The Importance of the U.S. Court of Appeals for the D.C. Circuit

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Often considered the second most important court in the country after the Supreme Court, the U.S. Court of Appeals for the D.C. Circuit is responsible for resolving critically important cases involving the separation of powers, the role of government, the rights of federal officials, and the decisions of a vast array of administrative agencies. Two-thirds of the cases before the D.C. Circuit Court of Appeals involve the federal government, and a third are appeals from administrative agencies—far larger percentages compared to its sister circuits.[1] As a result, the D.C. Circuit is considered a truly "national court"[2] that has become a breeding ground for future Supreme Court justices.[3] More U.S. Supreme Court justices have come from the D.C. Circuit than any other circuit court of appeals, and current alumni on the Supreme Court include Chief Justice Roberts, and Justices Ginsburg, Scalia, and Thomas.

The Rise of the D.C. Circuit

After Congress established a discrete set of local courts for the District of Columbia in 1970, the D.C. Circuit became active in shaping the rules for the judicial review of administrative regulations. As former D.C. Judge Patricia Wald describes it, the court "leaped to the challenge . . . like flies to honey."[4] Adjudicating administrative disputes and cases involving the national government, the D.C. Circuit, according to Justice Ginsburg, "became specialists in the oversight of actions taken by the three and four letter federal agencies burgeoning in number and in business, and in separation of powers disputes."[5] The D.C. Circuit Court of Appeals, as a result, was transformed into the "natural

[1] *Id.* at 376-77.

[2] John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375 (2006).

[3] David A. Yalof, *Dress Rehearsal Politics and the Case of Earmarked Judicial Nominees*, 26 Cardozo L. Rev. 691, 698 (2005).

[4] Patricia M. Wald, *Thirty Years of Administrative Law in the D.C. Circuit*, (July 1, 1997), 11 AdLaw Bulletin No. 13 (1999).

[5] Ruth Bader Ginsburg, *Bicentennial Celebration of the District of Columbia Circuit*, 204 F.R.D. 499, 506-07 (2001).

repository for jurisdiction to review agency decisions," which in turn persuaded the Supreme Court to consider it to be a truly "national court," according to Chief Justice Roberts.[6]

Since the 1980s, the D.C. Circuit has become an increasingly conservative court,[7] and its current composition is dominated by Republican-appointed judges. Of the court's eight active judges, five were selected by Republican presidents, and four of the court's five senior judges are Republican-appointees. In February, David Sentelle, a Reagan-appointee, will also take senior status, leaving the D.C. Circuit with four of its eleven judgeships vacant. These vacancies not only inhibit the ability of the D.C. Circuit to decide the cases before it, but also suggest the possibility of altering the court's ideological tilt in the future.

The D.C. Circuit and Our Regulatory State

Over the past forty years, Congress has granted the D.C. Circuit (and/or the lower D.C. District Court) jurisdiction over an impressive array of federal programs. Nearly two-thirds of the D.C. Circuit's caseload is made up of agency appeals, and the Circuit is responsible for 36% of all federal agency appeals in the country.[8] "[M]ore and more the business of America is justice and equity, and that translates into regulation, and that translates into the D.C. Circuit," Justice Scalia has explained.[9] Congress has increased the D.C. Circuit's

[6] John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375 (2006).

[7] For a discussion of the D.C. Circuit's ideological leanings, see *The District of Columbia Circuit: The Importance of Balance on the Nation's Second Highest Court: Hearing Before the S. Subcomm. on Admin. Oversight and the Courts*, 107th Cong. 74 (2002) (statement of Michael H. Gottesman, Professor of Law, Georgetown University Law Center).

[8] Ginsburg, *supra* note 11, at 4; *see also* Patricia M. Wald, *supra* note 2. Judge Wald explains what this entails:

> The D.C. Circuit has reviewed administrative decisions barring servicemen from trying to correct their dishonorable discharges, setting the ground rules for proficiency training for lab technicians processing PAP smears, listing landfills as Superfund clean-up sites; we rejected an NLRB bar on American unions seeking the support of Japanese unions in refusing to handle nonunion cargo, and we overturned the President's attempt by Executive Order to bar the use of permanent replacements for economic strikers in companies with federal contracts. In former years, the court has nixed a gag rule on abortion advice by doctors at publicly-funded clinics as well as FDA's refusal to police the inefficient use of lethal injections in death penalty cases, all on administrative law grounds.

[9] Antonin Scalia, *Bicentennial Celebration of the District of Columbia Circuit*, 204 F.R.D. 499, 594 (2001).

importance by granting the court exclusive jurisdiction over numerous federal laws, including:

- Review of decisions and orders by the Federal Communications Commission (47 U.S.C. § 402(b));
- Review of decisions and orders by the Postal Regulatory Commission (39 U.S.C. § 3663);
- Challenges to nationwide standards adopted under the Clean Air Act (42 U.S.C. § 7607);
- Challenges to regulations issued under the Resource Conservation and Recovery Act (42 U.S.C. § 6976(a)(1));
- Review of regulations adopted under the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund) (42 U.S.C. § 9613);
- Challenges to national primary drinking water regulations (42 U.S.C. § 300j-7(a)(1));
- Review of habeas corpus decisions involving suspected alien terrorists (8 U.S.C. § 1226a);
- Review of designation as a "foreign terrorist organization" (8 U.S.C. § 1189(b)(1));
- Rules of "general and national applicability" promulgated by the Federal Energy Regulatory Commission (15 U.S.C. § 766(c));
- Federal Election Commission determinations as to which presidential candidates are eligible for Federal money (26 U.S.C. §§ 9011(a) and 9041(a)).
- Challenges to *any* agency regulation promulgated in violation of the Government in the Sunshine Act (5 U.S.C. § 552b(g), (h)).

While many federal laws allow parties the option of seeking judicial review of agency action in the circuit in which they reside, parties frequently select the D.C. Circuit because it has become so specialized in the area of administrative law.[10] For example, this option is available to review the final regulations or orders of the Food and Drug Administration (21 U.S.C. § 360), decisions by the National Labor Relations Board (29 U.S.C. § 160(f)), and standards promulgated by the Occupational Safety and Health Administration (29 U.S.C. § 665(f)).[11]

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[10] Ginsburg, *supra* note 11, at 4.

[11] *See also* 28 U.S.C. §§ 1391, 2343.

In recent years, the ideological imbalance of the D.C. Circuit has come into sharper focus in the administrative law context. The court has become more likely than its sister circuits to reverse an agency's decision. While the other circuit courts reverse agency determinations roughly 15% of the time, the D.C. Circuit's reversal rate is nearly 23%.[12] In fact, since the Supreme Court's 1984 decision in *Chevron v. NRDC* calling for greater judicial deference to agency interpretations,[13] the D.C. Circuit's reversal rate actually has increased as the other circuits' rates have declined. As a result of recent decisions that have weakened environmental protections, overturned carefully-considered cigarette warning label requirements, and rolled back the reform of the Dodd-Frank Wall Street reform law, the D.C. Circuit has effectively "intimidated, undermined and demoralized the regulatory apparatus."[14] Filling the vacancies on the court could go a long way to restoring the ability of the federal government to respond to health and safety concerns that impact every American.

The D.C. Circuit and the EPA

Nowhere is the D.C. Circuit's impact on public policy seen with greater detail than in its hostility toward any manner of environmental regulation. Decisions involving the Environmental Protection Agency (EPA) have become especially contentious—and ideologically partisan. From 1970 through 2002, Democratic appointees supported EPA decisions 64% of the time, while their Republican counterparts regularly sided with industry challengers, deciding in favor of the EPA only 46% of the time.[15]

This sort of ideological partisanship was apparent in a recent 2-1 anti-environment decision striking down the EPA's "Transport Rule" intended

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[12] Ginsburg, *supra* note 11, at 4 (citing statistics from the Administrative Office of the U.S. Courts).

[13] 467 U.S. 837 (1984).

[14] Steven Pearlstein, *Regulatory Failure? Blame the D.C. Circuit*, Wash. Post, Apr. 9, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/04/08/AR2010040805699.html.

[15] Cass R. Sunstein et. al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 322 (2004).

to control air pollution that crosses state lines.[16] Despite citing no evidence to support his concerns, Bush-appointee Judge Kavanaugh found that the Transport Rule exceeded the EPA's authority on the Clean Air Act on two grounds. First, he claimed that the Transport Rule could technically force states to cut more emissions than they contributed to downwind states, even though the EPA had concluded such a scenario was unlikely.[17] Even though the states had largely failed to cooperate, he also invoked cooperative federalism and criticized the EPA for forcing states to adopt federal guidelines without first affording them the opportunity to implement their own plans.[18]

In a powerful dissent, Clinton-appointee Judge Judith Rogers explained that the decision was "a redesign of Congress's visions of cooperative federalism between the States and the federal government in implementing the [Clean Air Act] based on the court's own notions of absurdity and logic that are unsupported by the factual record, and tramping on this court's precedent which the [EPA] was entitled to rely in developing the Transport Rule . . . ."[19] The result, she concluded, is an "endorsement of a 'maximum delay' strategy for regulated entities, rewarding states and industry for cloaking their objections throughout years of administrative rulemaking . . . ."[20]

The D.C. Circuit and Wall Street Reform

Since the creation of the Securities and Exchange Commission (SEC) during the Great Depression, the question of whether a company's proxy materials must permit investors to put forward their own nominees to the corporate board of

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[16] EME Homer City Generation v. EPA, No. 11-1302 at 50 (D.C. Cir., decided Aug. 21, 2012).

[17] E. Sebastian Arduengo, *High-Profile Federal Appeals Court Shows Appetite for Striking Longstanding Regulations*, ACSblog (Oct. 15, 2012), www.acslaw.org/acsblog/high-profile-federal-appeals-court-shows-appetite-for-striking-longstanding-regulations.

[18] Steven Pearlstein, *The Judicial Jihad Against the Regulatory State*, Wash. Post, Oct. 13, 2012, www.washingtonpost.com/business/the-judicial-jihad-against-the-regulatory-state/2012/10/12/d9eb080c-13ca-11e2-bf18-a8a596df4bee_story.html.

[19] EME Homer City Generation v. EPA, No. 11-1302 (D.C. Cir., decided Aug. 21, 2012) (Rogers. J., dissenting, at 1).

[20] *Id.* at 43.

directors has remained an open question. According to the SEC, a proxy access rule would significantly improve the ability of shareholders to evaluate their own nominees in the same matter they evaluate nominees put forward by corporate management.[21] While the SEC has attempted multiple times to issue rules regulating proxy access, corporate America has typically responded "about as warmly as American patriots welcomed King George III's proposals for quartering his Redcoats in their homes."[22] In the aftermath of the 2008 financial crisis and the passage of the Dodd-Frank Wall Street reform law, however, Congress explicitly authorized the SEC to implement a proxy access rule in order to make it easier for shareholders to evaluate those running their companies.

While no law formally requires the SEC to engage in a formal cost-benefit analysis as part of its regulatory responsibilities, Reagan-appointee Judge Douglas Ginsburg, joined by two fellow Republican-appointees, harshly criticized the SEC for its failure to "adequately to assess the economic effects" of the rule.[23] Without a hint of deference to the SEC's determination, the court uncritically accepted facts presented by the corporate petitioners, while accusing the SEC of relying on inadequate empirical data and slipshod economic analysis.[24] Striking down the rule, the D.C. Circuit added one final insult, calling the proxy access rule "unutterably mindless."[25] The end result is that the SEC has been forced by the D.C. Circuit to redo years of regulatory legwork on account of the court's unwillingness to defer to the SEC's considered expertise in financial economics.

The D.C. Circuit and Deceptive Advertising

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[21] Facilitating Shareholder Director Nominations, 75 Fed. Reg. at 56,758.

[22] Bruce R. Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis* (November 15, 2012), 30 Yale Journal on Regulation 2, 16 (2013 Forthcoming).

[23] Business Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011); *see also* GAO Report to Congressional Addressees, DODD-FRANK ACT REGULATIONS Implementation Could Benefit from Additional Analyses and Coordination, at 9 (Nov. 2011).

[24] Kraus & Raso, *supra* note 24, at 22.

[25] Business Roundtable v. SEC, 647 F.3d 1144, 1156 (D.C. Cir. 2011).

In another partisan 2-1 split, the D.C. Circuit misapplied the First Amendment in order to hold that cigarette warning labels proposed by the Food and Drug Administration (FDA) ran afoul of the First Amendment's free speech protections. The FDA had proposed a series of graphically-disturbing warning labels similar to those seen in other countries as an effective method to reduce the incidence of smoking.

While the conservative majority claimed only to be rejecting the specific proposal put forward by the FDA, their hostility to any government efforts to educate and warn consumers about smoking was obvious.[26] Bush-appointee Judge Janice Rogers Brown went so far as to question whether the government had any "substantial interest in discouraging consumers from purchasing a lawful product, even one that has been conclusively linked to adverse health consequences."[27] Judge Brown begrudgingly "assumed" that the FDA had a substantial interest here, but she concluded that there was no evidence to suggest the FDA's warning labels would have any effect in actually reducing smoking. She completely disregarded the Supreme Court's prior holding that the government need only rely on experience and common sense in order to restrict *misleading* speech.[28] As a result, Judge Brown, along with conservative Judge A. Raymond Randolph, found that the warning labels burdened the First Amendment rights of tobacco companies.

Writing in dissent, Clinton-appointee Judge Judith Rogers explained that the court applied the wrong level of constitutional scrutiny. More important, the court had disregarded both "the tobacco companies' history of deceptive advertising" and the government's "interest of paramount importance in effectively conveying information about the health risks of smoking to adolescent would-be smokers and other consumers."[29]

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[26] *See* Garrett Epps, *Does Cigarette Marketing Count as Free Speech?*, The Atlantic (Aug. 29, 2012), www.theatlantic.com/national/archive/2012/08/does-cigarette-marketing-count-as-free-speech/261680/ ("In the new world of the First Amendment, the claim that smoking is good is an 'ideology,' and government attempts to combat this public-health scourge are a kind of politically correct liberal propaganda.")

[27] *Id.* at 1219 n.13.

[28] *Id.* at 1227 (Rogers, J., dissenting).

[29] *Id.* at 1222, 1237.

The D.C. Circuit Flouts Supreme Court Precedent on National Security

In 2008, the Supreme Court held in *Boumediene v. Bush* that detainees housed in Guantánamo had a constitutional right to habeas corpus and directed the D.C. Circuit to conduct a "meaningful review of both the cause for detention and the Executive's power to detain."[30] However, the conservative members of the D.C. Circuit effectively negated *Boumediene*'s promise of robust review, and moreover, they directly took umbrage at the Supreme Court for promising any review in the first place.[31]

Quoting *The Great Gatsby*, conservative Judge A. Raymond Randolph has suggested that the Supreme Court "were careless people. . . . They smashed things up . . . and let other people clean up the mess they had made."[32] His fellow conservative, Judge Laurence Silberman called the D.C. Circuit's habeas jurisprudence "a charade prompted by the Supreme Court's defiant—if only theoretical—assertion of judicial supremacy . . . ."[33] According to national security law scholar Stephen Vladeck, the D.C. Circuit's analysis and holdings are in profound tension with the Supreme Court's prior holdings and reflect a "fundamental unwillingness" by the court's conservatives "to take seriously the implications of the Supreme Court's analysis."[34]

The D.C. Circuit's behavior and its casual disregard for the instructions of the Supreme Court are unprecedented. Supreme Court reporter Linda Greenhouse has argued that never has "such open and sustained rudeness toward the Supreme Court" by members of the lower federal judiciary been

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[30] Boumediene v. Bush 553 U.S. 723, 783 (2008).

[31] Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 Seton Hall L. Rev. 1451 (2011).

[32] Editorial, *A Right Without a Remedy*, N.Y. Times, Mar. 1, 2011, at A26 (quoting Hon. A. Raymond Randolph, *Joseph Story Distinguished Lecture: The Guantanamo Mess*, Address Delivered to the Heritage Found. (Oct. 20, 2010), *available at* http://www.heritage.org/Events/2010/10/Guantanamo-Mess (comparing the Justices in the Boumediene majority to characters in F. Scott Fitzgerald's *The Great Gatsby*).

[33] Esmail v. Obama, 639 F.3d 1075, 1078 (D.C. Cir. 2011).

[34] Vladeck, *supra* note 36, at 1488.

seen.[35] Constitutional scholar Eric Freedman has opined that if Southern federal judges "had behaved after *Brown* as many of the judges of the D.C. Circuit had behaved after *Boumediene*, school desegregation would have been delayed for agonizing additional decades."[36]

The D.C. Circuit's Vacancy Crisis

As a result of the D.C. Circuit's importance both as a stepping stone to the Supreme Court and as a court with much influence on government affairs, it has become increasingly difficult to fill vacancies on the court. Currently, three of the D.C. Circuit's eleven seats remain vacant, and another will become vacant on February 12, 2013. Two of those seats are some of the oldest vacancies in the federal judiciary: the seat formerly occupied by Chief Justice Roberts has remained empty since September 29, 2005; another seat has remained vacant since November 1, 2008. The third D.C. Circuit vacancy has gone without a nominee since it arose on October 14, 2011.

The relatively low caseload in absolute numbers of individual appellate judges on the D.C. Circuit is frequently cited as one reason for the hesitation in prioritizing filling the vacancies on the Circuit.[37] In 2007, for example, the Senate went so far as to shift one of the D.C. Circuit's allocated seats to the overworked Ninth Circuit.[38] While the 168 pending cases before each of the

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[35] Linda Greenhouse, *Goodbye to Gitmo*, N.Y. Times, May 16, 2012, http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/.

[36] *Id.*

[37] In December 2011, Senator Scott Brown (D-MA) explained his support for filibustering D.C. Circuit nominee Caitlin Halligan by citing the Circuit's "comparatively small caseload" and the need to "focus on filling judicial vacancies in areas of the country that have the greatest needs," emphasizing the First Circuit which covers Massachusetts. *See* Post, Caitlin Halligan and Scott Brown, *Monday's Mini-Report*, Wash. Monthly (Dec. 19, 2011 6:24 PM), http://www.washingtonmonthly.com/political-animal/2011_12/mondays_minireport_31034202.php.

However, this argument is somewhat disingenuous. In 2005, the Republican-controlled Senate confirmed Thomas Griffith to the D.C. Circuit at a time when the court had fewer vacancies and each active judge was responsible for 133 pending cases. *See* Adam Shah, Media Matters, *MYTH: The D.C. Circuit's Case Load Is So Low It Does Not Need Another Judge* (Dec. 2, 2011), http://mediamatters.org/research/2011/12/02/myths-and-falsehoods-about-judicial-nominee-cai/159434#7.

[38] Court Security Improvement Act of 2007, S. 378, 110th Cong. (2007); *see also* Press Release, Senate Approves Additional Judgeship to Ninth Circuit, Sen. Dianne Feinstein's Office (Dec. 18, 2007), http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=ef06cb2c-9a35-c5bb-225c-4a31dc2b7dcc

eight active D.C. Circuit judges is indeed low compared to the other circuits, numbers alone do not illustrate how the Circuit's long-standing vacancies have impacted the court's work.

First and foremost, the cases handled by the D.C. Circuit are more complicated than the average case in other circuits, and more importantly, are often essential to the work of government.[39] Second, the low number of active judges has made it increasingly difficult—if not impossible—for the Circuit to grant rehearing en banc.[40] With only eight active judges, when a panel of three judges issues a unanimous decision, *all* of the other active judges must vote in favor of a rehearing. As a result, the internal error-correcting function of en banc review has been lost, and three-judge panels from the D.C. Circuit are almost always the final word on the cases discussed above.

While numbers do not tell the full story, the fact remains that the D.C. Circuit has more vacancies than any other circuit court of appeals, including the Ninth Circuit, and will soon have more. During his first term in office, President Obama attempted to fill the court's empty seats. Currently, Caitlin Halligan and Sri Srinivasan have been nominated by President Obama to fill the two oldest vacancies on the D.C. Circuit. Unfortunately, Halligan's nomination faced obstruction in the Senate. First nominated to the seat in September 2010, she has been renominated three additional times, on January 5, 2011; June 11, 2012; and September 19, 2012. Despite a letter of bipartisan support signed by conservative Miguel Estrada and twenty other prominent attorneys lauding

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("The Senate has recognized that it makes sense to take a judgeship from where it is needed least, and put it in California where it is needed most," Sen. Feinstein explained.)

[39] *See generally*, Ed Whelan, *Why the Push on Halligan?*, Nat'l Rev. Online (Feb. 11, 2011), http://www.nationalreview.com/bench-memos/258719/why-push-halligan-ed-whelan#. *See also The District of Columbia Circuit: The Importance of Balance on the Nation's Second Highest Court: Hearing Before the S. Subcomm. on Admin. Oversight and the Courts*, 107th Cong. 2 (2002) (statement of Senator Charles Schumer).

[40] *E.g.*, *Is the D.C. Circuit Too Small to Go En Banc?*, D.C. Circuit Review (May 29, 2012), http://dccircuitreview.com/2012/05/29/is-the-d-c-circuit-too-small-to-go-en-banc/. *Cf.*, Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 Geo. J. L. & Pub. Pol'y 1, 5 (2012), www.law.georgetown.edu/academics/law-journals/gjlpp/upload/zs800112000001.PDF (Judge Ginsburg argues that "the infrequency with which our court convenes en banc to rehear a panel decision is both a cause and an effect of institutional health and harmony.").

her as someone with "an ideal judicial temperament,"[41] Halligan has been unable to receive a floor vote on her nomination. Obama's second nominee for the Circuit, Sri Srinivasan, also had bipartisan support, but his nomination has not been without criticism either.[42]

An Opportunity for Change

As President Obama heads into his fifth year in office, he does so without having made any impact on the composition of the D.C. Circuit Court of Appeals. The importance of the D.C. Circuit—and its position as a potential stepping stone to membership on the Supreme Court—is certainly one reason to carefully scrutinize potential nominees, but the court has gone years without having its vacancies filled. All the while, the D.C. Circuit stands undermanned and ill-prepared even as it seems eager to eviscerate constitutional law and the health and safety of Americans along with it.

[41] Letter to Chairman Leahy and Senator Grassley (Mar. 4, 2011) (available at http://www.judgingtheenvironment.org/library/letters/halligan-030411-jointletter.pdf).

[42] Mike Hall, AFL-CIO, *Trumka: Questions Remain About Appeals Court Nominee Srinivasan* (June 12, 2012), http://www.aflcio.org/Blog/Political-Action-Legislation/Trumka-Questions-Remain-About-Appeals-Court-Nominee-Srinivasan.