Testimony of

The Honorable Abner Mikva

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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.