Testimony of

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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 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 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 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 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 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 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 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 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.

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 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 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. 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.