Testimony of

Mr. Fred Fielding

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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.