The D.C. Circuit Is Hardly in Crisis

The Court of Appeals for the D.C. Circuit hears a disproportionate share of cases of national importance, including the lion's share of challenges to federal environmental regulations. Thus it's no surprise it has played a prominent role in the long-running judicial nominations drama and often takes center stage in debates over regulatory policy.

Ideological partisans have made the D.C. Circuit a battleground in nomination fights. The first appellate nominee ever filibustered successfully was a Bush D.C. Circuit nominee, Miguel Estrada. President Obama had a D.C. Circuit nominee blocked as well.


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Likewise, having four empty seats on the D.C. Circuit is not unprecedented. There were four vacant seats on the court a decade ago. There are six senior judges still hearing cases now, however, whereas there were only two in 2003. Perhaps this explains why, despite a slight increase in the Court's caseload, justice has not lagged. The amount of time it takes the D.C. Circuit to decide a case has declined slightly over the past decade, as have the number of written opinions issued per active judge. The vacancies should be filled expeditiously, which will require the administration to be more aggressive in putting forth nominees, but the D.C. Circuit is hardly in crisis.

Progressive activists have suggested that without more judges the D.C. Circuit could fall prey to an aggressive anti-regulatory agenda on the court. The D.C. Circuit has become a "hotbed of activist judges" according to the American Constitution Society where, according to *Washington Post* columnist Steven Pearlstein, "a new breed of activist judges are waging a determined and largely successful war on federal regulatory agencies." Unlike concern for judicial vacancies, fears of an ideologically skewed D.C. Circuit are unfounded.

Contrary to some claims, the D.C. Circuit has not become more hostile to regulations than in the past. Consider the makeup of the court. If the party affiliations of nominating presidents is the proper measure of balance, the D.C. Circuit is more "balanced" than it has been for much of the past decade. There are currently four Republican nominees and three Democratic nominees on the court. Yet at the end of 2005, the split was 6–3 and in 2006 it was 7–3.

More revealing than the partisan makeup of the court is the substance of its opinions. While the court has invalidated a handful of prominent regulatory initiatives, such as the EPA's Cross-State Air Pollution Rule, it has upheld plenty of others, including EPA's endangerment finding and the first round of regulations controlling emissions of greenhouse gases under the Clean Air Act. Restrictive standing, long the bête noir of environmental litigants, has also been used to defend legally questionable EPA rules. While ideological splits are sometimes visible, in most regulatory cases the court speaks with one voice.

The Clean Air Act is responsible for a substantial proportion of environmental litigation in the D.C. Circuit, as it will be for years to come. The CAA is the broadest environmental statute on the books, imposes continuing obligations on all levels of government, and is the source of EPA authority over greenhouse gases. The Obama EPA was no doubt disappointed when a divided D.C. Circuit panel struck down the "good neighbor" rule, but this decision is hardly representative. The D.C. Circuit has heard several dozen CAA cases since 2000, with EPA prevailing about half the time.

While the Obama administration has had its share of losses, the Obama EPA's decisions have fared slightly better than those of the Bush EPA. In addition to the prior administration's effort to address interstate air pollution, the D.C. Circuit also struck down the Bush EPA's mercury emission regulations and efforts to reform New Source Review — all of which were lambasted by environmentalists as overly lax. At the same time, environmentalist litigants and others seeking more stringent application of the CAA have prevailed against the agency at a higher rate than those seeking regulatory relief. This is hardly what one would expect from an ideologically oriented, anti-regulatory court.

While not particularly hostile to regulation, the D.C. Circuit has a well-deserved reputation for subjecting agency action to exacting scrutiny. Much of what the D.C. Circuit does involves no more than questioning whether agency actions conform with relevant statutory requirements. In many cases, this is enough to set aside agency action. As D.C. Circuit Judge David Tatel explained in a 2009 speech to the Environmental Law Institute, "You'd be surprised how often agencies don't seem to have given their authorizing statutes so much as a quick skim."

Agency officials no doubt chafe against judicial review when it prevents them from adopting desired polices, but it's a mistake to confuse active judicial review with "judicial activism" or an anti-regulatory bias. The D.C. Circuit has long been a faithful steward of administrative law and there is no reason to believe its position is under threat.

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