Testimony of

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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. 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." Some of the information in my testimony today is based on that study.

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."

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." 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 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. Others have reached similar conclusions.

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. 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." 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.

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 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. 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. 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." 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 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." 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. 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."

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. There is a growing body of evidence in support of this conclusion. For instance, in one study women

who were heavy caffeine consumers were less convinced by the evidence in an article claiming that caffeine posed risks for women than were women who were low consumers of caffeine. Men, who had no directional goal with respect to the evaluation of the study, showed no such differential effects. 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. In short, "people are more likely to arrive at those conclusions that they want to arrive at."

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 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 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..."

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. In each case the NRC had followed procedures in its hearings that were set forth in the Administrative Procedure Act 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. 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." 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."

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. 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. 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 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."

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.

Under the Clean Air Act, EPA has been instructed by the Congress to set air quality standards "requisite to protect the public health." 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 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. 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."

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.

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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