversed by the U.S. Supreme Court. In *American Trucking Associations, Inc. v. EPA*, the D.C. Circuit rejected health standards for smog and soot, standards that EPA Administrator Carol Browner had called "the most significant step we've taken in a generation to protect the American people . . . from the health hazards of air pollution."[31] The court based its decision on a stunning revival of a nearly-extinct constitutional doctrine known as non-delegation.[32] In their dissent from the denial of en banc review, Judges Edwards, Tatel, and Garland noted that the decision marked a departure "from a half century of Supreme Court separation-of-powers jurisprudence."[33] The Supreme Court, in an opinion authored by Justice Scalia, *unanimously* reversed.[34]

In *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, the D.C. Circuit

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[30] *Id.* at 1760.

[31] 175 F.3d 1027 (D.C. Cir. 1999) (*per curiam*) (Williams and D. Ginsburg, JJ.; Tatel, J., dissenting), *modified by* 195 F.3d 4 (*per curiam*). Constitutional scholar Cass Sunstein labeled the court's ruling "a remarkable departure from precedent" which, "if taken seriously, brings much of the activity of the federal government into question." Cass R. Sunstein, *The Courts' Perilous Right Turn*, N.Y. Times A25 (June 2, 1999).

[32] The D.C. Circuit invoked the same non-delegation theory in a worker safety case involving an industry challenge to OSHA rules aimed at protecting workers from amputations and other injuries caused by the sudden activation of machinery that was unlocked. *See UAW v. OSHA*, 938 F.2d 1310 (1991) (Williams, J., joined by Henderson and Randolph, JJ.). The D.C. Circuit initially refused to uphold the standard on grounds that the agency's interpretation of its authority might constitute an unconstitutional delegation of power, and the court remanded the standard to OSHA for the agency to explain its approach to rulemaking and the limitations it perceived to apply to its rulemaking discretion. Only after that statement had been published in the Federal Register and submitted to the court did the D.C. Circuit finally uphold the standard. *UAW v. OSHA*, 37 F.3d 665 (1994).

[33] 195 F.3d 4, 17 (D.C. Cir. 1999)

[34] *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001). On remand, the D.C. Circuit upheld the EPA's standards. *ATA v. EPA*, No. 97-1440 (D.C. Cir. March 26, 2002) (Tatel, J., joined by Ginsburg and Williams, JJ.).

held that in construing the Endangered Species Act, the Department of the Interior was prohibited from defining "harm" to encompass "significant habitat modification that leads to an injury to an endangered species.[35] The court reasoned that this seemingly commonsense definition of "harm" was not a permissible interpretation of the state. Again, the Supreme Court stepped in and reversed.[36]

The *ATA* and *Sweet Home* cases are not the only examples of the D.C. Circuit inappropriately substituting its own judgment for the expertise of federal agencies. It has done so in numerous environmental cases, striking down corporate average fuel economy standards,[37] wetlands protections,[38] and priority listings of hazardous waste sites.[39]

Conclusion: The Need for Balance

A court of the prominence and importance of the D.C. Circuit, with its uniquely broad jurisdiction and national impact, needs balance. Just as Congress believes it is important for the independent regulatory agencies whose decisions are reviewed by the D.C. Circuit to be balanced and reflect a range of views, so too should be the court reviewing those agencies' decisions. The American people -- and justice itself -- depend upon a fair, impartial, and balanced judiciary.

On a positive note, as a result of several retirements and promotions, the D.C. Circuit has recently moved toward regaining some of the balance that eluded the court since the mid-1980s.

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[35] 17 F.3d 1463 (1994) (Williams, J.; Sentelle, J., concurring; Mikva, J., dissenting).

[36] 515 U.S. 687 (1995).

[37] *See Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 956 F.2d 321 (1992) (Williams, J., joined by Thomas, J.; Mikva, J., dissenting). Judge Mikva's dissent accused the majority of "directing the agency to second-guess a standard set by Congress."

[38] *See National Mining Ass'n v. United States Army Corps. of Engineers*, 145 F.3d 1399 (1998) (Williams, J., joined by Sentelle, J.; Silberman, J., concurring), relying in part on *North Carolina v. Federal Energy Regulatory Comm'n*, 112 F.3d 1175 (D.C. Cir. 1997) (Sentelle, J., joined by Silberman, J.; Wald, J., dissenting).

[39] *See Tex Tin Corp. v. EPA*, 992 F.2d 353 (1993) (Randolph, J., joined by D. Ginsburg and Sentelle, JJ.); *Harbor Gateway Commercial Property Owners Ass'n v. EPA*, 167 F.3d 602 (1999) (Sentelle, J., joined by Silberman, J.; Wald, J., dissenting).

But the lesson from the recent past is clear: The Senate should take care not to resurrect the extreme ideological imbalance that until recently plagued the court -- especially an ideology that accords so little deference to the decisions of administrative agencies. For, in the absence of balance in the appellate court, Congress' efforts to achieve balanced implementation of important statutes will be rendered naught, and the rights and protections that those statutes were designed to provide will prove elusive to their intended beneficiaries.

Statement of Senator Chuck Grassley, Judiciary Subcommittee on Administrative Oversight and the Courts, Hearing on "The D.C. Circuit: The Importance of Balance on the Nation's Second Highest Court", September 24, 2002

Mr. Chairman, as you know, I've looked at the D.C. Circuit before. Specifically, I studied the needs of the D.C. Circuit Court when I was Chairman of this Subcommittee, and my review specifically concluded that it does not need its full complement of judges to accomplish its work. I'll talk about this a little later.

However, I have to say that this is the first time that I've heard about some "balance" issue with the D.C. Circuit court. In fact, the premise and focus of this hearing appear misguided. Our job should be to find the best legal candidates possible to follow the rule of law, regardless of ideology. It shouldn't be to "restore balance" to a court with the goal of promoting one kind of ideology or another, nor should it be to balance out different ideologies amongst the judges. Ideology doesn't have anything to do with judging. This doesn't make sense to me, particularly when all judges are duty-bound to follow the law as set out by Congress and interpreted by the Supreme Court.

The Senate's "advise and consent" job is to make sure that a judicial nominee has the right judicial temperament, experience, and legal acumen to sit on the

bench. Factors such as a nominee's personal beliefs are irrelevant if that nominee has demonstrated that he will be bound by the law and committed to strictly interpreting the law. This is the crux of our constitutional duty - we should consider whether the nominees, in discharge of their constitutional oath, will dutifully apply the law. Moreover, we shouldn't be asking nominees how they will rule on specific issues. That further opens the door to politicization of the process. That's not what the judicial branch is all about.

I'm deeply troubled by the Judiciary Committee's recent treatment of judicial appointments. President Bush's judicial nominees are being litmus-tested on issues of importance to the liberal outside special interest groups. The highly qualified Priscilla Owen was recently tested this way. She was voted down along party lines despite the fact that she was unanimously rated "well qualified" by the ABA, and was heralded as a widely respected lawyer and excellent state court judge. I think that it was a travesty that her nomination was rejected because I believe the whole Senate would have confirmed Judge Owen had her nomination been brought to the floor. But the majority party in control of the Judiciary Committee, in trying to engineer a liberal ideology litmus-test into the third branch of government, was successful in voting her down. That's not right.

The left wing outside groups have been energized to distort, attack and destroy the records of highly qualified nominees because they do not comply with their ideological agenda. That means that they want the Senate to confirm judges that will rule the way they want, regardless of case law precedent and statutes. But what kind of evaluation is that? The constitution doesn't say that the judicial branch should be distributing justice based on ideology or political agenda - what I believe it does require is that judges follow the law and not legislate from the bench.

I've said this before - I fear greatly for the independence and integrity of our nation's judiciary if we continue to go down this road where ideology plays a supreme role in the judicial nominations process. If we continue down this road, we will not be confirming judges that follow the law, but judges that make the law to the satisfaction of the outside interest groups. Our constitutional system of checks and balances will be disrupted by a judiciary that consists of judges that substitute the views of certain outside interest groups for the law as intended by lawmakers. This is dead wrong.

So I am troubled by the premise of this hearing - restoring "balance" to a court. That sounds like we should be putting a certain number of Republicans and Democrats, or a certain number of liberals and

conservatives, on the federal bench. The constitution doesn't require a President to nominate a "quota" of judges. I repeat, that's not what the judicial branch is all about, and that's not what our constitution requires. I don't believe we should be focusing on trying to create or promote one ideology or another – or some ideological "balance" – in the D.C. Circuit. Instead, we should be considering the qualifications of particular judicial candidates, or, in our oversight capacity, the resource needs and the administrative workings of the courts. We need to be considering whether we are putting individuals on the bench that can appropriately interpret and follow the law based on case law and Supreme Court precedent, and they not infuse their ideology into their opinions.

So I urge my colleagues on the Committee to avoid trying to infuse an ideology requirement in the independent third branch of government. Ideology should play no legitimate role in the confirmation process. This will only undermine the rule of law and the independence of the courts. This will weaken public confidence in our federal judiciary.

One last issue. My point about court oversight and resources brings up an issue related to the D.C. Circuit which I think is relevant to this Subcommittee's review: how many judges does the D.C. Circuit really need to do its work? Let me give you some background. When I

was Chairman of this Subcommittee, I held hearings to consider whether the D.C. Circuit really needed to have all it's 12 judgeship positions filled in order to adequately complete its work. In 1995, under the Judicial Conference's formula for determining the number of judges needed in each Circuit, the Conference determined that the D.C. Circuit needed only 9.5 judges. Statistics supported that conclusion because filings in the Circuit had been steadily declining for several years.

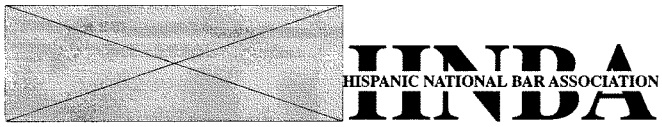
The Subcommittee's review concluded that the D.C. Circuit did not need 12 judges, and probably didn't even need an 11th judge, to perform adequately. So the Subcommittee report recommended that the Senate not fill the 12th vacancy, and warned against filling an 11th vacancy should one have opened.

At almost no point since 12 judges were allocated for the D.C. Circuit in 1984 has the court had 12 active sitting judges. Today, the D.C. Circuit has 8 active and 2 senior judges. In terms of workload, the D.C. Circuit has seen a steady decline in filings in recent years. From 1997 to 1999, filings and pending cases dropped 12 percent, and from 1999 to 2001, filings dropped 8 percent and pending cases were down 3 percent. In fact, while filings nationwide went up 1.4 percent between 2000 and 2001, the D.C. Circuit's filings went down 7.7 percent. Moreover, in 2001, the D.C. Circuit had just over 1,300

pending cases, up from recent years, but still well below the necessary backlog of 2,000 cases that the Chief Judge said in 1995 was necessary to ensure a ready availability of cases for consideration. So the D.C. Circuit continues to enjoy a lighter load than in years past, and a much lighter load than all other circuits.

In further support of my position, whereas other circuit courts oversee several district courts, the D.C. Circuit oversees just one such court. Prisoner appeals and civil rights claims are considerably fewer than in other circuits. And while the D.C. Circuit may have more administrative appeals than other circuits, it also has more consolidated appeals and fewer diversity jurisdiction cases, thus reducing its overall burden.

In conclusion, I've held the view, under both Democrat and Republican presidents, that the D.C. Circuit needs no more than 10 or possibly 11 active judges. I think it is more appropriate to debate whether the D.C. Circuit should fill its current vacancies based on its workload needs, rather than to look at whether the court has some ideological "balance" issue.



September 23, 2002

Statement for the Record

Senate Subcommittee on Administrative Oversight & the Courts

Hearing on the "**DC Circuit: The Importance of Balance on the Nation's Second Highest Court**"

Mr. Chairman and Distinguished Members of this Subcommittee:

Good Morning, My name is Angel Gomez, national President of the Hispanic National Bar Association. On behalf of the HNBA, I thank you for the opportunity to contribute in your deliberations pertaining to the importance of the Court of Appeals for the D.C. Circuit and the need to address the vacancies in such an honorable and important Court.

On behalf of our Association, we would appreciate the inclusion of this statement in the record. My remarks will address five main issues consistent with our mission and priorities, they are: 1)

Under-representation of Hispanics on the Federal Bench, 2) Fairness to Hispanics in the nomination process, 3) HNBA's constructive role in that process and, 4) Mr. Miguel Estrada's nomination to the D.C. Circuit.

The Hispanic National Bar Association is a non-profit, national association representing the interest of over 25,000 Hispanic American attorneys, judges, law professors, and law students in the United States. Our continuing mission, to improve the study, practice, and administration of justice for all Americans by ensuring the meaningful participation of Hispanic Americans, in this our most noble profession.

Founded in California in 1972 as the La Raza National Lawyers Association, the HNBA has grown to represent thousands of Hispanic American attorneys across the country. National officers are elected by the membership at large, and Regional Presidents are elected by their regional members. The HNBA collaborates with local Hispanic Bars in over 100 cities in the Unites States.

The primary objectives of the HNBA are to increase professional opportunities for Hispanics in the legal profession, and address issues of concern to the national Hispanic community. Legal education and civil rights have been fundamental concerns of the HNBA from the beginning. Judicial appointments and political representation are also priorities of the HNBA.

The HNBA is a member of the National Hispanic Leadership Agenda (NHLA), a group comprised of representatives from 21 Hispanic national organizations, representing over 160,000 active Hispanic community leaders. The NHLA's task is to provide an agenda that will improve the Hispanic community.

Additionally, HNBA members are leaders within their communities and have increasingly turned to the Association to provide them with information and support on issues affecting local Hispanic communities.

The HNBA holds a seat in the American Bar Association House of

Delegates, which represents over 500,000 attorneys. HNBA has also formed and sponsors a law student division that seeks to increase Hispanic student representation in law schools. This is a joint effort with all 183 ABA-accredited law schools, the American Association of Law Schools, and the Law School Admissions Council. Through its related 501(c) (3) charitable organization, The National Bar Foundation, Inc. (HNBF), thousands of dollars in scholarship have been awarded to deserving Hispanic law students and has significantly contributed to the development of our nation's future leaders. As a result of these efforts, the HNBA has become an integral part of the American legal education system.

The role of the HNBA is to provide professional services to our local and national members who seek assistance on their own professional advancement and on issues that affect the Hispanic Community. But ultimately, the Hispanic National Bar Association works diligently to bring about a better understanding and

confidence in our legal system for everyone.

And now, to address the issues outlined in my introduction.

1) Latinos continue to be underrepresented in our nation's judiciary, comprising less than 4% of all sitting judges. We encourage the Administration and the Senate to find constructive ways to put more Hispanic judges on the bench. Also, we urge the Senate to give fair and timely hearings to every nominee. The vacancy rate in the federal judiciary must be a cause for concern to all those who are interested in the fair administration of justice. Additionally, we expect the Administration and the Senate to ensure that an Hispanic is nominated and confirmed to the U.S. Supreme Court, after the next vacancy.

2) Qualified Latino(a) candidates and nominees deserve ample consideration by this honorable Senate, using the same standards applicable to all other nominees. Our perception is that many times, when a qualified Hispanic is nominated by whomever

sits in the White House, that nominee undergoes additional scrutiny and delay in comparison to similarly situated non-Hispanic candidates.

3) The HNBA seeks to play a constructive role in assisting all parties involved in the selection and eventual confirmation of Hispanic nominees. Although the process is inherently political, the HNBA will not fall "prey" to the politics involved, but rather seeks to add cohesion and a constructive dialogue into the process. Moreover, we reject those views and characters who seek to polarize the Hispanic community, particularly in the context of judicial appointments.

4) With regards to the D.C. Circuit, we endorsed Mr. Miguel Estrada after he was nominated by President Bush. Just as with all candidates, we conducted an extensive due diligence investigation of Mr. Estrada, and concluded, like the ABA and other professional associations have, that the candidate is qualified for the bench, and the D.C. Circuit in particular.

In sum, we are able and willing to assist you in a paramount due diligence process, which has very important repercussions for America in general, and for the Latino community in particular. We would welcome your questions, comments and suggestions.

Esteemed Subcommittee Members, we appreciate the opportunity to share our views with you today, and look forward to working with you on matters and nominations before this honorable body. Thank you.

Statement of Senator Mitch McConnell
"The Importance of Balance on the Nation's Second Highest Court"
Subcommittee on Administrative Oversight & The Courts
September 24, 2002

In appearing before the subcommittee today, Judge Mikva in effect asserts that the Senate should reject for the D.C. Circuit nominees who share the judicial philosophy of President Bush. This is a fascinating assertion. It appears to be grounded in the principle Judge Mikva set forth in his piece in *The Washington Post,* where he urged the Senate not to act on any Supreme Court vacancies until after the next election. He reasoned that, and I quote ,"If there are to be changes in [the Court's] personnel, they ought to be made by a president who has a popular vote mandate."

Judge Mikva, as a Constitutional scholar, of course knows that the Article II, Section 1, of the Constitution commands that the President be determined by the Electoral College, not the popular vote. And once a President is chosen by the Electoral College, the Constitution requires him (by use of the word "Shall"), to perform certain functions.

One of those functions is nominating judges. The Senate has never been a mere "rubber stamp" on the President's judicial nominees, nor should it. But it has traditionally afforded him some deference in this area, given his specific constitutional power to appoint judges.

Under Judge Mikva's approach, however, the President would not be afforded any deference with respect to nominating judges, given that he did not achieve a "popular vote mandate." Indeed, the logical extension of his proposition is for the Senate to block all of a president's judicial nominees unless the president receives a majority of the popular vote.

I find Judge Mikva's "constitutional nullification" theory remarkable. It would condition the President's powers and duties, not on the constitutional requirement of an Electoral College victory, but on the extra-constitutional requirement of a popular vote victory. The effect of this approach is to curtail dramatically, if not in fact strip, that power from the President.

President Bush was constitutionally elected, and, therefore, he possesses certain constitutional powers and duties. So if you believe, as Judge Mikva apparently believes, that failure to win a popular vote mandate effectively strips the President of one constitutional power–or substantially diminishes is ability to exercise it–why would it not apply to all of them? In other, words, under the "Mikva theory," would the President lose his power:

- As Commander-in-Chief to hunt down Al-Queda terrorists in Afghanistan, pursuant to Article II, Section 2 of the Constitution?
- To serve a full term of office of four years, as provided in Article II, Section 1, of the Constitution?
- To make treaties with Canada, Mexico, or other contries, as provided in Article II, Section 2?
- To appoint Ambassadors or Agency heads, as provided in Article II, Section 2?
- To advise Congress on the State of the Union as provided in Article II, Section 3?
- To grant pardons or make recess appointments, as provided in Article II, Section 2?

President Clinton received less of the popular than President Bush in both of his elections. Without a majority–let alone an overwhelming majority–he certainly did not receive a "popular vote mandate" that the "Mikva theory" requires in order to trigger the President's ability to exercise his constitutional powers. So it seems odd that we never heard

of this principle from my Democratic colleagues while we were confirming a near-record 377 Clinton judges, many of whom, like Judges Berzon and Paez and Justice Ginsburg are very liberal.

The converse of the Mikva "popular vote" principle would be that when a President gets an overwhelming landslide, the Senate should give him much more deference with respect to his judicial nominees. But I don't recall anyone–certainly not my Democrat colleagues–giving President Reagan extra deference during his second term as a result of his overwhelming reelection victory. I distinctly remember Senate Democrats giving the President very little deference on the nominations of Robert Bork, or Daniel Manion, or my good friend, Senator Sessions, all of whom shared President Reagan's judicial philosophy.

In sum, the "Mikva theory" is a recently-minted, very dangerous, and, in fact, unconstitutional, approach. It is yet another example of efforts by some in the Democratic Party to change the ground rules for nominating judges. It should be forcefully rejected, and the Senate should give the President the measure of deference to which he is constitutionally entitled with respect to judicial nominees, whether they be nominated to the Supreme Court or the lower federal courts.

THE UNIQUE NATURE OF THE DC COURT OF APPEALS

Statement for the U.S. Senate Judiciary Committee
By Abner J. Mikva
September 24, 2002

I appreciate the invitation to appear before this Committee to talk about the U.S. Court of Appeals for the District of Columbia and the special need for ideological balance on that court. I spent 15 years as a judge on that court, including almost 4 years as its Chief Judge. As a lawyer practicing administrative law, I had considerable dealings with that court. As a member of the House Judiciary Committee, I helped to fashion some of the laws that account for some of its uniqueness. As White House Counsel, I helped in the nominating process of judges to that court. And teaching the legislative process and the law of the executive branch to law students, I spend a lot of time talking about the DC Circuit and its jurisdiction and its precedents. So I have looked at that court from every angle: it is very special, and the need for an

ideological balance on the court is very special.

I suppose that every judge would argue that the court on which he served was special. And indeed they are. But the DC Circuit has some very special characteristics. It is rightly known as the "government court", not just because its geographical reach is limited to the 10 square miles that make up the District of Columbia Almost every law that Congress passes produces cases for this circuit, sometimes, as in the case of the Federal Communications Act, exclusive jurisdiction. And in cases where the two political branches end up in disputes with each other—the Nixon tape cases and other challenges to executive privilege come to mind--- the DC Circuit is an important battleground.

Obviously, the DC Circuit has no greater finality than any other of the intermediate courts—the "inferior" courts referred to in the Constitution to be established by the Congress. But it frequently tees up the important questions that the Supreme Court finally determines. Not surprisingly, because many of those questions are

on the cutting edge of the law, the Supreme Court sometimes decides the questions differently than the DC Circuit. Our clerks sported T shirts which said "DC Court of Appeals" with the year of their service on the front and on the back said "Reversed, U.S. Supreme Court" with the following year.

Those are some of the reasons why the court is a unique one, and that is a reason why it is especially important that the judges on it avoid carrying a political agenda to that court. I claim a special qualification to speak to that subject, because my appointment was challenged by those who said that since I had been a political activist as a Congressman, I would carry my unfinished causes with me to the court. The National Rifle Association was particularly active in the opposition, insisting that I would try to effect gun controls from the bench that I couldn't accomplish in the House of Representatives. As it turned out, I had only one case that involved a gun control question in my 15 years, and I ruled in favor of the NRA. But I had my share of critics who insisted that I was an

activist judge. I was conscious of that concern, and tried to remember that I was neither elected nor anointed--or even final--and that my role was to apply the laws passed by the Congress and Supreme Court precedents without regard to my personal views, whether it was the death penalty or interpretations of the Fourth Amendment, or criminal law procedures.

I do not suggest that the Senate only confirm judges to the DC Circuit who have never espoused views on the important subjects of the day. Such a requirement for a "tabula rasa" as Chief Justice Rehnquist once referred to that kind of nominee, might make for good Little League umpires, but they hardly would have the experience or anchors to make for good judges. But there is a difference between people who have views on subjects and those who have become zealots. One political analyst once described a nominee who failed to be ratified by the Senate as someone who felt he had a mission to educate the Senate to his point of view. Nominees who have missions to educate the political branches, or

the public, or their colleagues should stay on the lecture circuit or run for office. Such missionaries do not present the balance or the discipline necessary to be a good judge on any court.

When it comes to the unique role of the DC circuit judges, that balance and discipline will reflect how well the court tees up the sharp questions for the Supreme Court to answer finally. If the DC circuit court is anticipating the role of the Supremes or rejecting the answers that it gets to those hard questions, there is an overload. That is particularly true when the court is being asked to resolve some of the conflicts that arise between the two political branches in executive privilege cases. That is particularly true when one of the divisive questions confronting the courts and the Congress is the extent of congressional power under the commerce clause or under the 10th or 11th Amendments to the Constitution. It is not for intermediate courts to either ignore or extend the balance that the Supreme Court is striking on these hot issues. That is a drama that the main actors have to play out, and does not call for any

understudies to take center stage.

Some academics recently wrote a letter to this Committee extolling the virtues of a nominee who was a law professor. They said that the nominee "exhibits respect, gentleness, concern, rigor, integrity, a willingness to listen and to consider, and an abiding commitment to fairness and the rule of law." While those have to be good attributes for any judge, they are especially needed for the DC Circuit. The barn burners, the crusaders, the zealots, are counter productive to the task of maintaining that delicate balance between the branches of government.

Some believe that the best way to achieve balance on a court is to advocate bipartisan appointments. When I was White House Counsel, I did unsuccessfully urge the appointment of several Republican nominees. It is not an easy advocacy at any time. While Presidents as recently as Truman and Eisenhower did appoint persons of the opposite political party to the Supreme Court, it is not a common occurrence at the appellate court level.

And as you elected officials know better than anybody, the words "liberal" and "conservative" are mostly in the eye of the beholder and vary from issue to issue. I think that a better way to seek balance on any court is to seek the moderation within each judge.

The words at one time were "judicial temperament." They meant that the judge could hear with both ears, had not decided the case before hearing the evidence, and could remain reasonable even when the juices were flowing all around. I hope those are the kind of judges that the President nominates and the Senate confirms for the DC Circuit.

COMMUNITY RIGHTS COUNSEL · DEFENDERS OF WILDLIFE
EARTHJUSTICE · ENDANGERED SPECIES COALITION
ENVIRONMENTAL DEFENSE · ENVIRONMENTAL WORKING GROUP
FRIENDS OF THE EARTH · NATIONAL ENVIRONMENTAL TRUST
NATURAL RESOURCES DEFENSE COUNCIL · OCEANA
PHYSICIANS FOR SOCIAL RESPONSIBILITY · SCENIC AMERICA
SIERRA CLUB · SOUTHERN UTAH WILDERNESS ALLIANCE
THE WILDERNESS SOCIETY

September 23, 2002

The Honorable Charles E. Schumer, Chair
Judiciary Subcommittee on
Administrative Oversight and the Courts
United States Senate
Washington, DC 20510

RE: Hearing on "The DC Circuit: The Importance of Balance on the Nation's Second Highest Court."

Dear Senator Schumer:

On behalf of the more than one million members of the national environmental organizations listed above, we are writing to thank you for holding this vital hearing on the importance of balance on the U.S. Court of Appeals for the District of Columbia Circuit.

In July 2001, many of us wrote to you and other members of the Senate Judiciary Committee urging careful scrutiny of the environmental record and views of nominees for positions on the federal judiciary. The judges appointed to the federal bench over the next few years will dramatically affect the level of public health and welfare and environmental protection in this country for several decades. We explained that environmental protections long thought secure are now in jeopardy in the federal courts. Certain federal judges have been too willing to place their own personal policy preferences above the intent of Congress as expressed in our landmark environmental statutes like the Clean Water Act and the Clean Air Act. A few more judges out of this mold will tip the balance in courts across the country and roll the clock back further on important national environmental protections.

These concerns are particularly important when it comes to lifetime appointments to the DC Circuit. The DC Circuit is empowered to hear most cases challenging environmental rulings and regulations issued by the Environmental Protection Agency (EPA), the Department of the Interior, and other executive branch agencies. This unique jurisdiction makes the court the second most powerful environmental court in the country, surpassed only by the Supreme Court.

Today, the DC Circuit is a deeply divided court. This divide is illustrated by the razor-thin margin by which the court declined to review a panel ruling in *American Trucking Association v. EPA,* 175 F.3d 1027 (1999), that struck down Clean Air Act protections against soot and smog promulgated by EPA to prevent an estimated 15,000 premature deaths each year. As the panel dissent pointed out, the Court's ruling ignored "the last half-century of Supreme Court nondelegation jurisprudence." Indeed, the panel was reversed in 2001 by a unanimous Supreme Court.

The DC Circuit is also an increasingly unreceptive forum for environmental plaintiffs. A recent empirical study conducted by Professors Christopher Schroeder and Robert Glicksman found that in the 1990's pro-industry claimants experienced a five-fold increase in their success in challenging EPA's scientific decision making. Over the same period environmental claimants saw their success rate decrease by 20%. (For more on these cases and these statistics see the enclosed chapter on the DC Circuit from a report entitled *Hostile Environment: How Activist Federal Judges Threaten Our Air, Water, and Land*).

With 4 vacancies on the twelve member DC Circuit, President Bush has a historic opportunity to shape this critical court. We have urged the President to honor his promise to nominate judges who will respect the constitutionally mandated judicial function of interpreting—rather than making—the law.

The Senate's constitutional advice and consent role is as important as the President's role in filling vacancies in the third branch of government, the judiciary. We believe that, in carrying out that role, the Senate must ensure that judicial nominees are subject to the highest standard of scrutiny and, at a minimum, should be required to demonstrate the qualities of integrity, wisdom, fairness, compassion and judicial temperament. Accordingly, we urge you to vote to confirm only those nominees who:

1. Demonstrate a respect for the policy decisions made by elected representatives to protect the public health and welfare and our natural resources as reflected in our environmental laws;
2. Demonstrate superior qualifications for the position;
3. Bring an objective, balanced approach to decision-making; and
4. Demonstrate a commitment to protecting the rights of ordinary people and do not improperly elevate the interests of the powerful over those of individual citizens.

We also urge you to ensure that each nominee affirmatively establish his or her qualifications for the critical and esteemed position of federal judge. No President has a mandate to appoint to the federal courts judges who are or may be hostile to laws protecting the environment and the public's health and welfare. The mere absence of disqualifying evidence in a nominee's record should not constitute sufficient grounds for confirmation.

We strongly urge you to reject any nominee who would place his or her own personal policy preferences above the explicit Congressional mandates for protection embodied in our environmental laws. Thank you again for holding this timely and important hearing and for considering our views on the DC Circuit.

Sincerely,

Doug Kendall
Executive Director
Community Rights Counsel

Martin Hayden
Legislative Director
Earthjustice

John R. Bowman
Legislative Counsel
Environmental Defense

Sara Zdeb
Legislative Director
Friends of the Earth

Alyssondra Campaigne
Legislative Director
Natural Resources Defense Council

Karen Hopfl-Harris
Legislative Director/Staff Attorney
Environment and Health Program
Physicians for Social Responsibility

Pat Gallagher
Director, Sierra Club Environmental Law Program
Sierra Club

Leslie Jones
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The Wilderness Society

William Snape
Vice President of Law and Litigation
Defenders of Wildlife

Beth Lowell
Policy Analyst
Endangered Species Coalition

Richard Wiles
Senior Vice President
Environmental Working Group

Kevin S. Curtis
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Ted Morton
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Oceana

Meg Maguire
President
Scenic America

Larry Young
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Southern Utah Wilderness Alliance

HOSTILE ENVIRONMENT

How Activist Judges Threaten Our Air, Water, and Land

An Environmental Report on Judicial Selection

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July 2001

CHAPTER 6

THE D.C. CIRCUIT'S ATTACK ON ENVIRONMENTAL PROTECTIONS

The D.C. Circuit's ruling represents "a remarkable departure from precedent" that "if taken seriously, brings much of the activity of the federal government into question."
—Cass Sunstein

The U.S. Court of Appeals for the District of Columbia Circuit is empowered to hear most cases challenging regulatory decisions made by the Environmental Protection Agency (EPA), the Department of the Interior, and other executive branch agencies. This unique jurisdiction makes the court the second (to the Supreme Court) most prestigious and powerful court in the nation. The court is a breeding ground for Supreme Court appointees[124] and a battleground for judicial appointments.

Presidents Reagan and Bush appointed notable anti-environmental activists such as Stephen Williams, Douglas Ginsburg, and David Sentelle to this court, and as a result, in the last decade, the D.C. Circuit has dramatically curtailed the ability of the EPA and other federal agencies to enact regulations that advance environmental goals.[125]

CLEAN AIR PROTECTIONS: *AMERICAN TRUCKING ASS'N V. EPA*

The most dramatic example of hostility to environmental protections is the D.C. Circuit's May 1999 opinion in *American Trucking Ass'n v. EPA,*[126] delaying implementation of EPA's proposed health standards for smog and soot (or to use the technical terms, the National Ambient Air Quality Standards (NAAQS) for low level ozone (smog) and particulate matter (soot)). The Clinton administration hailed these regulations as "the most significant steps we've taken in a generation to protect the American people, especially our children, from air pollution."[127] EPA estimates that, each year, the standards will prevent an estimated 15,000 premature deaths, 350,000 cases of aggravated asthma, and nearly a million cases of significantly decreased lung function in children.[128]

Striking down these regulations, Judges Douglas Ginsburg and Stephen Williams dusted off what is known as the "non-delegation doctrine" to rule that a central provision of the Clean Air Act, as interpreted by EPA, represented an unacceptable transfer of power by Congress to EPA.[129] The Court remanded the standards to EPA with the instruction that the agency articulate a "determinate criterion for drawing lines."[130]

Judge Tatel's dissent pointed out the most glaring problem with this ruling: it "ignores the last half-century of Supreme Court nondelegation jurisprudence."[131] As chronicled

by Judge Tatel, the Supreme Court has repeatedly approved transfers of authority that are far less restricted than the delegation under the Clean Air Act.[132] The D.C. Circuit had also reviewed and upheld the precise section of the Clean Air Act in 10 prior opinions without once suggesting that Congress had transferred inordinate authority to EPA.[133] The ruling is thus, in former EPA Administrator Carol Browner's words, "bizarre and extreme."[134] The ruling also called into question many of this nation's health, safety, and welfare statutes. As Cass Sunstein, a preeminent constitutional scholar, put it, the ruling represents "a remarkable departure from precedent" that "if taken seriously, bring[s] much of the activity of the federal government into question."[135] The Supreme Court echoed the conclusions of Tatel, Browner, and Sunstein earlier this year when it unanimously reversed the D.C. Circuit's ruling.[136] The Court declared that "the scope of discretion § 109(b)(1) allows is in fact well within the outer limits of the Court's nondelegation precedents."[137] In the words of former Solicitor General Seth Waxman, who argued the case for the United States, "I can't imagine a more thoroughgoing rebuke of the D.C. Circuit's little escapade."[138]

ENDANGERED SPECIES HABITAT: *SWEET HOME V. BABBITT*

Another important example of the D.C. Circuit's hostility to environmental safeguards is its ruling in *Sweet Home v. Babbitt.*[139] The D.C. Circuit struck down Department of the Interior regulations prohibiting severe habitat modifications that would kill an endangered or threatened species. The ruling gutted a central provision of the Endangered Species Act for the 15 months it was in effect.

Under what is known as the *Chevron* doctrine (named after the Supreme Court's opinion in *Chevron U.S.A., v. NRDC*[140]), courts are supposed to engage in a two-step inquiry when reviewing an agency interpretation of the laws it administers. First the court determines whether Congress has unambiguously resolved the issue. If not, then under *Chevron*'s second step, a court is to defer to any "permissible construction of the statute" reached by the agency.[141]

Sweet Home should have been an easy victory for the government under *Chevron.* The Endangered Species Act makes it unlawful to "take" an endangered species. Take is defined under the act, meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect."[142] The Interior Department interpreted the term "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife."[143] Because the statute does not define harm and nowhere prohibits the application of that term to habitat modifications, *Sweet Home* was a classic "step two" *Chevron* case. Under step two, the Interior Department's interpretation was entitled to deference and the court's only role was to determine whether the Interior Department's interpretation was permissible.

The ruling gutted a central provision of the Endangered Species Act for the 15 months it was in effect.

Judges Williams and Sentelle jettisoned the *Chevron* standard in order to strike down the protections. Relying almost entirely on an obscure doctrine of statutory interpretation called *noscitur a sociis* ("a word is known for the company it keeps"),[144] the court defined harm not by its ordinary meaning (which would include habitat destruction that harms a species), but by reference to the words next to it, which all, according to the

court, suggested animus directed toward the species.[145] Reading the statute through this rarely used lens, the court ruled that the DOI's interpretation of the term "harm" was unreasonable.[146]

As Judge Mikva pointed out in dissent, that is not the way *Chevron* works. In Mikva's words:

> *The whole point of Chevron deference is that when Congress has not given a clear command, we presume that it has accorded discretion to the agency to clarify any ambiguities in the statute it administers. In requiring the agency to justify its regulation by reference to such a clear command, the majority confounds its role. Ties are supposed to go to the dealer under Chevron.*[147]

The Supreme Court reversed 15 months later in a 6-3 ruling.[148] The Court chronicled three clear errors in the D.C. Circuit's logic and upheld the Interior Department's interpretation of the act under a straightforward *Chevron* analysis.[149]

Empirical research confirms that judges on the D.C. Circuit are letting their ideology dictate their judicial decision making.

A PATTERN OF HOSTILITY

Sweet Home and *American Trucking Association (ATA)* are not isolated examples. During the 1990's, the D.C. Circuit has struck down or hindered a long list of critical environmental protections ranging from wetland protections,[150] to corporate average fuel economy (CAFE) standards,[151] to Superfund site designations,[152] to guidelines on treatment of petroleum wastewater.[153] The court has also imposed barriers to environmental standing that exceed the already alarming hurdles imposed by the Supreme Court.[154]

Empirical research confirms that judges on the D.C. Circuit are letting their ideology dictate their judicial decision making. For example, Professors Schroeder and Glicksman recently conducted a comprehensive study of environmental rulings by federal courts of appeals. They found that pro-industry claimants had experienced a five-fold increase in their success in challenging EPA's scientific decision making during the 1990's.[155] Environmental claimants over the same period saw their success rate decrease by 20%.[156] Professors Schroeder and Glicksman also note that the D.C. Circuit's rulings exhibit a double standard that favors industry claimants.[157] For example, they note that the circuit has struck down several important environmental rules employing the presumption that where Congress lists factors to be considered, that list is exclusive of other non-listed factors.[158] Where the non-listed factor is compliance costs to industry, however, the court has reversed this presumption, instead requiring "clear congressional intent to preclude consideration of cost."[159]

Other studies have documented the extent to which ideology drives judicial behavior in the D.C. Circuit. Looking at D.C. Circuit standing decisions, Professor Richard Pierce found that "Republican judges voted to deny standing to environmental plaintiffs in 79.2 percent of the cases, while Democratic judges voted to deny standing to environmental plaintiffs in only 18.2 percent of cases."[160] Professor Richard Revesz examined 250 D.C. Circuit opinions decided between 1970 and 1994 and concluded that judges on the D.C. Circuit employ a "strategically ideological approach to judging."[161] For example, Pro-

IDEOLOGY AFFECTS OUTCOMES IN D.C. CIRCUIT

• From 1970 to 1994, Republican judges votes to deny standing to environmental plaintiffs in 79.2 percent of cases challenging EPA decisions.
• During the same period, Democratic judges voted to deny standing to environmental plaintiffs in only 18.2 percent of EPA cases.

• From 1987 to 1994, three-judge panels consisting of two Republicans and one Democrat reversed the EPA on procedural grounds raised by industry in 54 to 89 percent of cases.
• During the same period, panels consisting of two Democrats and one Republican reversed the EPA in between 2 percent and 13 percent of these cases.

• During the 1990's, pro-industry claimants experienced a five-fold increase in their success in challenging EPA's scientific decision making.
• Over the same period, environmental claimants saw their success rate decrease by 20 percent.

Sources: Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C.L. Rev. 1741 (1999); Richard I. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); Christopher H. Schroeder and Robert L. Glicksman, *Chevron, State Farm, and EPA in the Courts of Appeals During the 1990's*, 31 Envt'l L. Rep. 10371 (2001).

fessor Revesz found that from 1987 to 1994, panels consisting of two Democrats and one Republican reversed the EPA on procedural grounds raised by industry in between 2 and 13 percent of cases. Over the same period, panels consisting of two Republicans and one Democrat reversed EPA in 54 to 89 percent of these cases. In Revesz's words, "the magnitude of these differences is staggering."[162]

The difference party affiliation and ideology have made in terms of results on the D.C. Circuit should be chilling to anyone who cares about public health and the environment. While two of the most damaging recent decisions were reversed by the Supreme Court, most D.C. Circuit opinions are left unreviewed. The Supreme Court reviews less than one percent of the numerous cases in which review is sought.

Furthermore, the D.C. Circuit's approach to the numerous cases in which it reviews the legality or reasonableness of an agency action significantly affects whether the environmental mandates enacted by Congress are fulfilled, even when no constitutional claim is at issue. The public loses when the D.C. Circuit engages in a more searching review of agency decisions to enhance (or maintain) public health and environmental protections, than of decisions to cut back on or carve out exemptions form such protections.[163] Thus, even without advancing novel constitutional theories, the D.C. Circuit can have tremendous impact on the level of environmental protection the public receives.

D.C. CIRCUIT SUMMARY

The *ATA* and *Sweet Home* cases illustrate the climate of anti-environmental activism festering on the federal bench these days. Lower federal courts are not supposed to go on

"escapades" that fly in the face of binding Supreme Court precedent, particularly in cases where thousands of lives are at stake. Nor are they supposed to dust off obscure doctrines of statutory construction to overturn congressional intent and reasonable agency interpretations. But the Supreme Court's activism in Commerce Clause, takings, and standing law has emboldened lower court judges with pet theories. These judges feel empowered to use cases before them as vehicles to serve up to the Supreme Court new vehicles to advance anti-environmental activism. Neither Congress nor the agencies nor the public can count on a predictable legal framework in which to establish vital protections for public health and our natural resources.

The Importance of Balance on the Court of Appeals for the District of Columbia Circuit with Regard to Environmental Policy

Testimony for the Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts

Christopher H. Schroeder

September 24, 2002

Chairman Schumer, Senator Sessions and members of the Subcommittee. Thank you for the opportunity to testify today on the topic of the relationship between the DC Circuit Court of Appeals and federal environmental policy and the importance of balance on that court.

I am Christopher H. Schroeder, Charles S. Murphy Professor of Law and Public Policy Studies at Duke University School of Law.[1] I teach administrative law, constitutional law and environmental law. I have studied and written about environmental law and policy for the last twenty-three years. One area of my research has focused on the relationship between the federal courts and environmental policy, especially the parts of that overall policy that are the responsibility of the Environmental Protection Agency. With a colleague from the University of Kansas, Robert Glicksman, I have published several studies of that relationship, most recently a 2001 publication entitled "Chevron, State Farm and EPA in the Courts of Appeals During the 1990s."[2] Some of the information in my testimony today is based on that study.

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[1] I am also a principal in the Center for Progressive Regulation (CPR), an organization that has recently been established by a group of scholars who are committed to promoting effective governmental programs for protecting human health and the environment. CPR's mission is to advance the public's understanding of the issues addressed by the country's health, safety and environmental laws in order to make the nation's response as effective as possible in reducing harm to public health and the environment. The Center is committed to developing and sharing knowledge and information, with the ultimate aim of preserving the fundamental value of the life and health of human beings and the natural environment.

[2] Christopher H. Schroeder and Robert L. Glicksman, "Chevron, State Farm, and EPA in the Court of Appeals in the 1990s," 31 ENVIRONMENTAL LAW REPORTER 10371 (April 2001).

I. The Importance of the DC Circuit for Environmental Policy

The Court of Appeals for the District of Columbia Circuit (DC Circuit) plays a pivotal role in federal regulatory affairs across the entire expanse of the federal government's regulatory activities, a role that equals or surpasses the role of the Supreme Court. In recent years the Supreme Court has been hearing approximately eighty cases a year, and drawing these cases from across the entire country and from all areas of federal law. During the last Term of Court, the 2001 Term, the Supreme Court issued eighty-one opinions, only three of which were cases from the DC Court of Appeals. The DC Circuit, in contrast, heard 480 appeals from administrative agency proceedings during that same period. In other words, for many matters of administrative law, whether the cases involve statutory interpretation, administrative due process, adequacy of a rule making record or the sufficiency of an adjudicatory record, the DC Circuit has the last judicial word. Administrative agencies are fully aware of this, and are accordingly as attuned to the legal rulings of the DC Circuit as they are to those of the Supreme Court.

The central role that the DC Circuit has in federal regulatory affairs results in significant part from deliberate choices the United States Congress has made. Over the past thirty years, the Congress has enacted or amended a number of statutes to provide that the DC Circuit will be the exclusive forum for hearing challenges to administrative agency rule makings. It remains possible to challenge many agency rules in other circuit courts, but for a number of high visibility, high impact rules, such as the ambient air quality standards that are periodically set by the Environmental Protection Agency, the DC Circuit is the only circuit in which legal challenges can be brought. These provisions of statutes that funnel appeals into the DC Circuit add to the prominence that the Circuit would otherwise have simply by virtue of being the Circuit located at the seat of government in Washington, D.C.

A wide variety of types of appeals from administrative agencies come to the DC Circuit, ranging from appeals from rulings by INS immigration judges in deportation cases to challenges to workplace safety standards set by the Occupational Health and Safety Administration, to challenges to prices set by the Federal Energy Regulation Commission for interstate sale of natural gas to review of the requirements for passive restraints in automobiles written by the National Highway Traffic Safety Administration. Each case is vitally important to the particular litigants involved. The cases with the greatest national ramifications, though, are the cases that challenge some national rule or regulation that has been written through notice-and-comment rulemaking.

The work of the Environmental Protection Agency in implementing the environmental laws that the Congress has enacted depends heavily on issuing national rules and regulations. Laws such as the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act and the Safe Drinking Water Act contain many provisions that can have absolutely no effect on improving the

quality of our environment until the EPA issues rules and regulations to complete the work that Congress assigns to that agency. For just one example, the Congress has declared that the exhaust from automobiles must meet certain emissions standards, or else the car cannot be sold in the United States. Congress, however, did not set those emissions standards itself. Setting such standards requires detailed analysis and testing of available technologies for reducing automobile exhaust emissions. These technologies are continually evolving as industry experiments with different approaches to the problem of reducing those emissions. So in the Clean Air Act, Congress provided that the EPA "Administrator shall by regulation prescribe ... standards applicable to the emission of any air pollutant from ... new motor vehicles."[3]

This means that when the Congress originally passed the Clean Air Act automobiles could go on producing air pollution just as they had been doing up until then, until such time as EPA established limits on that pollution by issuing a regulation. More to the point, it meant automobile manufacturers would not have to install new pollution control equipment until the EPA regulation had gone into effect, which is hardly the same thing as having issued the regulation. Because current administrative law permits interested persons to challenge most regulations in court *prior* to the regulations taking effect, a substantial period of time can pass between the agency completing its analysis, listening to the input of all interested parties, and then finally issuing its regulation and the date on which that regulation will actually begin making a difference in improving the quality of the environment.

This, of course, is where the federal courts come in. All controversial regulations go through at least one challenge in a federal appellate court. For environmental rules, that court is almost always the DC Circuit. To illustrate the role of this Circuit with regard to environmental policy, when Rob Glicksman and I examined all the courts of appeals cases in the decade of the 1990s that involved rules of national scope that EPA had issued, we found that of the 145 of rules of this type that were challenged, 102 of those challenges were heard by the DC Circuit.

II. Polarized Decision Making on the DC Circuit

Fourteen years ago, Richard Pierce, a professor at Georgetown University and a renowned expert on administrative law, published an article entitled "Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking."[4] In it he quoted Judge Pat Wald, who at the time was the Chief Judge of the DC Circuit, as saying that "the flow of membership in the DC Circuit ... is more like what one would expect

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[3] 42 U.S.C. § 7521(a).

[4] Richard J. Pierce, "Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking," 1988 DUKE LAW JOURNAL 300 (1988).

in Congress with elections every few years, or in the Executive, shifting its key policymakers with each administration." Pierce went on to argue that "the democrat and republican judges on the DC Circuit see agency policy decisions through dramatically different prisms," and that they tend to decide cases differently because of this. The polarization of the DC Circuit noted by Judge Wald and Professor Pierce had already been a characteristic of the circuit for over a decade, and it has continued to characterize the circuit to this day.

This should hardly be a surprising finding, nor should it be one that by itself counts as any kind of indictment of the many fine judges who have sat on or who currently sit on this circuit. Two factors interact to create the conditions for polarized decision making. First, Presidents have tended to appoint to this circuit individuals with strong connections either to electoral politics or executive branch service or both. This probably results from several different factors. For one, the tendency to draw on lawyers who work in the geographic area covered by the circuit makes people who work in Washington the primary candidate pool, and that pool is stocked like no other with lawyers in government or who have had significant government experience. For another, appointment to the DC Circuit has a prestige second only to appointment to the Supreme Court, and so it is natural for Presidents to give some preference to people who have made substantial contributions to his administration or policies. Unlike all other circuits, furthermore, in appointing judges to the DC Circuit there are no Senators from the circuit whose interests or preferences the President needs to take into account, so that to the extent loyalty or significant service do play a role in these nominations, it will be loyalty or service to the President that is the sole consideration.

These factors do not guarantee that judges appointed to the DC Circuit will have strong partisan commitments, but they do create circumstances conducive to that result, and the history of appointments since 1970 bears out this trend. This factor alone, however, would not be enough to produce polarized decision making on the DC Circuit. In my experience, judges do strive to comply with the norms of legal reasoning when they confront a legal dispute – at least much of the time. If the law in an area is clear, precise, and dependent on objective considerations whose recognition is not influenced by partisan orientation, there is little room for polarized results. In other words, although judges might see a dispute through "dramatically different prisms," that fact would not produce dramatically different legal decisions.

By and large, the doctrines of law in the field of administrative law do not come close to being clear, precise and objective. Several years ago, Professors Sid Shapiro and Richard Levy undertook a review of the rules of judicial review in administrative law and concluded that many of them were "vague and indeterminate," often employing balancing tests of one kind of another, or open-ended standards that employ terms like "reasonable" or permissible," or other types of analysis that are difficult to apply consistently or are subject to being manipulated. The result, these two scholars conclude, is that judges can decide

cases in ways that advance the policy outcomes they prefer without violating rules of the judicial craft.[5] Others have reached similar conclusions.[6]

The most convincing demonstration of polarized decision making on the DC Circuit as it relates specifically to environmental policy is the analysis published in 1997 by Richard Revesz, now Dean of the NYU Law School.[7] The study by Dean Revesz analyzed 250 cases involving the Environmental Protection Agency and decided between 1970 and 1994, and tested a number of ideas about what factors may influence judicial decision making. He examined two of the most basic questions that courts conducting judicial review of agency action ask: whether the Environmental Protection Agency has interpreted its statutory authority correctly and whether or not it has sufficiently justified the rule it has issued by compiling a record with adequate supporting evidence and by adequately explaining why it made the choices it did in deciding the content of its final rule. Revesz found differences between Republican and Democrat judges deciding whether EPA had sufficiently justified its decisions that he called "staggering."[8] One of his calculations determined that three judge panels with Republican majorities voted to reverse EPA when industry was challenging EPA between 54 and 89 percent of the time, while panels with Democrat majorities reversed EPA in those situations only between 2 and 13 percent of the time.[9]

Rob Glicksman and I looked at all challenges brought against EPA's national rules in the 1990s. Using a simpler statistical analysis than Dean Revesz, we found that Democrat judges are more inclined to reverse EPA when environmental organizations are challenging EPA than when industry groups are doing so. Democrat judges voted to reverse in 33% of industry challenges while they did so 48% of the time when environmental organizations were bringing the challenge.

The upshot of these empirical studies suggests that environmental groups enjoy a more sympathetic hearing when appearing before Democrat judges on the DC Circuit, and industry enjoys a more sympathetic hearing when appearing before Republican judges. When EPA issues national rules it can often find itself whipsawed between environmental organizations who think the rule too lax and

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[5] Sidney Shapiro and Richard Levy, "Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions," 44 DUKE LAW JOURNAL 1051, 1064 (1995).

[6] See, e.g., Frank Cross, "Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance," 92 NORTHWESTERN LAW REVIEW 251, 285-294 (1997) (arguing that judges tend to base decisions on ideology when issues are high in political content and applicable doctrines are relativley indeterminate).

[7] Richard L. Revesz, "Environmental Regulation, Ideology and the DC Circuit," 83 VIRGINIA LAW REVIEW 1717 (1997).

[8] Id. at 1763.

[9] Id.

industry groups who consider the rule too harsh. If one of those challenges lands before a judicial panel sympathetic to that type of challenge, it has a substantially greater change of being successful, and of EPA's rule being reversed and sent back to the agency for further work. Judicial polarization, then, seems likely to contribute to the overall reversal rates for EPA, which are not good. In fact, the outcome of judicial review in the DC Circuit for EPA when its national rules were being challenged was quite dramatic in the 1990s. EPA prevailed only 53% of the time in those challenges.

The cumulative consequences in terms of delay in putting rules and regulations into effect – and hence in beginning to accrue the improvements in environmental quality that such rules bring – is hard to quantify in the aggregate, but it surely imposes considerable costs in terms of adverse health effects and damage to natural resources and the environment. The delaying effect of reversals seems particularly troubling when you further consider the study conducted by Professor William Jordan.[10] Professor Jordan sought to determine whether the ultimate rules that were eventually sustained and put into effect after an original rule was reversed differed significantly from the original. He traced sixty one rules that had been remanded by the DC Circuit during a ten year period between 1985 and 1995. (His study was not limited to EPA rules). He concluded that in approximately 80% of these cases "agencies have successfully implemented their [original] policies" by making minor modifications to the original proposals or finding a different approach that was as effective as the original.[11] This is encouraging information for those who think the elected branches of government should be making our environmental policy choices, but it also ought to prompt great concern about the impact of the delays that judicial reversals impose. It the agency eventually succeeds in implementing its policy choices much of the time, the delays caused by the courts have less justification than they otherwise might.

Before examining the consequences of judicial polarization further, we ought not to leave the general subject of polarized decision making without saying a word about what these findings regarding Democrat and Republican judges imply about the integrity of the judicial decision making process on the DC Circuit. Professor Pierce argues that the patterns of decision making just reviewed "can contribute significantly to the growing public perception that courts are not capable of dispensing justice in an unbiased manner."[12] Public perception is certainly important, but it is important to bear in mind that there are two different ways in which ideology can influence judicial decisions, and they

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[10] William S. Jordan, III. "Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking," 94 NORTHWESTERN LAW REVIEW 393 (2000).
[11] Id. at 440.
[12] Richard J. Pierce, "The Special Contribution of the DC Circuit to Administrative Law," 90 GEORGETOWN LAW JOURNAL 779, 784 (2002).

have profoundly different implications for assessments of the integrity of the judiciary.

The way that ideology produces biased decision making that comes to mind most readily harkens back to some of the legal realist writings earlier in this century. Some realists thought that the process of judicial decision making was best explained by a model in which judges first thought about a dispute that came before them just as you or I would when confronted with a practical problem and asked what the best outcome was. Having decided how they would personally prefer the case to come out, they would then look around for legal arguments that would justify that outcome. If the case had partisan political implications, judges operating with this model would determine the outcome most consistent with their partisan political preferences, and then would find legal arguments to explain their decision, trying to write an judicial opinion as if they were being guided by the force of the better legal arguments, when in fact they were manipulating those legal arguments to justify a decision reached in some entirely different manner.

The second way that ideology may affect judicial thinking so that outcomes may seem biased derives from the work of cognitive scientists, people who study the way people think and reason. They have concluded that when someone has "a wish, desire, or preference that concerns the outcome of a given reasoning task," this often "may affect reasoning through reliance on a biased set of cognitive processes: strategies for accessing, constructing, and evaluating beliefs."[13] The desired outcome can influence the results of the reasoning process because when we are confronted with a problem about which we need to deliberate, we reason by drawing on an existing supply of beliefs, evaluation techniques and inference rules.[14] At any one time, we do not draw on our entire supply of beliefs, techniques and rules. In fact, this is probably impossible to do. Instead, "people access different beliefs and rules on different occasions: They endorse different attitudes ... express different self-concepts ... make different social judgments ... and use different statistical rules."[15]

When an outcome or goal preference is strong, that will be among the conditions that can influence the beliefs and rules and the evaluations that people employ and find persuasive.[16] There is a growing body of evidence in support of this conclusion.[17] For instance, in one study women who were heavy caffeine consumers were less convinced by the evidence in an article claiming that

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[13] Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 480 (1990).
[14] *Id.*
[15] *Id.* at 483.
[16] *Id.*
[17] *See* ZIVA KUNDA, SOCIAL COGNITION 212-235 (1999) (summarizing evidence for the superiority of motivated reasoning theory over a purely cognitive account of reasoning).

caffeine posed risks for women than were women who were low consumers of caffeine.[18] Men, who had no directional goal with respect to the evaluation of the study, showed no such differential effects.[19] Similarly, persons who endorsed the viewpoint that capital punishment deters crime were more likely to criticize a disconfirming study on the basis of such reasons as "insufficient sample size, nonrandom sample selection, or absence of control for important variables" than were those who already believed that capital punishment was not a deterrent.[20] In short, "people are more likely to arrive at those conclusions that they want to arrive at."[21]

Judge Wald once observed that "[d]espite much protestation to the contrary, a judge's origins and politics will surely influence his or her judicial opinions. Judges' minds are not compartmentalized by some insulated, apolitical internal mechanism. However subtly or unconsciously, the judge's political orientation *will* affect decision making." The understanding being developed by cognitive scientists about how we reason shows how it might be the case that ideology could indeed affect decisions without being forced to conclude that judges were being insincere in their efforts to find the legally correct outcome. Under the approach to reasoning being explored by this research, strong preferences for outcomes can affect the reasoning process internally, so that the reasoning person will experience as persuasive the arguments, inferences, evaluation techniques and so on that form a chain of reasoning supporting the preferred outcome. The reasoner, in other words, can sincerely believe that these arguments, inferences, etc., fit the occasion better.

III. The Consequences of Polarization on Environmental Policy

The starting point for my consideration of the consequences of polarization on environmental policy is the principle that federal environmental policy ought to be made by the country's elected officials, the Congress and the President. Congress sets policy in the first instance. To the extent that its statutes require administrative agencies to implement the laws it enacts, those agencies, under the President's direction, resolve remaining issues within the constraints set by the Congress. This is a highly abbreviated statement of a rich set of political premises, but it ought to be recognizable as the position of the Supreme Court for at least the past two decades. In its *Chevron*[22] decision, the Supreme Court stated that where Congress has spoken to the precise question raised by some dispute over agency interpretation of its statutory authority, "that is the end

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[18] Ziva Kunda, *Motivation and Inference: Self-serving Generation and Evaluation of Evidence*, 53 J. PERSONALITY & SOC. PSYCH. 636 (1987)
[19] Id..
[20] Kunda, *supra* note 13, at 490 (citing C.G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. OF PERSONALITY & SOC. PSYCH. 2098 (1979)).
[21] *Id.* at 495.
[22] Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

of the matter." Where Congress has delegated further questions to an agency, the courts ought also to be reluctant to interfere. "Judges are not experts in the field," the Court continued, "and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of the delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices..."[23]

Courts cannot be rubber stamps, because the responsibility they have been given for judicial review would be meaningless if they were. The impact of polarization on judicial decision making, however, suggests that a polarized court, one in which judges come to the bench with strong partisan political preferences (whether Democrat or Republican), will result in more aggressive judicial behavior, more reversals of agency action, than would result if the DC Circuit were stocked with judges with more balanced views. As a consequences, environmental policy will less often be set by the country's elected officials. This result is in tension with principles of democratic responsibility, in which elections are understood to have policy consequences.

In modern times, the seats on the DC Circuit have never been occupied exclusively by judges chosen by Presidents from a single political party, and so long as that continues to be the case, the Circuit will have judges capable of thwarting policy decisions made by the elected branches of government regardless of which particular ideology favors a policy. In this way, judicial polarization is an equal opportunity obstruction to environmental policy making. Two examples of significant policy decisions made by the elected branches of government that have been thwarted by aggressive judging, where it appears likely that strong policy preferences on the part of the deciding judges influenced the outcome, will illustrate how policies on either side of the political spectrum can be adversely affected by aggressive judicial action.

The first goes back to the 1970s and involves the Nuclear Regulatory Commission's procedures for licensing nuclear reactors for generating electrical power. In several different decisions, the DC Circuit heard appeals by environmental organizations challenging NRC actions favorable to utility company applications for the NRC approvals needed to be able to proceed with the eventual building of new reactors.[24] In each case the NRC had followed procedures in its hearings that were set forth in the Administrative Procedure Act

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[23] Id. at 865.

[24] Natural Resources Defense Council v. U.S. Nuclear Regulatory Commission, 547 F.2d 633 (D.D. Cir. 1976); Aeschliman v. U.S. Nuclear Regulatory Commission, 547 F.2d 622 (D.C. Cir. 1976).

and in the National Environmental Policy Act and had permitted groups opposed to the reactor to submit testimony and arguments and to review studies and information compiled by commission staff and the power company, with the opportunity to offer rebuttal evidence. In each case, the relevant issues had been extensively studied by the agency's staff and by the Commission. And in each case, the DC Circuit had found a procedural defect in the proceedings sufficient to reverse NRC approval and remand to the agency for further proceedings. In one case the court found an environmental impact statement to be inadequate and in a second case it found that NRC had improperly failed to provide an environmental organization an opportunity to cross examine an expert who had submitted testimony favorable to the reactor license application.

The Supreme Court reversed these court of appeals decisions in *Vermont Yankee v. Nuclear Regulatory Commission*.[25] In a strongly worded decision by then-Associate Justice William Rehnquist, the Supreme Court found that the DC Circuit had stepped well outside the bounds of appropriate judicial review, misreading both the Administrative Procedure Act and prior Supreme Court decisions. As regards the APA, "this much is absolutely clear," wrote Justice Rehnquist, "absent constitutional constraints or extremely compelling circumstances, the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their administrative duties. ... There is absolutely nothing in the relevant statutes to justify what the [DC Circuit] did here."[26] The Supreme Court also concluded that the court of appeals had "seriously misread" relevant precedent from the Supreme Court. The handiwork of the court of appeals was "judicial intervention run riot."[27]

The DC Circuit opinions in these nuclear reactor cases are part of a larger group of decisions in which the DC Circuit had imposed additional procedures on agency hearings, resulting in remands to the agency that delayed implementation of the agency action. Antonin Scalia, a law professor at the time, has done a thorough job criticizing the adventuresome nature of these cases.[28] Many of these decisions have a common thread: they suggest suspicion among some of the judges on the DC Circuit that federal agencies were not taking their then-new responsibilities to protect the environment sufficiently seriously.[29] Nuclear power was one of the technologies regarded with heightened suspicion by environmental organizations at the time, and defeating efforts to build additional nuclear reactors was an important agenda item. Eventually, electric utilities

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[25] 435 U.S. 519 (1978).
[26] Id. at 543, 556..
[27] Id. at 556.
[28] Antonin Scalia, "Vermont Yankee, The APA , the DC Circuit, and the Supreme Court," 1978 SUPREME COURT REVIEW 345.
[29] Robert L. Glicksman and Christopher H. Schroeder, "EPA and the Courts: Twenty Years of Law and Politics," 54 LAW & CONTEMPORARY PROBLEMS 249 (1991).

became so disenchanted with the delays and uncertainties of finding suitable locations for planned reactors and obtaining the necessary permits that the construction of new reactors completely ceased.

Certainly, the reasons for the cessation of new construction of nuclear reactors were numerous, but there is also little doubt that the DC Circuit's reversals of decisions made by the Nuclear Regulatory Commission were one significant source of delay during the decades of the 1970s. The effect of those decisions thwarted the policy choice which was then being pursued by the federal government, a policy of supporting the careful construction of nuclear reactors. This effect was not lost on the Supreme Court when it reviewed these cases. "Nuclear energy may some day be a cheap, safe source of power, or it may not be," wrote Justice Rehnquist. "But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment."[30]

The second example is of more recent vintage. If the NRC story represents the DC Circuit thwarting pro-industry, anti-environmental decision making by the NRC, this more recent example represents that DC Circuit thwarting pro-environment, anti-industry decision making by the EPA. In 1997, the EPA culminated an exhaustive and thorough review of the medical evidence of adverse health effects related to ozone and particulate matter in our nation's atmosphere. In light of new evidence developed since the time of the last revisions to the air quality standards, it concluded that each standard must be lowered. The administrative records compiled in the EPA proceedings were massive, and included thorough participation by many interested industry and environmental organizations, as well as by state and local governments. In 1999, both standards were remanded to the agency by the DC Circuit, meaning that the implementation of the standards was stopped pending action taken by the agency to cure the defects found by the court.[31]

Under the Clean Air Act, EPA has been instructed by the Congress to set air quality standards "requisite to protect the public health."[32] EPA had examined and taken into account a number of criteria relating to the adverse effects of these pollutants, including the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be

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[30] 435 U.S. at 558.
[31] American Trucking Ass'n v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), reversed sub. nom. Whitman v. American Trucking Ass'n, 531 U.S. 457 (2001).
[32] 42 U.S.C. § 7409(b)(1).

addressed. In the court's eyes, however, EPA had failed to explain exactly how each of these various criteria influenced the final standard. Because it was impossible to know how EPA claimed that uncertainty and severity, for example, ought to be traded off against one another, the court concluded it was impossible to see if EPA had set standards in compliance with the decision criteria it said it was following.

The DC Circuit concluded that the way EPA had proceeded violated the non-delegation doctrine. The non-delegation doctrine is the constitutional principle that Congress cannot delegate its legislative authority. Under long standing Supreme Court precedent, the non-delegation doctrine is satisfied so long as Congress supplies an "intelligible principle" to be applied by the agency that has been instructed by Congress to implement a statutory scheme.[33] The remedy for finding a violation of the non-delegation doctrine is to find the statute unconstitutional. In this EPA litigation, however, the DC Circuit did not declare the Clean Air Act to be unconstitutional. Rather, it said the non-delegation problem lay not with the statute but with the EPA's failure to articulate an intelligible principle that explained how the factors relevant to a "requisite to protect public health" determination would be weighed and traded off to produce a specific ambient air quality standard. Therefore, it remanded the air quality rules to EPA so that it could comply with the requirements of the non-delegation doctrine.

When this case reached the Supreme Court, this interpretation of the non-delegation doctrine was rejected as completely inconsistent with the way that doctrine has always been understood and interpreted. The DC Circuit was reversed by a unanimous Supreme Court, with Justice Scalia writing the opinion. Justice Scalia found the DC Circuit's approach to non-delegation to be as unsupportable as Justice Rehnquist had earlier found the DC Circuit's views on imposing additional procedures on the NRC to be unsupportable. "We have never suggested that an agency can cure an unlawful delegation by adopting in its discretion a limiting construction of the statute," Justice Scalia wrote. "The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to use internally contradictory logic. The very choice of which portion of the power to exercise – that is to say, the prescription of the standard that Congress had omitted – would itself be an exercise of the forbidden legislative authority."[34]

The Supreme Court's reversal of the DC Circuit sent the case back down to the DC Circuit. That Circuit has subsequently held additional hearings and on March 26 of this year it upheld the validity of the EPA's new air quality standards, some five years after the EPA issued them.[35]

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[33] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).
[34] 451 U.S. at 473.
[35] American Trucking Ass'n v. EPA, 283 F.3d 355 (D.C. Cir. 2002).

IV. Conclusion

The NRC's saga with licensing nuclear reactors and the EPA's saga with its new ozone and particulate matter standards illustrate the value of balance on the DC Circuit. In both cases, the DC Circuit produced opinions that pursued bold and aggressive lines of legal analysis out of keeping with the precedents of the Supreme Court and with more straightforward interpretations of statutes. In both cases, careful and considered policy decisions of the elected branches of the federal government were overturned. In EPA's case, the final effect was to delay, rather than to cancel, the new air quality standards. In Professor Jordan's terms, this would be a case in which the agency had been successful in implementing its original policy. Any ultimate success does not vitiate one's concern over the adverse impacts of such rulings, however. The air quality standards were issued in the first case because of evidence of adverse health effects being visited on American citizens so long as air quality remains at the level of the old standards. To the extent that the delay imposed by the DC Circuit's initial remand delays lowering emissions to comply with the lower standards, American citizens have suffered adverse health effects for a longer period of time than was necessary. EPA issued cost-benefit estimates in conjunction with its 1997 air quality standards. They projected annual benefits in the range of $19 to $104 billion per year for the particulate matter improvements, and $0.4 to $2.1 billion per year for the ozone improvements. A delay of five years means that five years of these benefits have been lost. In NRC's case, of course, the government's policy choice was not successful even in Professor Jordan's terms. The DC Circuit's opinion contributed to a failure of the government's policy regarding nuclear energy, because ultimately the government was not able to facilitate private construction of nuclear reactors sufficiently to keep that source of energy as a viable choice for the production of electricity.

It is always hazardous to draw conclusions about what factors exerted a background influence on a judicial decision, and we all know the adage about lies, damned lies and statistics. Still, it seems likely to me, as I think it will to many others, that the role played by the DC Circuit in each of these stories would have been different if that circuit were dominated by more centrist judges, people with less strong partisan and ideological commitments than has been the case in our recent history. Instances such as these are also but the most visible examples of the way that polarized decision making affects environmental policy by supplanting the judgments reached by the elected branches of government through judicial decisions that have been influenced by strong partisan and ideological commitments. Administrative law doctrines are too vague and indeterminate for us to be able to agree on when a judge's preferences for particular outcomes in cases has influenced his or her thinking "too much." Nonetheless, the more outstanding cases like the two we have reviewed here are pretty convincing illustrations that this influence can be real, and what we know about the way people think and reason points to this influence being present in other cases as well, even when its effects are less obvious.

Judicial appointments are influenced by a variety of legitimate considerations, and individual appointees must be evaluated by the Senate on a case-by-case basis, not on the basis of general conclusions draw from statistical analyses or historical reviews of the past performances of other individuals on the bench. The point on which I will conclude is simply this: there is good reason to believe that achieving greater balance and moderation on the DC Circuit would result in more environmental policy decisions being made by the Congress and the President, as well as more of those decisions going into effect without unnecessary delay. That state of affairs is more consistent with how our democratic and representative government ought to be making those important choices than is our present situation.

* * * * *

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FOR IMMEDIATE RELEASE
September 24, 2002

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SCHUMER: IDEOLOGICAL BALANCE ON THE DC CIRCUIT MATTERS

With Senate Judiciary Committee to consider key nominee to DC Circuit later this week, hearing shows how ideological balance on the court is essential to protecting civil rights, workers' rights, the environment

Hearing features Judge Abner Mikva, Judge Fred Fielding, Michael Gottesmon, Christopher Schroeder, Brad Clark, and other legal scholars

If there is one court in the country besides the Supreme Court where ideology plays a key role in influencing verdicts more than any other, it's the DC Circuit. If there's one court in the country besides the Supreme Court whose rulings have a direct impact on the daily lives of Americans more than any other, it's the DC Circuit. But despite the key role that it plays in the US judicial system, it often gets short shrift.

The DC Circuit – often called America's second highest Court – is important because its decisions determine how federal agencies go about doing their jobs. So when it comes to the way federal agencies regulate gas prices, clean air and water, unfair labor practices, campaign finance reform, and a host of other areas, the DC Circuit almost always has the last word.

The hearing being held today by the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, chaired by US Senator Charles Schumer, focuses on what is at stake when considering nominees to the DC Circuit, how their ideological predilections will impact the decisions coming out of the court, and why it is vital for Senators to consider how nominees will impact the delicate ideological balance on the court when deciding how to vote. Schumer issued the following statement:

"I want to thank everyone for joining us for this important hearing on the unique role the DC Circuit plays in our system of justice and the need for ideological balance on this vital court. The DC Circuit is often called 'The Nation's Second Highest Court' and with good reason. More judges have been nominated and confirmed to the Supreme Court from the DC Circuit than from any other court in the land. The DC Circuit is where Presidents look when they need someone to step in and fill an important hole in the lineup.

"It's sort of like the Bullpen Court – having given us Supreme Court Justices Scalia, Thomas, and Ruth Bader Ginsburg. Not to mention Robert Bork, Ken Starr, and my good friend who is here with us today, the notorious Abner Mikva.

"All the other federal appellate courts handle just those cases arising from within its boundaries. So,

for example, the Second Circuit, where I'm from, takes cases coming out of New York, Connecticut, and Vermont. The Eleventh Circuit, where Jeff's from, gets cases coming out of Alabama, Georgia, and Florida.

"But the DC Circuit doesn't just take cases brought by residents of Washington, DC. Congress has decided there's value in vesting one court with the power to review certain decisions of administrative agencies. We've given plaintiffs the power to choose the DC Circuit – and in some cases we've forced them to go to the DC Circuit – because we've decided, for better or worse, that when it comes to these administrative decisions one court should decide what the law is for the whole nation.

"When it comes to regulations adopted under the Clear Air Act by the EPA, labor decisions made by the NLRB and rules propounded by OSHA, gas prices regulated by the Federal Energy Regulatory Commission, and many other administrative matters, the decisions are usually made by the judges on the DC Circuit.

"To most, it seems like this is the Alphabet Soup Court, since virtually every case involves an agency with an unintelligible acronym. EPA, NLRA, FCC, SEC, FTC, FERC, and so on and so on. It leads to another set of letters – a long line of zzzzzzz. Even my eyes glaze over and roll back in my head when you read down the list.

"But the letters that comprise this Alphabet Soup are what make our government tick.

"They are the agencies that write and enforce the rules that determine how much "reform" there will be in campaign finance reform. They determine how clean water has to be for it to be safe for our families to drink. They establish the rights workers have when they're negotatiating with corporate powers.

"The DC Circuit is important because its decisions determine how these federal agencies go about doing their jobs. And, in so doing, it directly impacts the daily lives of *all* Americans more than any other court in the country, with the exception of the Supreme Court.

"But we probably wouldn't be talking about this court today if it weren't for the political maelstrom brewing over a few of the pending nominations to it. So before any of the reporters here get too excited, I want to be clear that the witnesses with us today are not going to discuss Miguel Estrada and John Roberts – those discussions are for another day.

"That said, nominations to this special Circuit merit special scrutiny. Anyone who thinks we should just blindly confirm the President's nominees to this all-important court needs to think again.

"The goal of this hearing is to underscore what is at stake when considering nominees to the DC Circuit, how their ideological predilections will impact the decisions coming out of the court, and why it is vital for Senators to consider how nominees will impact the delicate ideological balance on the court when deciding how to vote.

"Perhaps more than any other court aside from the Supreme Court, the DC Circuit votes break down on ideological lines with amazing frequency. The divide happens in cases with massive national impact. And if anyone thinks this court's docket isn't chockful of cases with national ramifications, they've got another thing coming. Let me give you some examples.

"When it comes to civil rights, the court plays a big role.

"In Hopkins v. Price Waterhouse, the DC Circuit enforced the Civil Rights Act's guarantee of equal

treatment in the workplace by remedying blatant sex discrimination in a case where a woman was denied a partnership at Price Waterhouse based on her gender alone.

"When it comes to communications, the court plays a big role. It has exclusive jurisdiction over appeals from FCC decisions. That's a pretty big chunk of law with massive impact on American consumers. Just a few years ago, the Circuit upheld the constitutionality of the Telecommunications Act of 1996, guaranteeing more competition in the local and long distance marketplaces – which, in turn, guaranteed better and cheaper phone service for all of us.

"Even when it comes to defining our post-9/11 world, the DC Circuit also plays a big role in interpreting and defining our anti-terrorism laws. In the ongoing case of Holy Land Foundation v. Ashcroft, the Circuit will soon be called upon to determine whether a charitable organization is really a charitable organization or a terrorist front whose assets can be frozen by the federal government.

"When it comes to privacy, this court plays a big role. Earlier this year, the court was called upon to assess the FTC's power to protect consumer privacy when it comes to the private personal information credit reporting agencies may make public.

"When it comes to consumers, this court plays a big role. Yesterday's blockbuster decision by a Federal Energy Regulatory Commission that a major gas and oil company deliberately manipulated gas prices in California will undoubtedly end up before the DC Circuit.

"When it comes to the environment, the court plays a big role. When Congress passed the Clean Air Act in 1970, we gave the Environmental Protection Agency the authority to set clean air standards – the power to determine how much smog and pollution is too much.

"In 1997, having reviewed literally thousands of studies, it toughened standards for smog and soot. The decision was to have two primary effects. First, it was going to improve air quality. But, second, it was going to force some businesses to spend more to pollute less. Industry groups appealed the EPA's decision and a majority Republican panel on the DC Circuit reversed the EPA's ruling.

"In doing so, the court relied on an arcane and long-dead concept known as the 'non-delegation doctrine.' It was a striking moment of judicial activism that was pro-business, anti-environment, and highly political. While that decision ultimately was reversed by a unanimous Supreme Court, most other significant decisions of the DC Circuit have been allowed to stand without review. With the Supreme Court taking fewer and fewer cases each year and taking an increasingly ideological bent itself, we can't rely on the Supreme Court to right the DC Circuit's wrongs.

"Through the 1990s, conservative judges had a stranglehold majority on this court. In case after case during the recent Republican domination of this court, the DC Circuit has second-guessed the judgment of federal agencies, striking down fuel economy standards, wetlands protections, and pro-worker rulings by the National Labor Relations Board.

"Now, for the first time in a long time, there is some balance on the DC Circuit: 4 Republican judges and 4 Democrats. Some of us would like to keep balance on this all-important court – not giving either side an ideological edge.

"Of course, if President Clinton's last two moderate nominees to the Circuit, Elena Kagen and Allen Snyder, had been confirmed, we wouldn't be as worried about balance now. Both had impeccable credentials. There were no blue slip problems, no 11th hour nominations (one waited 15 months, the other 18 months), no 'gotcha' incidents, and support for both from prominent conservatives (e.g., Judge Bork supported Snyder's

nomination; Professor Michael McConnell supported Kagen's). Nonetheless, the Republican-controlled Judiciary Committee failed to act on their nominations.

"Given the recent revelations of corporate irresponsibility, avarice, and greed, now more than ever we need to ensure that we will have balanced courts to ensure the law is enforced equally against all offenders.

"While politics isn't always the best predictor of how judges will vote, some recent studies of the DC Circuit pretty conclusively prove that ideology plays a big role in how the judges vote. That's part of what we'll hear from our witnesses today.

"Over the course of the last year or so, I've spoken out about my belief that we should have a more open, honest, and legitimate discussion about judicial nominees and the federal bench. My argument has boiled down to this. Ideology matters in the way we vote on some judges because ideology matters in the way some judges vote.

"Instead of playing games, instead of playing 'gotcha' politics – on both sides – we should be honest and say that ideology is what bothers us. I don't like judges who are too far left or too far right – I want judges who will be non-ideological. It's obvious from the erudite comments of our panel that the DC Circuit is a crucial court. But in reading up on the Circuit, I've been almost shocked by how clear it is that ideology drives votes. I'm not saying these judges are being nefarious. But their different worldviews clearly lead them to different conclusions – at least when it comes to certain kinds of cases.

"Let me give you some examples drawn from several studies that have been done over the last few years. There are some pretty striking numbers when you look at environmental cases where industry is challenging pro-environment rulings. (Chart #1)

	Rulings in Favor of Industry Challenges
All Republican Panels	80%
Majority Republican Panels	48%
Minority Republican Panels	27.5%
All Democratic Panels	20%

"Professor Cass Sunstein has a study coming out soon that makes similar findings in so-called 'Chevron' cases, where the Court is charged with upholding agency interpretations of law so long as they are 'reasonable.' You would predict that Republicans would vote to uphold agency actions rarely while Democrats would uphold frequently. And that conclusion is borne out by the data. (Chart #2)

	3-0 Repub Panel	**2-1 Repub Panel**	**2-1 Dem Panel**	**3-0 Dem Panel**
Uphold Agency	**33%**	**62%**	**86%**	**71%**

"It's interesting to note that the findings are especially striking when it comes to Democrats – a panel of all Democrats is actually less likely to uphold agency actions than a panel of 2 Ds and 1R. In other words, you need a Democrat to keep the Republicans in check, but when left alone, the Democrats on this court don't run amok. But that's not really the point here. So my question to the panel is this. Do these numbers prove that ideology matters?"

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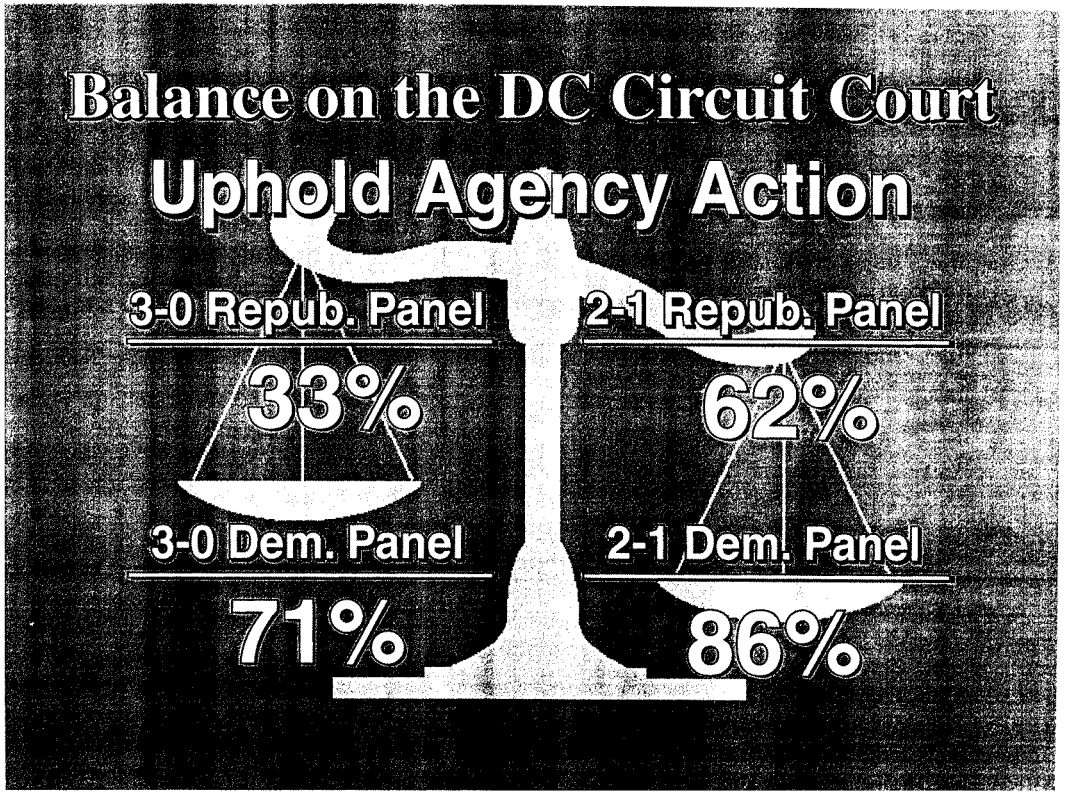
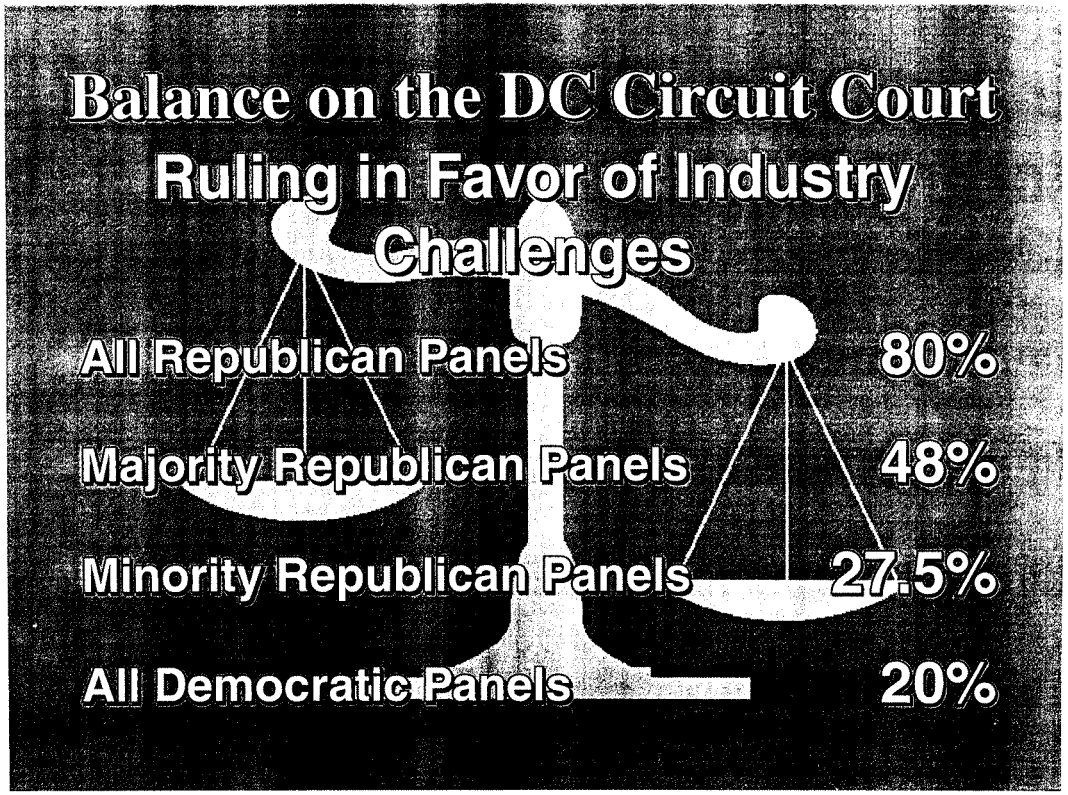

Balance on the DC Circuit Court
Uphold Agency Action
3-0 Repub. Panel
33%
2-1 Repub. Panel
62%
3-0 Dem. Panel
71%
2-1 Dem. Panel
86%


Balance on the DC Circuit Court
Ruling in Favor of Industry
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All Republican Panels 80%
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Minority Republican Panels 27.5%
All Democratic Panels 20%

United States Senate

WASHINGTON, DC 20510

March 16, 2001

President George W. Bush
The White House
Washington, DC 20500

Dear President Bush:

We are writing to you as Ranking Member of the Senate Judiciary Committee and Ranking Member of the Courts Subcommittee to express our serious concern that your Administration is considering terminating the policy of soliciting comment from the American Bar Association on prospective nominees for the federal courts. The policy of obtaining ABA review – half a century old and uniformly followed by Republican and Democratic Presidents alike – has served our nation well, and ending it would imperil the process of selecting and confirming federal judges.

Since 1952, the ABA has reviewed the professional qualifications of potential nominees to the federal bench before the person under consideration is formally nominated and submitted to the Senate. The ABA considers only the integrity, professional competence and temperament of persons identified as potential nominees – not their philosophy or ideology.

To ensure complete insulation from politics, members of the ABA committee that evaluates potential nominees refrain from participating in or contributing to political campaigns, or taking part in political activity of any kind. The ABA's views remain confidential until after a judicial candidate is formally nominated.

We firmly believe that ending the long established practice of ABA review would dilute the quality of the federal bench. The process of judicial selection needs *more* information about the competence and integrity of potential nominees, not less. If ABA evaluation did not provide unique, unbiased and essential information, presidents of both parties would not have so heavily relied on it for almost 50 years.

ABA evaluation has been the gold standard by which judicial candidates are judged, which is why presidents have rarely elected to proceed with a nomination after the ABA found the candidate unqualified in the confidential pre-nomination stage. Indeed, for every candidate the ABA finds unqualified, there are undoubtedly scores of others never submitted for ABA review because it is known they cannot meet that body's rightfully exacting scrutiny. Without having to clear the bar of ABA review, nominees will inevitably be of lower quality.

Eliminating ABA review will also further polarize a process that, by now, all Senators agree cries out for less partisanship. The void of information about a candidate's merits that will result from elimination of ABA review will inevitably be filled with politics. And if the Administration chooses not to consult the ABA, we and others of our committee will. Far from saving time, that will delay Senate consideration of nominees, and the Administration's ability to withdraw a nomination in a confidential manner because of a poor ABA rating (which will also publicly embarrass nominees), and drive Senators apart over ideology rather than bring them together.

In sum, we urge you to continue the nearly 50 year old tradition of independent, apolitical ABA evaluation of potential nominees for federal judgeships. Our system of justice can only benefit as a result.

Sincerely,

Charles Schumer

Charles E. Schumer
UNITED STATES SENATOR

Patrick Leahy

Patrick J. Leahy
UNITED STATES SENATOR

STATEMENT OF SENATOR JEFF SESSIONS
Before the Subcommittee on Administrative Oversight and the Courts
"The D.C. Circuit: The Importance of Balance on the Nation's Second Highest Court"
September 24, 2002

Mr. Chairman, today's hearing on the importance of ideological, or political, balance on the United States Court of Appeals for the D.C. Circuit is significant for three reasons: First, this is the fourth hearing attempting to justify using a judicial nominee's personal politics, rather than his or her view of the judicial role, as a legitimate reason to vote against a nominee. Second, this hearing will shed light on the historic slowdown in circuit court confirmations during the first 2 years of a President Bush's term. Third, this hearing serves as an introduction to the nomination hearing for Miguel Estrada, who if confirmed this year, would be the first Hispanic judge to sit on the D.C. Circuit.

As an initial matter, however, I would like to state again for the record that I agree with Democrats Lloyd Cutler, Judicial Nominations: Should Ideology Matter?: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the Senate Comm. on the Judiciary, 107th Cong. 25 (2001) (statement of Lloyd Cutler) ("[I]t would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one.") (quoting the Miller Commission

Report), and former Chief Judge of the D.C. Circuit Harry Edwards, Harry T. Edwards, Collegiality and Decision Making on the D.C. Circuit, 84 Va. L.Rev. 1335 (1998) (refuting the assertion that "ideology 'significantly influences' judicial decision making on the D.C. Circuit"), and with Republicans C. Boyden Gray, Judicial Nominations: Should Ideology Matter?: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the Senate Comm. on the Judiciary, 107th Cong. 22-29 (2001) (statement of C. Boyden Gray) ("'Should ideology matter?' I can answer in one word: No."), and retired Judge James Buckley of the D.C. Circuit, Judicial Nominations: The D.C. Circuit: The Importance of Balance on the Nation's Second Highest Court: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the Senate Comm. on the Judiciary, 107th Cong. (2002) (statement of Judge James Buckley) ("If the proposal [for an ideological test] were to be adopted, ... it would feed the cynical view of the judiciary as merely the third political branch of our federal government and encourage future appointees to act as if it were."), that a nominee's political ideology should not play a role in judicial confirmation and should not play a role in judging.

Instead, I believe that nominees of Democratic Presidents, who will generally be Democrats, and nominees of Republican Presidents, who will generally be Republicans, should be treated the same. They should be confirmed if they have integrity, are qualified, have a judicial temperament,

and appreciate that the role of a judge is to make fair findings of facts and reasonable interpretations of valid sources of law, and not to step outside these sources to advance a political agenda. If a nominee's record indicates a problem in one of these areas, I may oppose them, Republican or Democrat. Else, I will support them. Thus, on this score, I disagree with my friend from New York's statements over the past year and a half.

Reasons to Use Politics as a Test

At our first hearing in this Subcommittee on June 26, 2001, we heard that the Senate had to reject nominees based on their politics because the Supreme Court was a "right-wing" activist court. When we examined the current Court's decisions, however, we found that it had protected burning the American flag, United States v. Eichman, 496 U.S. 310 (1990), banned voluntary student prayer at high school football games, Sante Fe Independent School District v. Doe, 530 U.S. 290 (2000), stopped the police from using heat sensors to search for marijuana growing equipment, Kyllo v. United States, 121 S.Ct. 2038 (2001), reaffirmed and expanded abortion rights, Stenberg v. Carhart, 530 U.S. 914 (2000), and struck down a federal ban on virtual child pornography, Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002). These decisions may be many things, but they are not "right-wing."

We also heard the assertion that during the first 100 years of the Constitution, the Senate rejected one out of four nominees to the Supreme Court based on the nominees' ideologies. Thus, we were told that the modern day Senate should return to the role of actively rejecting judicial nominees based on the nominees' ideologies. An examination of history, however, demonstrates that during the first hundred years one out of four nominees to the Supreme Court were not rejected because of their ideologies. Some, like Robert Hanson Harrison, Levi Lincoln, William Smith, Roscoe Conkling, William Cushing, and John Quincy Adams, declined the nomination because the Court was not prestigious at that time. Some, like Roger Taney, and Stanley Matthews, were delayed and later confirmed. Others, like Jeremiah Black , John J. Crittenden, Reuben Walworth, Edward King, John Spencer, John M. Read, Edward A. Bradford, George E. Badger, William C. Micou, and Henry Stanbery, were rejected because of the lame duck status of the nominating President. In total, however, only approximately 5% of the nominees were rejected because of their ideology. Clearly, rejection based on the nominee's ideology was the historical exception, not the historical rule. See **Appendix A**.

On a September 4, 2001, hearing, we were told that, because a nominee's politics mattered, the Senate should shift the burden to Republican nominees to prove their worthiness of confirmation beyond their paper record. We then examined recent history and found that Senator Hatch

had consistently said that for Democratic nominees, the burden was on the Senate to reject the nominee.

We then examined more distant history and found that during the first 130 years of our country's history, the Senate did not ask nominees any questions at hearings, probing or otherwise. Nominees did not appear regularly before the Judiciary Committee until John Marshall Harlan II in 1955. See Senate Judiciary Committee in OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 770, 771 (Kermit L. Hall ed. 1992). It would be difficult indeed for a nominee to bear some illusory historical burden of earning confirmation, to submit to vigorous cross examination, and to personally convince senators on the Committee that he truly meets the criteria in a way not reflected in his record, if the nominees were absent throughout most of our history.

At the May 9, 2002, hearing, we heard about how bad the Republicans were for not confirming circuit nominees. Upon close examination, however, it was discovered that 2 of the 4 proffered examples of unfairly treated nominees lacked support from home state Senators, 1 was nominated approximately 4 months before the Presidential election, and the final judicial nominee had never tried a case in a courtroom.

Indeed, my colleague across the aisle deemed the home state Senator support rule was so important to them when passing on Republican nominees that they walked out of a Judiciary Committee meeting on April 26, 2001, protesting that the rule be enforced with complete strictness. See Naftali Bendavid, Bush's Judge Picks Face Senate Tussle, CHICAGO TRIBUNE, May 6, 2001, at 1C.

And within the last few days we have been treated to a press release with an accompanying chart purporting to offer new proof that the political ideology of nominees is routinely taken into account by Senators. See **Appendix B**. The chart, however, contains several errors.

First, the chart purports to count only the "No" votes of "current members of the Senate Judiciary Committee – both Republicans and Democrats – who served on the Committee for at least two years of the Clinton Administration." Sen. Schumer, Press Release, New Analysis of Judiciary Voting Records: Ideology Plays Key Role When Judicial Nominees are Opposed (Sept. 19, 2002). Accordingly, the chart excludes the "No" votes of current Committee Members Edwards and Cantwell, who did not serve on Committee during the Clinton years.

The chart includes, however, the "No" votes of current Committee Members Brownback and McConnell. But Senators Brownback and

McConnell did not serve on the Judiciary Committee while President Clinton was in office during the 105th and 106th Congresses. Thus, the chart, by its on terms, erroneously includes 25 Republican "No" votes that should have been excluded. See **Appendix C**.

Second, the chart displays an artificial disparity in Republican "No" votes and Democratic "No" votes by showing 4 full years of Republican votes against President Clinton's nominees, but only one and one-half years of Democratic votes against President Bush's nominees. Thus, the visual misperception that Republicans vote against Democrat nominees more often than the vice versa.

By looking at percentages of no votes over the number of total votes of committee members for nominees on the floor, a rough approximation on a percentage basis removes the mismatch of time periods. This shows that of the votes all Republican Committee Members cast on President Clinton's nominees on the floor, 3.6% were "No" votes. And of the votes Democrat Committee Members cast on President Bush's nominees, approximately 3.4% were "No" votes. And that does not count the upcoming votes on Dennis Shedd, Mike McConnell, and Miguel Estrada. See **Appendix D**.

Third, after all the obvious errors are corrected, the chart still conveys a fundamental misperception about political ideology. The propensity for votes against nominees to be against nominees of the opposite party reflects

the obvious reality that Senators scrutinize more carefully the nominees of the opposite party. Democratic nominees will almost always be more liberal than Republican nominees, and Republican nominees more conservative than Democratic nominees, yet the large majority of both get confirmed, something more must be at work.

But, the chart shows nothing about the political ideology or records of the individual nominees voted against. One nominee may have drawn a negative vote because he or she had a background issue that cannot be discussed in public; another because he or she lacked trial experience; another because of an ethical issue that arose on the public record; and another because the record demonstrated a propensity to disregard the law as enacted by the political branches. Thus, the assertion that "votes against judicial nominees are almost always driven by ideology," Sen. Schumer, Press Release, is simply not proven by the chart.

Finally, the chart fails to note that while the Republicans spread their "No" votes out among over 14 nominees, the Democrats concentrated most of their "No" votes on just 3 circuit nominees in Committee. Defeating the nominee of the Minority Leader and the nominee of the President. Perhaps these were, in the words of my friend "Shots across the bow" with respect to the Supreme Court. See Helen Dewar, A Serious Breach In Bipartisanship; Democrats Fire 'Shot Across the Bow', Wash. Post, Feb. 2, 2001, at A6 (describing the vote against John Ashcroft for Attorney General).

Historic Circuit Court Slowdown

What we are seeing this Congress, however, is something new. We are seeing a historic slowdown in the confirmation of circuit nominees. In addition to the concentration of votes against circuit nominees in Committee, we are seeing a failure to act on circuit nominees at all. To date, during President Bush's first two years in office, the Senate has confirmed only 44% of President George W. Bush's circuit nominees, compared to 86% for President Clinton, 95% for the first President Bush I, and 95% for President Reagan. See **Appendix E**. Even including the defeated nominations of Pickering and Owen, this Senate has brought up only about half the circuit nominees up for a vote as prior Senates did. Because confirmations historically slow in the last 2 years of an Administration, we may have the lowest percentage of circuit confirmations in memory.

Estrada Hearing

This takes us to the Estrada nomination to the D.C. Circuit. It would be a shame if the Senate did not act this year to confirm this highly qualified, ethical lawyer, who believes that only the political branches should make the law. While I have said in the past and still believe that this court needs only 10 active judges because of its unique case load, there are currently only 8. The Senate confirmed 3 of President Clinton's nominees to the DC Circuit which took the court up to 10 active judges. But retirements have reduced that number to 8. Confirmation of John Roberts and Miguel Estrada would bring the court back to 10.

Yes, the D.C. Circuit is an important appellate court. It needs 10 active judges. But no, partisan politics should not be used to defeat these fine nominees.

Article II of the Constitution invests the Senate with the powers of Advice and Consent concerning judicial nominations. History will judge us on whether we exercise those powers in a responsible manner for this Committee, for the Senate, and for the nation.

SUPPLEMENTAL STATEMENT OF SENATOR JEFF SESSIONS
PROBLEMS WITH REVESZ STUDY

The Revesz study found that for procedural environmental cases for certain time periods, Democrat Judges on the DC Circuit favored activist groups and Republican Judges favored industry. The use of this study to conclude that the DC Circuit is an ideologically driven court is fraught with difficulty.

First, the Revesz study looks only at environmental cases. It does not look at Department of Energy cases, Agriculture Department cases, Federal Trade Commission cases, criminal cases, or any other types of cases.

Second, the Revesz study finds no significant difference in Republican and Democrat voting patterns for statutory environmental cases.

Third, the study finds no industry favoritism by Republicans in procedural environmental cases in 7 of 10 time periods studied. It finds no activist group favoritism by Democrats in procedural environmental cases in 4 of 10 time periods studied.

Fourth, the Revesz study admittedly does not look at current membership of the court.

Fifth, the Revesz study admittedly does not take into account that in 97% of all cases are decided without dissent. See Harry T. Edwards, Collegiality and Decision Making on the D.C. Circuit, 84 VA. L.REV. 1335, 1338 (1998).

Thus, the Revesz study is too narrow, too selective, and too out of date to support the assertion that the DC Circuit makes decisions based on ideology.

Similarly, the study performed by Professor Cass Sunstein also appears too narrow in scope to be helpful in assessing the voting patterns of DC Circuit judges. Although we have not been given the study to review, Chairman Schumer did mention that it is limited to environmental cases. Thus, by its terms, the study excludes the vast majority of the DC Circuit's work on Department of Energy cases, Agriculture Department cases, and other executive branch agency cases. The single statistic that does take all of the cases into account is that 97% of the DC Circuit's cases are decided unanimously – hardly a record of partisan ideological division.

Nor does either study take into account a comparison of the D.C. Circuit with the Ninth Circuit. This comparison shows the much more mainstream record of the D.C. Circuit.

Supreme Court Reversal Rates for the D.C. and Ninth Circuit Courts of Appeals 1997 - 2001 Terms

Circuit	Total Cases*	Number Reversed	Reversal Rate
D.C. Circuit	19	5	26%
Ninth Circuit	83	56	67%

* Includes full opinions, but not memorandum orders.
**Supreme Court Statistics Table – Harvard Law Review.

Over the last five years, the Ninth Circuit has been reversed 67% of the time, compared to a 26% reversal rate by the D.C. Circuit. These statistics do not include the 1996-1997 term, where the Supreme Court, in a record setting reversal rate, overturned the Ninth Circuit 27 out of 28 times. And of course, an number of those reversal were by a unanimous court.

Thus, by the two total measures – 97% unanimity and less than half of the reversals that the Ninth Circuit has had – the D.C. Circuit is exceptionally non-ideological and legally mainstream.

APPENDIX A

STATEMENT OF SENATOR JEFF SESSIONS REGARDING THE ACTUAL REASONS FOR SENATE'S FAILURE TO CONFIRM 20 SUPREME COURT NOMINEES OUT OF 85 MEN NOMINATED FROM 1789 TO 1900

After the recent hearing on ideology, I was of the impression that during the nation's first 100 years the Senate had rejected 1 out of 4 nominees to the Supreme Court based on their political ideology.[1] My subsequent and more detailed review of this subject, however, has revealed a much different reality.

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[1] *See, e.g., Should Ideology Matter?: Judicial Nominations 2001: Hearings Before the Senate Subcomm. on Administrative Oversight and the Courts of the Comm. on the Judiciary*, 107th Cong. 1ST Sess. *9 (2001) (statement of Marcia Greenberger, President, National Women's Law Center); *see also* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 78 (1985) ("Almost *one out of every five nominees* to the Court has failed to gain the Senate's consent.") (Emphasis in original); *id.* at 89 ("One need not endorse the opinions espoused by those Senators who cast negative votes on confirmation, nor disagree with the positions taken by the nominees who suffered those rejections, in order to accept the irrefutable historical evidence that, for reasons both good and bad, the Senate has long judges candidates for the Supreme Court on the basis of what they believe.").

First, during the initial 100 years of our nation's history, a number of men who were nominated to the Supreme Court were not rejected, but declined to serve on what then was perceived as a less than prestigious court. Those declining to serve were Robert Hanson Harrison, Levi Lincoln, William Smith, Roscoe Conkling, William Cushing, and John Quincy Adams.[2] In general, those declining to serve believed that the Court held little prestige. For instance, William Smith declined to serve because he preferred to stay in the Senate and "defend federal rights against nationalization."[3] The Senate's view of the nominees' various political ideologies played no role in these nominees not reaching the Court.

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[2] See HENRY J. ABRAHAM, JUSTICES PRESIDENTS AND SENATORS 37 (1999); JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS 200 (1990).

[3] ABRAHAM, *supra* note 2, at 73.

Second, two nominees that some count as "rejected" were only temporarily delayed and were eventually confirmed. Those nominees were: Roger B. Taney,[4] and Stanley Matthews.[5] In fact, in the case of Chief Justice Roger Taney's nomination there was a power struggle between the Senate and President Andrew Jackson. As a result, Taney's nomination was postponed by the Senate, but President Jackson re-nominated him, and he was eventually confirmed.

Third, 10 nominees were not acted upon or were rejected primarily because of the lame duck or near lame duck status of the nominating President, not primarily because of their personal ideology. These include: Jeremiah S. Black , John J. Crittenden, Reuben Walworth, Edward King, John Spencer, John M. Read, Edward A.

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[4] *Id.* at 74-5.

[5] *Id.* at 102-3.

Bradford, George E. Badger, William C. Micou, and Henry Stanbery. In the instance of Henry Stanbery, who was nominated after Andrew Johnson's failed impeachment, the Senate not only declined to act upon his nomination, but passed legislation to remove the tenth seat for which Stanbery was nominated.[6] Regardless of whatever personal ideology these men may have had, the Senate would not have confirmed them.

Fourth, a few nominees were rejected for miscellaneous non-ideological reasons. George H. Williams was simply unqualified, and personally requested that his nomination be withdrawn.[7]

William Hornblower and Wheeler Peckham were rejected because New York Senator David Hill refused to confirm

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[6] *Id.* at 93.

[7] *Id.* at 98.

anyone that President Cleveland nominated unless it was his personal choice from New York.[8]

Finally, it appears that only five nominees were not confirmed primarily because of their personal ideology. These four nominees are: John Rutledge, who opposed Jay's Treaty[9]; Alexander Wolcott, who vigorously sought enforcement of the Embargo Act[10]; Ebenezer R. Hoar, who opposed Andrew Johnson's impeachment[11]; George Woodward, who was an extreme American nativist[12]; and the 74-year-old Caleb Cushing had switched parties and positions so much he had demonstrated a complete lack

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[8] THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 412, 627-28 (Kermit Hall ed. 1992).

[9] ABRAHAM, *supra* note2, at 29- 30.

[10] *Id.* at 30.

[11] *Id.* at 96.

[12] *Id.* at 81.

of ideology.[13]

Thus, were we to calculate rejections during the first hundreds year on ideology alone, we would find a drastic change in the numbers. Instead of 1 out of 4 or 25% rejections for ideology, the number is about 1 out of 20 or approximately 5% rejections for ideology. Thus, a nominee's personal ideology played a minor and generally nonexistent role in Senatorial rejection during the first 100 years of our history. And I would say that those very few ideological rejections were not necessarily proud days for the institutional integrity of this Senate.

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[13] *Id.*

Breakdown of the 20 Nominees "Rejected" out of the 85 Supreme Court Nominees Submitted Between 1789 and 1900

To support the use of ideology as a standard by which to confirm or reject the nomination of United States Supreme Court justices, some have asserted that between 1789 and 1900, 1 out of 4 Supreme Court nominees were rejected that such rejections arose in large part from the nominees' ideologies.[1] This statistic,[2] which is misleading, states that the Senate refused to confirm 20 out of 85 Supreme Court nominees. In actuality, 2 of the 20 nominees were eventually confirmed, 10 of the 20 were either rejected or not acted upon because they had been nominated by lameduck, or near lameduck, administrations, 4 were rejected for other reasons (*e.g.*, a senator wanted his favorites nominated), and only 4 of the 20 nominees were rejected on ideological grounds – primarily based on their personal political views. Because only 1 out of more than 20 nominees was rejected because of his ideology, a nominee's ideology historically played a minor or nonexistent role in confirmation, not a major role.

Actually Confirmed

Roger B. Taney[3]	Nomination was postponed, but confirmed a few months later. (1836)	In a power play between the Senate and President Andrew Jackson, Taney's nomination was postponed indefinitely by the Senate, but President Jackson re-nominated him, and Taney was eventually confirmed[4].

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[1] *See, e.g.*, *Should Ideology Matter?: Judicial Nominations 2001: Hearings Before the Senate Subcomm. On Admin. Oversight and the Courts of the Comm. On the Judiciary*, 107th Cong. *9 (2001) (statement of Marci Greenberger) ("During its first hundred years, between 1789 and 1900, 20 of 85 Supreme Court nominees did not make it to the bench – they were rejected, withdrawn, or not acted upon. Between 1895 and 1969, during a period in which many Administrations did not use judicial philosophy as a driving selection criterion, just one nominee was rejected.")

[2] *See* JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS ix (1999).

[3] Even though Roger Taney was actually confirmed, Laurence Tribe characterizes the initial opposition he encountered as based on ideological grounds, namely his opposition to the National Bank. LAURENCE H.TRIBE, GOD SAVE THIS HONORABLE COURT 86 (1985).

[4] HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 74-75 (1999); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 858 (Kermit L.

Stanley Matthews[5]	Not acted on under President Hayes, but later confirmed under President Garfield. (1881)	Matthews was nominated in the waning days of the Hayes administration, not allowing the Senate enough time to act, but he was renominated and confirmed under President Garfield.[6]

Not Confirmed Due to Opposition to the Nominating President

John J. Crittenden[7]	Postponed (1828)	Nominated in the last days of John Quincy Adams's lame duck administration; Andrew Jackson had already been elected.[8]

Hall, ed. 1992) [hereinafter OXFORD COMPANION].

[5]While Stanley Matthews was also actually confirmed, Professor Tribe asserts that the initial opposition to him was due to his sympathy with business interests. TRIBE, *supra* note 3, at 89.

[6]ABRAHAM, *supra* at note 4, at 102-103; OXFORD COMPANION, *supra* note 4, at 533.

[7]John Crittenden's nomination is described by Laurence H. Tribe as having been postponed because Crittenden was a moderate Whig. TRIBE, *supra* note 3, at 31.

[8]ABRAHAM, *supra* note 4, at 70 ("Adams, now a lame-duck president, send Crittenden's name to the Senate late in December 1828. Yet victorious Andrew Jackson's Democratic supporters in that body were not about to award the Supreme Court plum to a Clay Whig and , without ever discussing Crittenden's qualifications *or his views*, by a vote of 23:17 'postponed' the nomination in February

John Spencer	Rejected (1844)	The Henry Clay dominated Senate disliked Tyler and refused to confirm 5 of his 6 Supreme Court nominees. Spencer, was opposed due to his acceptance of cabinet posts under John Tyler. Accordingly, his nomination was defeated, but not based on his personal political or jurisprudential ideology.[9]

1829, thus consigning it to oblivion.") (emphasis added); David J. Danelski, Confirmation Controversy: The Selection of a Supreme Court Justice: Ideology as a Ground for the Rejection of the Bork Nomination, 84 Nw. U.L. Rev. 900, 907-08 (1990) ("Crittenden's case may be a clear precedent for partisan rejection of lameduck nominations, but it is not a clear precedent for ideological rejection of Supreme Court nominees.").

[9]ABRAHAM, *supra* note 4 at 29, 79 ("[S[pencer] was an avowed political enemy of Henry Clay and his followers, and it was with more ease than the rejection vote of 21:26 indicated that the Clay faction succeeded in blocking Spencer."); OXFORD COMPANION, *supra* note 4, at 816 ("[T]he Senate rejected by a vote of 21 to 26, owing largely to the opposition of those Whigs who distrusted any friend of Tyler and to Spencer's fierce temper.").

Reuben Walworth	Withdrawn (1844)	President Tyler withdrew Walworth after the Senate postponed the nomination indefinitely. The Whig Senators were mistakenly confident that Henry Clay would defeat James Polk in the next presidential election, and that Clay would submit nominees more to their liking.[10]
Edward King	Withdrawn (1844)	President Tyler withdrew King after the Senate postponed the nomination indefinitely. The Whig Senators were mistakenly confident that Henry Clay would defeat James Polk in the next presidential election and that Clay would submit nominees more to their liking.[11]

[10] ABRAHAM, *supra* note 4 at 29, 79 ("It was now June, and the Whig Senators thinking they had victory in their grasp in the forthcoming presidential election, moved to postpone" both the Walworth and King nominations by votes of 20:27 and 18:29, respectively."); OXFORD COMPANION, *supra* note 4, at 908 ("Walworth's nomination suffered from Tyler's lack of support from either Whigs or Democrats.").

[11] ABRAHAM, *supra* note 4 at 79 ("It was now June, and the Whig Senators thinking they had victory in their grasp in the forthcoming presidential election, moved to postpone" both the Walworth and King nominations by votes of 20:27 and 18:29, respectively."); OXFORD COMPANION, *supra* note 4, at 486 ("Both the King and Read nominations failed as a result of Tyler's lack of support from either the Whig or Democratic party.").

John M. Read	Not Acted On (1844)	Although Read had Democratic and Whig support, the Senate adjourned without acting on his nomination because Read was nominated by Tyler and was nominated during the waning days of Tyler's lame duck administration.[12]
Edward A. Bradford	Not Acted On (1852)	When Bradford was nominated, the Senate was about to adjourn before the elections. Because President Fillmore was a lameduck, the Senate did not act on the Bradford's nomination.[13]

[12] ABRAHAM, *supra* note 4 at 80 ("[Tyler] nominated well-known Philadelphia lawyer with supporters in both the Whig and Democratic camps, a one-time U.S. attorney of proved legal acumen and political deftness, John Meredith Read. But it was now mid-February, and a weary Senate adjourned without acting on the nomination – thus handing Tyler his fifth failure. It was widely expected that the incoming President Polk would have more luck."); OXFORD COMPANION, *supra* note 4, at 709 ("[The Read] nomination[] suffered from Tyler's lack of support from either Whigs or Democrats.").

[13] ABRAHAM, supra note 4, at 83 ("Fillmore's first choice to succeed the late [Justice McKinley] was Edward A. Bradford of Louisiana, a well-known, able lawyer from the same circuit. The Senate, however, was about to adjourn and it was in no mood to expedite a Fillmore nomination. ... [I]t reconvened after Pierce's victory ...."); OXFORD COMPANION, *supra* note 4, at 81 ("The Democratic majority in the Senate failed to act on the nomination before the end of the session.").

George E. Badger	Postponed (1853)	President Fillmore was now a lameduck, and the Senate chose to preserve the nomination for the incoming president, Franklin Pierce. In addition, Badger drew some opposition because he was a North Carolinian and lived outside the 5th Circuit where the preceding justice had resided.[14]
William C. Micou	Not Acted On (1853)	The Senate failed to act on another Fillmore nominee, preserving the Court vacancy for incoming Democratic President Franklin Pierce.[15]

[14] ABRAHAM, *supra* note 4, at 83 ("When [the Senate] reconvened after Pierce's victory, Fillmore named U.S. Senator George E. Badger of North Carolina on January 3, 1853. A conservative Whig who was not readily identifiable as either pro-slavery or anti-slavery, Badger was nonetheless a clearly committed Whig who had served as secretary of the navy in the Harrison and Tyler cabinets. The Democratic majority in the Senate was not about to deprive the victorious incoming President of the choice of his own man, even though rejecting one of its own members would be little short of political sacrilege."); OXFORD COMPANION, *supra* note 4, at 54 ("Badger's residence outside the fifth circuit aroused criticism from Alabama, Mississippi, and Louisiana senators, who preferred resident candidates.").

[15] ABRAHAM, *supra* note 4, at 83 ("Finally, lame-duck Fillmore turned back to Louisiana and to another well-known attorney, William C. Micou – law partner of U.S. Senator-elect Judah P. Benjamin, to whom Fillmore had offered the Court post, but who preferred to go to the Senate. ... Predictably, the Senate refused to act on Micou's nomination, and the McKinley seat remained vacant for the incoming Franklin Pierce to fill."); OXFORD COMPANION, *supra* note 4, at 545 ("The Democratic majority in the Senate, however, failed to confirm [Micou's] appointment. Within a month, the new Democratic President, Franklin Pierce, had appointed John A. Campbell.").

Jeremiah S. Black[16]	Rejected (1861)	Was nominated at the end of Buchanan's lame-duck term, and Republican senators wanted to hold the seat for Lincoln.[17]
Henry Stanbery	Not Acted On (1866)	After Andrew Johnson survived impeachment, the Senate was opposed to any Johnson nominees, and when a vacancy to which Stanbery was nominated arose, the Senate passed a bill that abolished the vacant seat and provided a proviso that when the next vacancy occurred that seat would also be eliminated.[18]

[16]Laurence Tribe characterizes Black's true liability as his opposition to abolition of slavery. TRIBE, *supra* note 3, at 88.

[17]ABRAHAM, *supra* note 4, at 29 ("Democrat James Buchanan's nomination of Jeremiah S. Black in December 1860, three months before his term ended, fell 25:26, chiefly because Republican senators wanted to hold the seat for Abraham Lincoln to fill."), 86; Danelski, *supra* note 8, at 910 ("The standard explanation that Black's defeat turned chiefly on the nomination's timing, Buchanan's loss of power, and Republican control of the Senate is more plausible. As in Crittenden's case, Black's party affiliation was far more important to his defeat than his ideology.").

[18]ABRAHAM, *supra* note 4 at 93 ("Vacillating for almost a year, Johnson finally chose Attorney General Henry Stanbery, and Ohio Republican of considerable legal skill and a well-liked public figure. But it is doubtful that the Senate would have approved God himself had he been nominated by Andrew Johnson. Not only did it fail to act on the Stanbery nomination, it also passed a bill that abolished the vacant ... set, reducing the Court's membership from ten to nine."); OXFORD COMPANION, *supra* note 4, at 818 ("Henry Stanbery's nomination fell victim to the bitter conflict between President Andrew Johnson and Republican leaders in Congress.").

Rejected on other grounds

George H. Williams	Withdrawn (1873)	Williams requested that the President withdraw his name. Williams had been attacked as being unqualified.[19]

[19] ABRAHAM, *supra* note 4 at 98 ("It was now November and Grant, realizing that he had to take some action, turned to his attorney general, George H. Williams of Oregon, an honest but only marginally capable individual. Williams's nomination ran into immediate flak from the bar, press, and public – all of whom quite rightly deemed William to be lacking in stature – but Grant persisted in pushing the 50-year-old lawyer until the Judiciary Committee approved his nomination. The full Senate, however, demurred, and the president withdrew Williams's name early in January 1874 at the nominee's own request."); OXFORD COMPANION, *supra* note 4, at 031 ("President Ulysses S. Grant's 1873 nomination of George Williams for the position of chief justice met with considerable controversy, arousing opposition in the Senate and among the organized bar that viewed Williams as too undistinguished for the nation's chief legal position. At Williams's request Grant withdrew the nomination.").

Caleb Cushing[20]	Withdrawn (1874)	Although qualified, his nomination was withdrawn by the President because of his age - he was 74 -, because he had made many enemies by switching political parties on a regular basis, and because he wrote a letter of recommendation for a former law clerk to Jefferson Davis. Cushing was rejected primarily because of his lack of political loyalty, not his adherence to a particular political or judicial ideology.[21]

[20]Professor Tribe acknowledges that Cushing's political unreliability factored in the withdrawal of his nomination, but posits that it was Cushing's pro-slavery views and correspondence with Confederate President Jefferson Davis that truly doomed his nomination. TRIBE, *supra* note 3, at 88.

[21]ABRAHAM, *supra* note 4, at 32 ("Cushing's age – 74 – was noted prominently during debate, but the real reason for his rejection was the Senate's not entirely erroneous belief that Grant's close personal friend was a political chameleon. Indeed, Cushing had been, in turn, a regular Whig, a Tyler Whig, a Democrat, a Johnson Constitutional Conservative, and finally a Republican."); Danelski, *supra* note 8, at 911 (reviewing numerous historical sources and concluding "[i]n view of these essentially nonideological interpretations, it is difficult to conclude with any confidence that Cushing's views on slavery were the principal cause of his defeat.")

William Hornblower	Rejected (1893)	President Cleveland's nominees were rejected because Senator David Hill was disappointed when Cleveland refused to select Hill's favored candidates and Hill convinced his fellow Senators to vote likewise when Cleveland nominated an enemy of Hill's friend.[22]
Wheeler H. Peckham	Rejected (1894)	President Cleveland's nominees were rejected because Senator David Hill was disappointed when Cleveland refused to select Hill's favored candidates, and Peckham had also been involved in a patronage conflict with Hill in which Hill was the loser.[23]

[22]ABRAHAM, *supra* note 4 at 108 ("[New York's] astute and powerful Senator David B. Hill advanced numerous suggestions to the president. But Hill was a member of an anti-Cleveland patronage faction in New York's Democratic party, at odds with the president on personnel matters, and the president refused to heed the senator despite of the letter's threats to invoke senatorial courtesy. When Cleveland thus proposed a conservative corporation lawyer and Cleveland loyalist, William B. Hornblower, to the Senate at the end of the summer, Hill, although with some difficulty, rallied his colleagues, and Hornblower went down to defeat 24:30 four months later."); OXFORD COMPANION, *supra* note 4, at 412 ("A year earlier, Hornblower, as a member of a committee of the New York City Bar Association, had conducted an investigation into an election irregularity, leading to the defeat of Isaac H. Maynard in a contest for a seat on the New York Court of Appeals. Maynard's powerful ally and friend, Senator David B. Hill of New York retaliated by leading a successful campaign to defeat Hornblower's nomination; the nomination was rejected by a vote of 30 to 24on 15 January 1894.").

[23]ABRAHAM, *supra* note 4, at 108 ("Not one to capitulate readily, Cleveland again ignored Hill's admonitions, and nominated another New Yorker of similar persuasions, Wheeler H. Peckham, that January. Following a month of debate, Hill's senatorial courtesy claims proved to be victorious again, this time by a nine-vote margin, 32:41."); OXFORD COMPANION, *supra* note 4, at 627-28 ("Peckham was opposed by Senator David B. Hill of New York because Peckham had become involved in a patronage squabble

Rejected on Ideological Grounds

John Rutledge	Rejected (1795)	Rutledge had actually already been appointed as an associate justice on the Supreme Court; only his nomination for the Chief Justice position was rejected because of his opposition to Jay's Treaty.[24]

between Cleveland and Hill, in which Hill was the loser. Hill invoked senatorial courtesy and the Senate voted 41 to 32 against confirmation on 16 February 1894.") .

[24] ABRAHAM, *supra* note 4, at 30 ("Rutledge had asked President Washington for the appointment on John Jay's resignation but now found his fellow Federalists voting against him because of his vigorous opposition to Jay's Treaty of 1794. The Federalist senators refused to confirm a public figure who actively opposed the treaty they had championed so ardently ...."); OXFORD COMPANION, *supra* note 4, at 751 ("Rutlege's nomination as chief justice was in extreme jeopardy even before Washington submitted it to the Senate. On 16 July 1795 Rutledge presided over a meeting in Charleston protesting the Senate's ratification of Jay's Treaty. Not content simply to lead the meeting, Rutledge delivered a lengthy harangue against the treaty and urged the president not to sign it. Outraged by his opposition to Jay's Treaty, a cornerstone of the administration's diplomacy, and concerned by the reports of his insanity, the Federalist majority in the Senate voted against Rutledges's nomination on 15 December 1795 by a vote of 14 to 10 ....").

Alexander Wolcott[25]	Rejected (1811)	Wolcott's nomination was rejected because of his vigorous enforcement of embargo and nonintercourse acts when he was a U.S. Collector of Customs.[26]
George Woodward	Rejected (1846)	Woodward was rejected because of his reputation as an extreme American nativist and because of divisions within the Democratic party.[27]

[25]While Abraham lists qualification as a side-issue in the failure of Wolcott's confirmation, Laurence Tribe attributes the rejection of Wolcott's nomination as entirely based upon his lack of qualification. TRIBE, *supra* note 3, at 81.

[26]ABRAHAM, *supra* note 4, at 30 ("In 1811 James Madison's nomination of Alexander Wolcott's vigorous enforcement of the embargo and nonintercourse acts when he was U.S. collector of customs in Connecticut. There was, however, also some genuine question as to Wolcott's legal qualifications and his moral cosmos."); OXFORD COMPANION, *supra* note 4, at 935 ("Spurred on by Wolcott's vigorous and unpopular enforcement of the Embargo, a federal statute of 1807 that prohibited all naval commerce to foreign countries, Federalists greeted his nomination with contempt, describing him as a man of mediocre talent. Despite the partisanship of these attacks, they were not far off the mark and even Republicans found it difficult to defend Wolcott. The extreme doubts within both parties about his judicial abilities caused the Senate to reject his nomination by a vote of 9 to 24.").

[27] *See* ABRAHAM, *supra* note 4, at 81 ("Although a member of a distinguished family and a proved Democrat, Woodward had acquired a reputation as an extreme American nativist and was staunchly opposed by several Democratic senators, among them Simon Cameron of his home state."); *see also* OXFORD COMPANION, *supra* note 4, at 939 ("Although a loyal Democrat from a distinguished family, Woodward failed to gain Senate confirmation. Divisions within the Democratic party – especially opposition from a senator from Woodward's home state – caused the Senate on 22 January 1846 to reject Woodward's nomination by a vote of 20 to 29.") *But see* Danelski, *supra* note 8, at 908 ("The historical context of Woodward's rejection is useful in understanding the event. The Senate was in a feisty mood. In the two years preceding Woodward's nomination it had defeated five of Tyler's Supreme Court nominations, despite the fact that all the nominees were highly regarded lawyers. Further, in the same year Woodward was rejected, two Polk nominees to executive offices were also rejected. Polk interpreted those rejections as attempts to embarrass his administration. In view of all the evidence, it is hard to conclude that Woodward's rejection is a clear precedent supporting Tribe's thesis [that a historical

Ebenezer R. Hoar	Rejected (1869-70)	Hoar was rejected because he would not support Republican Senators in their strictly partisan suggestions for lower-court nominees, opposed Andrew Johnson's impeachment, and worked for a federal civil service system.[28]

precedent exists for the regular rejection of nominees based on their personal ideology.]").

[28]ABRAHAM, *supra* note 4, at 96 ("Hoar was superbly qualified, but after seven weeks of debate and delay the Senate rejected him 24:33 on February 3, 1870. The majority was furious with Hoar for his refusal to back their strictly partisan suggestions for lower-court nominees, his active labors ob behalf of a merit civil service system for the federal government, and his opposition to Andrew Johnson's impeachment."); OXFORD COMPANION, *supra* note 4, at 404 ("President Grant nominated Hoar for a seat on the Supreme Court on 15 December 1869; a bitter fight over his confirmation raged for seven weeks. The Senate rejected his nomination on 3 February 1870 by a vote of 33 to 24. His high professional standards, refusal to play party politics, and advocacy of a civil service system lost for the nation a justice of uncompromising integrity.").

APPENDIX B

New York's Senator

CHARLES E. SCHUMER

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FOR IMMEDIATE RELEASE
September 19, 2002

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NEW ANALYSIS OF JUDICIARY VOTING RECORDS: IDEOLOGY PLAYS KEY ROLE WHEN JUDICIAL NOMINEES ARE OPPOSED

Same results for both Democrats and Republicans

Report demonstrates hypocrisy of those who say ideology doesn't drive their votes

Rebutting Republican claims that ideology should play no role in the Senate's consideration of judicial nominees, US Senator Charles E. Schumer today released an analysis showing that both Republicans and Democrats regularly vote along ideological lines.

The report concludes that – notwithstanding Republican claims that legal excellence is the only relevant criterion when it comes to judicial nominees – ideology is almost always the deciding factor in a no vote on a judicial nominee. The finding is consistent for both Republican and Democratic Senators on the Senate Judiciary Committee. Schumer noted that Senators Biden, Kohl, Hatch and Specter appear to be the least ideological members on the Committee.

"This report confirms what everyone has always known; ideology matters," Schumer said. "It doesn't make a difference whether you're a Republican or a Democrat, votes against judicial nominees are almost always driven by judicial ideology."

Schumer's report examined the votes of current members of the Senate Judiciary Committee – both Republicans and Democrats -- who served on the Committee for at least two years of the Clinton Administration. In the 105th through 107th Congresses, Republican members cast 85 votes against President Clinton's nominees and 2 against President Bush's. Democrats, meanwhile, cast one vote against President Clinton's nominees but have thus far cast 26 votes against those put forth by President Bush. The numbers are broken down senator by senator on chart #2.

"If ideology doesn't matter and the only question is whether a nominee is among the best the bar has to offer, then 'no' votes from each side should be evenly distributed against Democratic and Republican nominees," Schumer said. "The only conclusion one can reasonably draw from this data is that ideology does matter."

#####

CHARLES E. SCHUMER
NEW YORK

COMMITTEES
BANKING
JUDICIARY
RULES

United States Senate
WASHINGTON, DC 20510

Let the Record Reflect That Ideology Does Matter

by US Senator Charles E. Schumer

On September 5, 2002, the Senate Judiciary Committee voted down the nomination of Priscilla Owen. The vote broke on purely partisan lines with 10 Democrats opposing and 9 Republicans supporting her confirmation.

At the vote, Republican after Republican criticized Democratic senators for considering Justice Owen's judicial ideology in evaluating her candidacy for a lifetime appointment to the Fifth Circuit Court of Appeals. One comment in particular stood out for me. As one Republican put it:

> "I would say that what is happening today is that we are changing the ground rules. We are making politics an element of the confirmation of judges.... I don't think that the members of this Committee fully understand the risk we are taking when we make politics and ideology a factor in judge selection and voting in this body."

Over the course of the past year, I have argued that politics and ideology are and always have been considered in the nomination and confirmation process. In the past, when senators worried that a nominee was too ideological, either the nominee did not get a hearing and a vote or senators dug up a minor personal peccadillo and claimed that was the basis for opposing the nominee. Far better to have a real debate about the issues than to use "gotcha politics" as a pretext for opposing a nominee whose ideology is troublesome.

As I have advocated this change – a movement toward more openness, honesty, and legitimacy in the confirmation process – I have been confronted with increasing doomsaying from my Republican colleagues. As one of them put it, "the sword of Damocles hangs over the Senate" because of the vote against Justice Owen's confirmation.

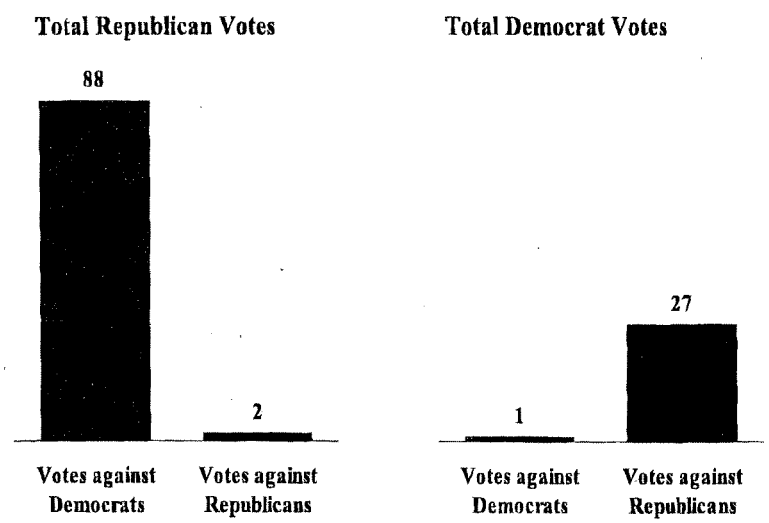
The Republicans' comments at the Owen vote got me wondering whether their votes match their rhetoric. I decided to examine the votes of current members of the Judiciary Committee – both Republicans and Democrats -- who served on the Committee during at least two years of the Clinton Administration. If, as they claim, ideology does not matter and the only question is whether a nominee is among the best the bar has to offer, then the "no" votes from each side should be evenly distributed against Democratic and Republican nominees.

The results put the point in stark relief. In the 105th through 107th Congresses, those Republican members cast votes against 88 votes against President Clinton's nominees and 2 against President Bush's. Democrats meanwhile cast 1 vote against President Clinton's nominees but thus far have cast 27 votes against President Bush's. (Please see Charts #1 and #2).

The only conclusion one can reasonably draw from this data is that ideology matters.

Drawn Chart

SUMMARY OF NOMINATION VOTES BY MEMBERS OF SENATE JUDICIARY COMMITTEE



Note: For purposes of this report, a senator's vote either in committee or on the floor was counted as a "no" vote. Where a senator voted against a nominee in committee and on the floor, only one "no" vote was counted.
Source: Drawn from committee records and congressional record

CHARLES E. SCHUMER
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WASHINGTON, DC 20510

Democrat Chart

Chart #2 - How They Voted (Democrats are in italics)

Senator	Vote against Dem nominee	Votes against GOP nominee
Hatch	1	0
Thurmond	13	0
Grassley	13	1
Specter	1	0
Kyl	13	0
DeWine	9	0
Sessions	13	0
Brownback	12	0
McConnell	13	1
Leahy	*0*	*4*
Biden	*0*	*2*
Kennedy	*0*	*4*
Kohl	*0*	*2*
Feinstein	*0*	*3*
Feingold	*1*	*4*
Schumer	*0*	*4*
Durbin	*0*	*4*

1 - For purposes of this report, a senator's vote either in committee or on the floor was counted as a "no" vote. Where a senator voted against a nominee in committee and on the floor, only one "no" vote was counted.
2- Drawn from committee records and congressional record

APPENDIX C

United States Senate

WASHINGTON, DC 20510

COMMITTEES:
BANKING
JUDICIARY
RULES

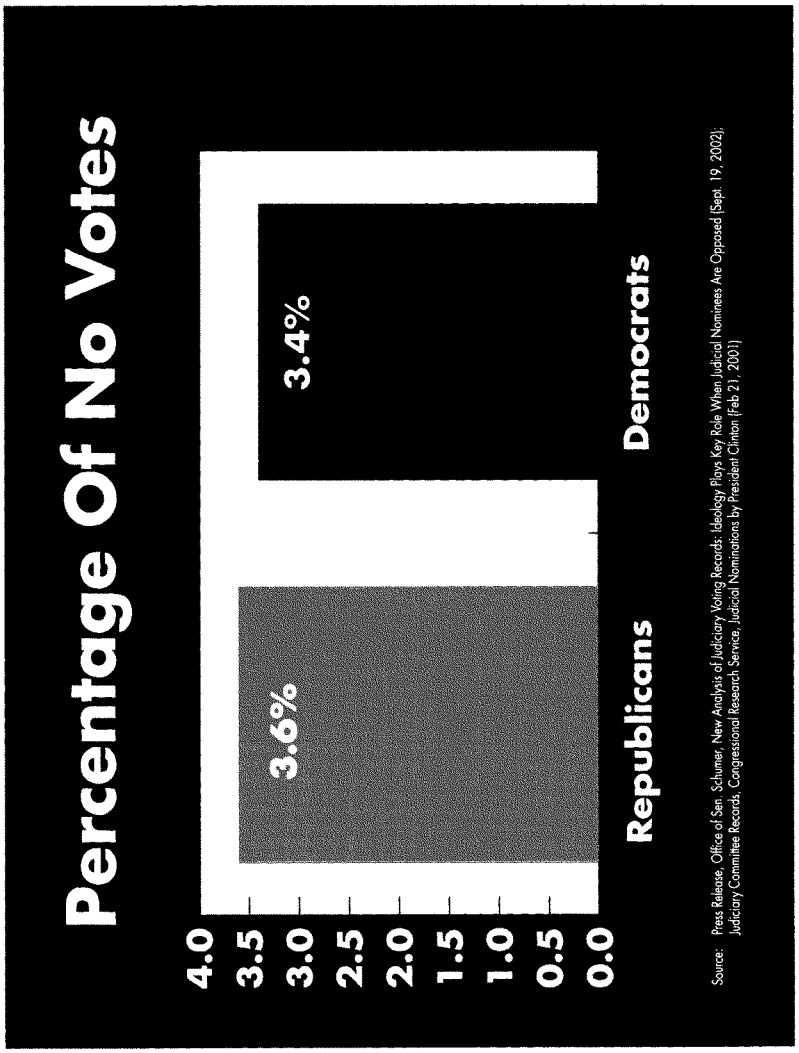
DEMOCRAT CHART

Chart #2 - How They Voted (Democrats are in italics)

Senator	Vote against Dem nominee	Votes against GOP nominee
Hatch	1	0
Thurmond	13	0
Grassley	13	1
Specter	1	0
Kyl	13	0
DeWine	9	0
Sessions	13	0
Brownback	12	0
McConnell	13	1
Leahy	*0*	*4*
Biden	*0*	*2*
Kennedy	*0*	*4*
Kohl	*0*	*2*
Feinstein	*0*	*3*
Feingold	*1*	*4*
Schumer	*0*	*4*
Durbin	*0*	*4*

1 - For purposes of this report, a senator's vote either in committee or on the floor was counted as a "no" vote. Where a senator voted against a nominee in committee and on the floor, only one "no" vote was counted.
2 - Drawn from committee records and congressional records.

APPENDIX D



Source: Press Release, Office of Sen. Schumer, New Analysis of Judiciary Voting Records: Ideology Plays Key Role When Judicial Nominees Are Opposed (Sept. 19, 2002); Judiciary Committee Records, Congressional Research Service, Judicial Nominations by President Clinton (Feb 21, 2001)

APPENDIX E

Circuit Nominee Confirmation

President	Congress	Circuit Court Nominations Submitted	Circuit Court Nominations Confirmed
Bush 2001-2002	107th	32	14 (44%)
Clinton 1993-1994	103rd	22	19 (86%)
Bush 1989-1990	101st	23	22 (95%)
Reagan 1981-1982	97th	20	19 (95%)

Source: CRS - Judicial Appointments and Vacancy Statistics, 1977-2001

Bush Nomination Tallies as of September 13 , 2002 (11:00 am)

From: Paul Strauss United States Senator District of Columbia (Shadow)

United States Senate- Committee on the Judiciary

Subcommittee on Administrative Oversight and the Courts

Hearing: "The DC Circuit: The Importance of Balance on the Nation's

Second Highest Court."

September 24, 2002

10:00 am

SD-226

Chairman Schumer, Senator Sessions and other members of the Subcommittee, I appreciate the opportunity to submit a statement on this important matter. As an elected U.S. Senator from the District of Columbia I feel privileged to have so many of the nation's highest courts in my district. I am pleased that you are having a hearing this most important issue. What has been informally called the second highest court in the nation, the U.S. Court of Appeals for the District of Columbia Circuit, has a geographical jurisdiction made up entirely of my constituents. Therefore, I feel it is important that I speak on this matter. There exists a separate Federal Circuit Court and although the DC Circuit also hears many cases with a primarily federal interest, the DC Circuit is the sole federal appellate tribunal for the residents of the District of Columbia.

Congress has decided that there is usefulness in vesting one court with the power to review certain decisions of administrative agencies, especially regarding regulatory commissions. In other cases plaintiffs have the discretion to file in the DC Circuit. In some cases Congress has forced them to go to the DC Circuit because Congress has decided that when it comes to these administrative decisions one court should interpret the law for the nation as a whole but for my constituents, the DC Circuit is not a choice. The fact that more United States Supreme Court Justices have been nominated and confirmed from the DC Circuit than any other court in the land, sometimes obscures it's traditional role as the appellate tribunal for DC residents.

The DC Circuit Court has local jurisdiction over my entire constituency. In addition to the important regulatory, including exclusive jurisdiction over the Federal Communications Act and other federal cases that the District of Columbia Circuit Court

hears it also presides over all federal cases from the District of Columbia. Therefore, from my perspective the local reason is a fundamental reason why the DC Circuit Court should be balanced. Although I agree with the testimony of other witnesses, that balance is important, none of them addressed the impact of imbalance on the people of DC. A jurisdictions courts should reflect the values of that jurisdiction. That is why membership balance is so important.

The DC Circuit Court should better reflect the common values and prevailing ideals of the citizens of the District of Columbia. An overwhelming majority of citizens in the District of Columbia are African Americans yet, only 2 of the eight justices, Harry T. Edwards and Judith Ann Wilson Rogers, sitting on the DC Circuit Court currently are African American. Another matter that causes concern is the impact that the lack of statehood and voting congressional representation for the District of Columbia has on the confirmation process. If the citizens of the District of Columbia were afforded two Senators like citizens in any of the fifty states that make up this great nation, then the elected Senators from DC would have a strong voice in the process. Unfortunately, the citizens of the District of Columbia are not even given a place at the table in the process. That is fundamentally wrong and it is undemocratic.

Right now, as you know, the DC Circuit Court is arguably balanced at least with regards to partisan affiliation, and some suggest that it is balanced with regard to community values as well. Nevertheless, it is not just that the court is not balanced proportionally with regard to the people of the District of Columbia with regard to community values. Unfortunately, if all of President Bush's present nominees for the court were to be confirmed, it is very likely that the end of the even balance that does not

represent the district but at least it is not shifted to the right which would be even more uncharacteristic of the prevailing ideology of my DC Constituents. I would appreciate it if President Bush was to nominate more moderate candidates, however, it is his probative and right to nominate whomever he sees fit. However, it is the United States Senate's job and more specifically the Senate Judiciary Committee's Constitutional duty to make the last determination. Once again, I must reiterate that neither I nor anybody representing those who make up the local jurisdiction of the DC Circuit Court is involved during this process. This obligates those voting Senators to act as fiduciary to the interest of underrepresented D.C.

As Senator, elected by the citizens of the District of Columbia, I am encouraged to see how seriously judicial nominations to the court are taken. The Senate Judiciary Committee, especially recently, has put a lot of effort into making sure that the DC Circuit Court receives only the most talented, qualified, and balanced Jurists. It would be a serious breach of responsibility for the Judiciary Committee's job just to rubber stamp Presidential Nominations to any court. In the case of the DC courts, committee members should also review whether nominees are not just appropriate for the Federal bench, but whether or not they are representative of the values and ideals of the District of Columbia.

Whether we like it or not, ideology does and should play an important role in the judicial nomination and confirmation process. The Chairman of this subcommittee is right on the mark when he argues that however, I would like to add that the ideological values of judges should also be close to the values of the jurisdiction in which they preside. It is not just about ideology its about community values and ideals. Moreover, if

values did not play a role then why does President Bush nominate only very conservative judges? Or why did President Clinton nominate judges that were reflected in his liberal values? In both cases it was the right thing to do for the Senate Judiciary Committee to strictly scrutinize Presidential Nominees, not only on competence and judicial restraint which are very important, but on their values as well. Moreover, community values play a crucial role in whether the judges reflect the jurisdiction in which they preside. Furthermore, as the elected U.S. Senator from the District of Columbia, I hope that one day soon, I will have the right to represent the constituents from my state when it comes to judges on the DC Circuit Court Senatorial Courtesy applied to DC's Senators would go a long way toward ensuing the balance this committee rightly strives for. The citizens of the District of Columbia deserve, nothing less than the same rights as their fellow citizens in the states.

Thank you for the opportunity to submit my testimony for the record on this important issue that can not possibly hit any closer to my home. This issue is very important to my constituents and I for obvious reasons. In addition, thank you for having a hearing on this important issue. I look forward to working with the Committee in the future on this and other issues germane to the District of Columbia. I would also like to thank a member of my staff, Matthew Helfant, for his help in drafting this testimony.

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2002 WL-WSJ 3397590
(Publication page references are not available for this document.)

The Wall Street Journal
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Thursday, June 13, 2002

Obstruction of Justice
By James L. Buckley

At a certain point, the Senate's willful failure to act upon a president's judicial nominees can only be described as an obstruction of justice. The U.S. Court of Appeals for the District of Columbia Circuit is a case in point. Recent retirements have left the court, which has 12 judges, with four standing vacancies. Although President Bush nominated two candidates over a year ago, the Senate Judiciary Committee has yet to hold hearings to consider their qualifications.

This extraordinary inaction is having a significant effect on the court's ability to handle its workload. As Chief Judge Douglas H. Ginsburg plans to announce today at the D.C. Circuit's judicial conference in Williamsburg, Va., in the coming term the court will be able to process far fewer cases than usual. The eight full-time judges, and two retired judges who have volunteered to hear cases on a part-time basis, will hear oral arguments in only 335 cases compared to the 405 cases that would have been scheduled if the Senate had acted upon -- or been allowed to act upon -- the president's nominations.

Given the thousands of federal cases that are appealed each year, a prolonged delay in hearing 70 cases may seem a relatively trivial matter. The D.C. Circuit, however, occupies a special niche in the interpretation and application of federal law. It is often referred to as the second most important court in the country because of its role as the primary forum for determining the scope and legality of the federal regulations that control vast areas of American life.

In the general run of litigation, a delay in the disposal of a case will affect only a limited number of parties. A delay in addressing challenges to the latest directives of a Federal Energy Regulatory Commission or the Environmental Protection Agency, on the other hand, can have consequences that run into the billions of dollars and affect tens of thousands of lives. The aphorism that justice delayed is justice denied applies with particular force in cases with such far-reaching consequences.

What makes the failure of the Senate to act in this particular case especially difficult to justify is that the two nominees, John Roberts Jr. and Miguel Estrada, are lawyers of impeccable credentials. They have received the American Bar Association's highest rating, and neither has been the subject of ideological controversy. Yet they have been kept in a state of limbo for more than 13 months as pawns in a political game.

Thirty years ago, when I was privileged to serve in the Senate, nominees of their caliber would have been confirmed within weeks after their names had been submitted, regardless of party affiliation. In those days, a candidate's personal opinions were deemed irrelevant as long as he was qualified by training, experience and temperament to interpret and apply the law dispassionately. The confirmation process has changed dramatically for the worse since then.

Part of the blame no doubt lies with federal judges who have fanned ideological passions by stretching the Constitution to achieve social goals that were the proper concern of state and federal legislatures. But that's no excuse for the political atmosphere that has corrupted the confirmation process and slowed it to a crawl.

The Senate is failing to meet its clear-cut constitutional responsibility: to consider and vote on presidential nominations in a timely manner so that the essential business of the judiciary will not be impeded. The time has come for the leadership of both parties to rise above partisan bickering and adopt new procedures so that nominations do not continue to languish in the Judiciary Committee.

The decision to approve or reject a judicial nomination is too important to be made by other than the Senate acting as a whole. The rules should therefore be changed to allow the committee adequate time to investigate a nominee's qualifications and then

require it to submit the confirmation for a vote by the Senate within a few months of the date it received the nomination.

Other reforms come to mind, such as a ban on confirmation-hearing questions about a candidate's views on issues that might come before him in future litigation. But these can await another day. Procedures that would ensure a timely up-or-down vote on all judicial nominations is the most pressing need at this time. It ought to win the acceptance of all senators who understand the importance of a fully functioning judiciary.

Mr. Buckley, a former senator from New York, is a judge emeritus of the U.S. Court of Appeals for the D.C. Circuit.

---- INDEX REFERENCES ----

WASHINGTON POST

January 25, 2002

SECTION: EDITORIAL; Pg. A25

LENGTH: 1099 words

HEADLINE: Supreme Patience

BYLINE: Abner J. **Mikva**

BODY:

The Supreme Court has played different roles in the history of our country. Sometimes it has been a passive branch, resolving mostly private disputes and letting the political branches make and change public policy. Most of the time it has tried to avoid the "political thicket."

In 2000, however, it inserted itself into the granddaddy of all political disputes when it decided that Florida's electoral votes would be awarded to George Bush. While Bush v. Gore was an obvious attention-grabber, there have been others in which the current court has flexed its political muscles:

* It has imposed limits on what areas Congress can regulate.

* It has cut back substantially on any affirmative action programs that government agencies can conduct, even when legislatively authorized.

* And doubt continues to fester on whether the Constitution guarantees a woman's right to terminate a pregnancy.

What makes these court decisions so troublesome, albeit fascinating, is that most have been resolved 5 to 4. With three justices over age 70, speculation about a change in the court's delicate balance is unavoidable. What kind of person would President Bush nominate? And what kind of nominee would the Senate confirm? Suppose the Senate did not confirm anybody. Would that be deemed political conduct? Would that be a responsible exercise of the Senate's constitutional power? I think the answer to both questions is yes.

There is nothing magic about the number nine for the size of the Supreme Court. The Constitution does not suggest a number, and the first court was authorized to have six members. The authorized number has gone up and down during our history, usually for very political reasons. It went to 10 in 1863 and then was reduced to nine because Congress was angry at

President Andrew Johnson. In the 1930s when the court continued to strike down New Deal legislation, President Franklin D. Roosevelt threatened to increase the size of the court by one for every justice who was over age 70. The plan failed in passage, but "apostasy and death" caused the court to reverse its doctrinal direction.

Vacancies also have persisted when the Senate was unhappy with the particular nominee that the president sent up for confirmation. While sometimes the retiring justice has continued to serve until a successor was chosen, often the resignation was immediate or the vacancy occurred as a result of death. For example, a vacancy existed for three years because Congress was unhappy with President Lincoln's choices, and then with those of his successor. When Congress was unhappy with Lyndon B. Johnson's effort to promote Abe Fortas to chief justice, a vacancy persisted for more than a year.

The Constitution states that the president is to nominate justices and appoint them "by and with the advice and consent" of the Senate. While presidents seldom request the advice of the Senate in advance of their nominations, it has occurred. President Hoover wanted to appoint a westerner to fill a vacancy, but his ally, Sen. William Borah of Idaho, persuaded him to appoint Justice Benjamin Cardozo instead. President Clinton was discouraged from nominating Sen. George Mitchell at least in part by senators who thought it would be a political mistake.

There are more than a few occasions in which the Senate has exercised its political powers to help shape the makeup of the court. There are special reasons why the present political climate warrants such an action.

First, this president does not have the mandate of a national plurality. While the court did resolve the dispute about Florida's electoral votes, giving President Bush an electoral college majority, it could not alter the popular vote. Bush lost to Al Gore by more than 500,000 votes. Most of the other appointments the president will make are for finite terms, but his choice to fill a vacancy on the court -- a lifetime appointment -- probably would serve for many years after the people resolve this political anomaly and elect a president who wins the popular vote.

Second, the delicate balance of the court on fundamental issues makes even a single appointment of great moment. During the Warren Court years, when the justices made some fundamental changes in criminal justice, elections and the system of segregation in our public institutions, there were usually substantial majorities supporting the result. The Warren Court did not strike down that many congressional decisions. But seldom in its history has the court invalidated so many acts of Congress by 5 to 4 decisions as at present.

Still another reason that the political climate warrants Senate involvement is that the court itself made the final decision as to who should be **president.** That judgment raised many doubts about the legitimacy of the court's actions. There was gossip that at least one of the justices was upset by the consequences to the court of a Gore victory, and that one of the justices in the 5 to 4 majority was close to changing his vote. Conservative scholars who favored the result of the case

politically have nevertheless criticized the "equal protection" rationale the unsigned majority opinion provided for the decision. While the events of Sept. 11 have stilled much of the controversy about the manner in which the 2000 election was decided, there is still unhappiness, partisan and otherwise, about the court's intervention.

The appointment of Supreme Court justices is a shared responsibility. The Senate has a plenary power to advise and consent. This has never been perceived to be some kind of rubber-stamp function, and it has been used with substantive results on less compelling occasions.

This Supreme Court is in an activist mood. Each year yields a bumper crop of decisions that overrule or modify political choices made by Congress. If there are to be changes in its personnel, they ought to be made by a president who has a popular vote mandate. I think the Senate should not act on any Supreme Court vacancies that might occur until after the next presidential election. Changes in the existing delicate balance could put the very legitimacy of the court as an institution at risk. Other than the black robes and the high bench, that legitimacy is all that the court has going for it.

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