Testimony of

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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. Such judicial independence was designed to insulate judges from political pressures and permit them to serve as a check on Congress and the President. Allowing the political branches to extract specific promises from judicial nominees could undermine 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.)

In addition to undermining judicial independence, the Senate's attempt to question judicial nominees about their political ideology would 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 inappropriate. 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 of 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 make it difficult for judges to simply follow ideology rather than law and precedent. First, appellate judges decide cases sitting in panels of three judges. 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 inordinate 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 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 largely 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. 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 false 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, these two judges worked so closely together 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 quickly appreciate 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.