

**COMMUNITY RIGHTS COUNSEL · DEFENDERS OF WILDLIFE  
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SIERRA CLUB · SOUTHERN UTAH WILDERNESS ALLIANCE  
U.S. PUBLIC INTEREST RESEARCH GROUP  
THE WILDERNESS SOCIETY**

September 23, 2002

The Honorable Charles E. Schumer, Chair  
Judiciary Subcommittee on  
Administrative Oversight and the Courts  
United States Senate  
Washington, DC 20510

RE: Hearing on "The DC Circuit: The Importance of Balance on the  
Nation's Second Highest Court."

Dear Senator Schumer:

On behalf of the more than one million members of the national environmental organizations listed above, we are writing to thank you for holding this important hearing on the importance of balance on the U.S. Court of Appeals for the District of Columbia Circuit.

In July 2001, many of us wrote to you and other members of the Senate Judiciary Committee urging careful scrutiny of the environmental record and views of nominees for lifetime positions on the federal judiciary. The judges appointed to the federal bench over the next few years will dramatically affect the level of public health and welfare and environmental protection in this country for several decades. We explained that environmental protections long thought secure are now in jeopardy in the federal courts. Certain federal judges have been too willing to place their own personal policy preferences above the intent of Congress as expressed in our landmark environmental statutes like the Clean Water Act and the Clean Air Act. A few more judges out of this mold will tip the balance in courts across the country and roll the clock back further on important national environmental protections.

These concerns are particularly important when it comes to appointments to the DC Circuit. The DC Circuit is empowered to hear most cases challenging environmental rulings and regulations issued by the Environmental Protection Agency (EPA), the Department of the Interior, and other executive branch agencies. This unique jurisdiction makes the court the second most powerful environmental court in the country, surpassed only by the Supreme Court.

Today, the DC Circuit is a deeply divided court. This divide is illustrated by the razor-thin margin by which the court declined to review a panel ruling in *American Trucking Association v. EPA*, 175 F.3d 1027 (1999), that struck down Clean Air Act protections against soot and smog promulgated by EPA to prevent an estimated 15,000 premature deaths each year. As the panel dissent pointed out, the Court's ruling ignored "the last half-century of Supreme Court nondelegation jurisprudence." Indeed, the panel was reversed in 2001 by a unanimous Supreme Court.

The DC Circuit is also an increasingly unreceptive forum for environmental plaintiffs. A recent empirical study conducted by Professors Christopher Schroeder and Robert Glicksman found that in the 1990's pro-industry claimants experienced a five-fold increase in their success in challenging EPA's scientific decision making. Over the same period environmental claimants saw their success rate decrease by 20%. (For more on these cases and these statistics see the enclosed chapter on the DC Circuit from a report entitled *Hostile Environment: How Activist Federal Judges Threaten Our Air, Water, and Land*).

With 4 vacancies on the twelve member DC Circuit, President Bush has a historic opportunity to shape this critical court. We have urged the President to honor his promise to nominate judges who will respect the constitutionally mandated judicial function of interpreting—rather than making—the law.

The Senate's constitutional advice and consent role is as important as the President's in filling vacancies in the third branch of government, the judiciary. We believe that, in carrying out that role, the Senate must ensure that judicial nominees are subject to the highest standard of scrutiny and, at a minimum, should be required to demonstrate the qualities of integrity, wisdom, fairness, compassion and judicial temperament. Accordingly, we urge you to vote to confirm only those nominees who:

1. Demonstrate a respect for the policy decisions made by elected representatives to protect the public health and welfare and our natural resources as reflected in our environmental laws;
2. Demonstrate superior qualifications for the position;
3. Bring an objective, balanced approach to decision-making; and
4. Demonstrate a commitment to protecting the rights of ordinary people and do not improperly elevate the interests of the powerful over those of individual citizens.

We also urge you to ensure that each nominee affirmatively establish his or her qualifications for the critical and esteemed position of federal judge. No President has a mandate to appoint to the federal courts judges who are or may be hostile to laws protecting the environment and the public's health and welfare. The mere absence of disqualifying evidence in a nominee's record should not constitute sufficient grounds for confirmation.

We strongly urge you to reject any nominee who would place his or her own personal policy preferences above the explicit Congressional mandates for protection embodied in our environmental laws. Thank you again for holding this timely and important hearing and for considering our views on the DC Circuit.

Sincerely,

Doug Kendall  
Executive Director  
Community Rights Counsel

William Snape  
Vice President of Law and Litigation  
Defenders of Wildlife

Martin Hayden  
Legislative Director  
Earthjustice

Beth Lowell  
Policy Analyst  
Endangered Species Coalition

John R. Bowman  
Legislative Counsel  
Environmental Defense

Richard Wiles  
Senior Vice President  
Environmental Working Group

Sara Zdeb  
Legislative Director  
Friends of the Earth

Kevin S. Curtis  
Vice President, Government Affairs  
National Environmental Trust

Alyssandra Campaigne  
Legislative Director  
Natural Resources Defense Council

Ted Morton  
Federal Policy Director  
Oceana

Karen Hopfl-Harris  
Legislative Director/Staff Attorney  
Environment and Health Program  
Physicians for Social Responsibility

Meg Maguire  
President  
Scenic America

Pat Gallagher  
Director, Sierra Club Environmental Law  
Program  
Sierra Club

Larry Young  
Executive Director  
Southern Utah Wilderness Alliance

Anna Aurilio  
Legislative Director  
U.S. Public Interest Research Group

Leslie Jones  
Staff Attorney  
The Wilderness Society