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THE BEHAVIOR OF FEDERAL JUDGES A VIEW FROM THE D.C. CIRCUIT
In this short essay, I reexamine the authors' analyses of dissent rate and ideological influence as applied to the United States Court of Appeals for the District of Columbia Circuit.

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JUD -- Judicial Management, Process & Selection

A federal judge is perhaps the least qualified professional to shed light on a book about the behavior of federal judges. The authors of The Behavior of Federal Judges [1] are a law professor steeped in the quantitative methods of contemporary social science, an economist who has long studied legal institutions, and perhaps the only federal judge competent to collaborate with them as an equal on a book subtitled A Theoretical and Empirical Study of Rational Choice. In attempting to comment upon their work I, as a worker bee of the federal judiciary, am relegated to anecdotal and crude quantitative observations that cannot possibly refute, or even correct, any of the authors' important statistical findings. It may be possible, however, to illuminate two of the more remote corners of the authors' edifice.

The United States Court of Appeals for the District of Columbia Circuit has been a very collegial court for the past 20 years. [2] I was struck, therefore, by the authors' finding that this court, of the 12 courts of appeals ***110** they studied, [3] had the second-highest "dissent rate," 4.6 percent, over the period of 1990-2007 for cases decided on the merits. [4] Only the judges of the notoriously factious Sixth Circuit [5] dissented more often at 4.8 percent. [6] By contrast, the Eleventh Circuit had the lowest dissent rate at 1.0 percent. [7] I was struck, too, by the authors finding a "significant ideological influence on court of appeals decisions," [8] but thAT FINDING IS NOT SPECific to the d.c. circuit.

I was surprised by the high dissent rate in the D.C. Circuit because I was under the impression that the high degree of collegiality here obviates any need or desire to dissent if common ground can be found. [9] Consider the conferences we hold immediately after oral argument: Unlike the Supreme Court and some other courts of appeals, [10] the judges here do not simply announce their views seriatim but rather discuss the issues and, if they disagree initially, reason together in an effort to resolve or at least to narrow those differences. [11] From time to time a judge will say that, although he is not convinced his two colleagues are right, he will not dissent because the issue is not of importance to the path of the law or, more often, that he will withhold judgment in the hope the opinion will be written in a manner that makes it possible for him to sign on. [12]

My unquantified view of collegiality in the D.C. Circuit is not inconsistent with the authors' more formal model of a judge's decision to dissent. They analyze the decision to dissent in terms of benefits and costs: Benefits of dissenting include promotion of the judge's view of what the law is or should be, greater scrutiny of the majority's position by the Congress and the Supreme Court, and any associated boost to the judge's reputation; [13] costs include the work of writing the dissent and the work imposed upon the majority to respond. [14] A judge benefits less from dissenting if his colleagues are willing to consider his legal views and perhaps adopt at least some of them in the opinion, and he in turn will be less inclined to accept the costs of dissenting upon

such a show of courtesy from his colleagues. The unwelcome distinction of having the second-highest dissent rate among the courts of appeals struck me, therefore, as a surprise warranting a closer look at the authors' calculus of dissent.

* * *

The work of the D.C. Circuit is, as the authors acknowledge, different from that of the other courts of appeals in a manner I believe highly relevant to their inquiry. [15] For at least the 27 years I have been on the court, about one-third of the cases have involved a challenge to the validity, substantive or procedural, of an action taken by a federal administrative agency. [16] A significant percentage of those challenges is aimed at regulations promulgated pursuant to the Administrative Procedure Act and whatever substantive statute(s) the agency is charged with implementing. In such a case, the administrative record may run to many thousands of pages, the joint appendix filed with the briefs may fill a 10-ream box, and briefs may be submitted by several parties on each side. Due to their complexity, I estimate these cases account for at least two-thirds and in some years perhaps three-fourths of the work of the court; by contrast, complex agency cases are a very modest share of the work in the 11 federal courts of appeals outside Washington. [17]

The D.C. Circuit is also unusual in ***111** that it has but one place of holding court, and it is unique among the 12 circuits studied in that all the judges have their only chambers in that one place. Although the court is authorized to have 11 judges, and for some years was authorized for 12, there is almost always at least one vacancy (and often several) due to the time it takes to get a new judge nominated and confirmed; it is fair, therefore, to think of the court as composed of just 10 judges. [18] The modest number of judges means each judge sits frequently with each of his or her colleagues. [19] Unlike many other circuits, we do not invite judges from other circuits or even from the one district court within the D.C. Circuit to sit with us. [20] Professional interaction among the judges is therefore frequent and is supplemented each year by a few purely social gatherings of the judges and a dinner for the “court family” of judges and their spouses.

In such a small court, the heightened propensity of one or two judges to dissent can have a significant effect upon the overall dissent rate. This is reflected, though not made express, in the data from which the authors calculated our dissent rate.

Looking at the dissent rate year by year, [21] I found a significant drop off beginning in 1997, followed by relatively level and much lower rates from 1998 to 2007. Indeed, the average dissent rate in the first eight years of the study period (1990-97) was 5.5 percent, whereas it was only 3.6 percent for the next 10 years (1998-2007). Upon closer inspection, I noticed that 20 percent of the dissents in the entire period were filed by two judges; one left the court in July 1994, the other in late 1999. [22] But for the dissents of those two judges, the dissent rate for the first eight years would have been 3.9 percent, and the rate for the overall 18-year period covered by the authors would have been 3.7 percent instead of 4.6 percent. Without the contribution of those two judges, the D.C. Circuit's dissent rate would drop from the second to the fourth-highest of the courts of appeals. [23]

When the first of the two frequent dissenters left the court, it had a reputation for being contentious; a number of local newspaper gossip columns had run articles reporting rumors of bad blood among the judges. [24] At that point, however, Harry Edwards became the new chief judge and made it a priority to restore collegiality among the judges; that he did with remarkable success, and his efforts have been continued by the three chief judges since. His becoming chief judge marked the end of the court's practice of seating visiting judges. In relatively short order, the number of times the full court sat en banc to rehear a case previously decided by a panel of three judges dropped significantly: The number of rehearings en banc averaged six per year in the 1980s, [25] three in the 1990s, [26] and less than one in the first decade since. [27] In my view, these declining numbers reflect in part the increasing level of mutual trust and respect among the judges.

Why then a dissent rate of even 3.7 percent when excluding the two judges who dissented much more than any others? And, to return to the second topic I mentioned at the outset, what should we make of the “significant ideological influence on court of

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appeals decisions" the authors found? [28] Insight into both questions can be found in a 2001 study by Professor William Jordan that, curiously, goes unmentioned among the otherwise comprehensive citations in The Behavior of Federal Judges.

* * *

Professor Jordan examined all the cases from 1985 through 1995 in which the D.C. Circuit reversed a rulemaking decision of the Environmental Protection Agency. [29] He identified 133 issues decided in those 18 cases, recognizing that "when courts are reviewing complex agency rules, the cases involve far too many issues to allow a characterization based upon whether there is a remand or reversal on only one or a few of the issues at stake, or based upon whether one challenger achieved a remand but another did not." [30]

For the same reason, a dissent in a complex agency case may be ill- ***112** suited to casual characterization. Suppose, for example, a panel unanimously upholds the EPA against all challenges to the substance of its regulation but divides, two to one, in favor of remanding the case for the agency to correct a minor procedural deficiency. Professor Jordan would capture the complexity of such a case by examining each issue; by contrast, Epstein et al. would suppress that complexity by characterizing the case as a whole. Epstein et al. do not distinguish between a deep dissent and a minor disagreement, or between a "conservative" reversal of an EPA rule based upon its substantive unreasonableness and a "liberal" disposition that upholds the rule in substance but remands it solely for the agency to fix a minor procedural deficiency. Indeed, the court might even deny the challenger's request that the rule be vacated while the agency cures the deficiency because the court is confident the agency will be able to support the rule on remand. The result, particularly in the D.C. Circuit, is to overstate the degree of disagreement and to see ideology where there is none.

Professor Jordan added granularity in a second respect. Rather than code each judge's vote on each issue (not case) as "conservative" or "liberal," he coded each judge's vote on each issue as either (1) pro-environment or pro-industry, and as either (2) pro-agency or anti-agency. [31] The former goes to the judge's policy view "with respect to regulatory burdens," [32] while the latter goes to his jurisprudential view "of agency functioning and the relationship between courts and agencies." [33] Because the D.C. Circuit's work is so heavily weighted toward challenges to rules promulgated by administrative agencies, a judge's "ideology" with respect to the proper relationship between agency and court may be a good deal more meaningful than his "ideology" in the sense of policy preferences. [34]

Professor Jordan found little evidence of ideological voting according to environmental or industry preference. Of the eight judges studied, only Judge Buckley and Judge Williams voted, consistent with expectation, at a higher than average rate for, respectively, environmental and industry interests. [35] Even this finding of ideological voting by two judges came with a caution: Professor Jordan (like the current authors) [36] expected Judge Williams to be pro-industry based upon his appointment by a Republican president but expected Judge Buckley to be pro-environment based upon his votes as a Senator and despite his appointment by a Republican president. [37] Epstein et al. acknowledge that one drawback of their coding the ex ante ideology of a judge based upon the political party of the appointing president is "it assumes all Republican presidents are conservative-and uniformly so-and all Democratic presidents are uniformly liberal." [38] So, too, with judges: Some judges appointed by Republican presidents are not conservative, some judges appointed by Democratic presidents are not liberal, and no judge is always one or the other.

Professor Jordan found no evidence of predictable, i.e., ideological, voting for or against agency interests. As one would expect if the judges are following the legally correct standards of review, all eight D.C. Circuit judges in Professor Jordan's study tended to favor the agency's positions, with a frequency ranging from 58 to 84 percent, [39] and there was no discernible pattern based upon the party of the appointing president. [40] When Professor Jordan focused solely upon issues that were decided at the second step of the Chevron [41] analysis, i.e., "decisions in which the court appeared to find ambiguity in the statute and to

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review the agency's position under a 'reasonableness' standard" [42] -and that raised significant opportunities to affect policy, the results were even more stark: Every judge voted to defer to the agency on every one of the 82 issues in the set. [43] These results suggest the overriding ideology in the D.C. Circuit is that of agency deference, not policy preference. Indeed, Judge Posner reached just that conclusion in a 1983 article based upon his analysis of the court's opinions, without the benefit of statistical methods by which to test his insight. [44]

It is no small consolation to see the D.C. Circuit absolved-yet again-of the charge, so often levied in the vacuous but vociferous political debates over the confirmation of a new judge, that the court is a political partisan.

Footnotes

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1 Lee Epstein, William M. Landes, & Richard A. Posner, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (Cambridge, MA: Harvard University Press 2013) [hereinafter Epstein et al.].

2 My service as a judge on the D.C. Circuit began in 1986. Since 2011, I have continued to serve after taking senior status.

3 The authors exclude the Federal Circuit from their analysis because "its case mixture is so different from that of the other courts of appeals." Id. at 15.

4 Id. at 265 tbl. 6.3.

5 See, e.g., Adam Liptak, Weighing the Place of a Judge in a Club of 600 White Men, N.Y. Times, May 17, 2011, at A16; R. Jeffrey Smith, The Politics of the Federal Bench, Wash. Post, Dec. 8, 2008, at A1; Adam Liptak, Order Lacking on a Court: U.S. Appellate Judges in Cincinnati Spar in Public, N.Y. Times, Aug. 12, 2003, at A10.

6 Epstein et al., supra n. 1, at 265 tbl. 6.3.

7 Id.

8 Id. at 199.

9 See, e.g., Lily Henning, The Edwards Treatment, NAT'L L.J., Nov. 21, 2005 ("[Chief Judge Harry] Edwards is widely recognized for returning civility to the D.C. Circuit, resulting in fewer dissents, fewer en bancs, and less sniping at colleagues in written opinions"); Editorial, John Roberts's Record, Wash. Post, July 25, 2005, at A18. ("The D.C. Circuit is among the more collegial federal appellate courts in the nation. Despite a broad political spectrum among its judges, dissents are rare. Its judges generally work far harder than do the justices to achieve consensus.")

10 See Epstein et al., supra n. 1, at 306-07 (describing conduct of conference in the Supreme Court and in some courts of appeals).

11 Chief Justice Rehnquist recalled in his book on the Supreme Court: "When I first went on the Court, I was both surprised and disappointed at how little interplay there was between the various justices during the process of conferring on a case. Each would state his views, and a junior justice would express agreement or disagreement with views expressed by a justice senior to him earlier in the discussion .... I don't doubt that courts traditionally consisting of three judges, such as the federal courts of appeals, can be much more relaxed and informal in their discussion of a case....But my years on the Court have convinced me that the true purpose of the conference discussion...is not to persuade one's colleagues..., but instead, by hearing each justice express his own views, to determine therefrom the view of the majority of the Court." William H. Rehnquist, THE SUPREME COURT 254-55, 258 (New York, NY: Random House 2002).

12 The Federal Judicial Center strikes a similar note in its advice to judges: "Judges generally should not write dissenting opinions when the principle at issue is settled and the decision has little significance outside the specific case....The issue should be significant enough that the judge's 'fever is aroused,' as one judge said, but the motivation for writing a dissent should be to further the development

of the law rather than to vent personal feelings." FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 29 (2d ed., 2013), http://www.fjc.gov/public/pdf.nsf/lookup/judicial-writing-manual-2d-fjc-2013.pdf/$file/judicial-writing-manual-2d-fjc-2013.pdf.

13 Epstein et al., supra n. 1, at 256-57.

14 "The effort involved in [making] revisions, and resentment at criticism by the dissenting judge, may impose a collegiality cost on [the dissenter] by making him less well liked by his colleagues, which may make it harder for him to persuade other judges to join his majority opinions in future cases. This assumes that judges refuse to treat such costs as bygones to be ignored in future interactions with the dissenter. But such refusal is rational, for by withholding or reducing collegiality in the future the judges in the majority punish the dissenter, and this may deter him from dissenting as frequently. We therefore predict that dissents will be less frequent in smaller courts of appeals, because any two of its judges will sit together more frequently and thus have a greater incentive to invest in collegiality." Id. at 261.

15 See id. at 75 and 56. Also see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2012 ANNUAL REPORT OF THE DIRECTOR tbl. B-3 (2013), http:// www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/B03Sep12.pdf [hereinafter JUDICIAL BUSINESS].

16 See Douglas H. Ginsburg, Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter, 10 GEO. J.L. & PUB. POL'Y 1, 2 (2012).

17 The D.C. Circuit receives a large and growing share of the nation's administrative cases. See id. at 3. In 2012, the D.C. Circuit heard 38 percent of administrative cases excluding immigration appeals; the next most popular forum for such cases, the Ninth Circuit, heard just 13 percent. JUDICIAL BUSINESS, supra n. 13, at tbl. B-3.

18 The smallest circuit is the First, with six judgeships; the largest is the Ninth, with 29 judgeships. The average size of the 12 circuits (excluding the Federal Circuit) is 14. UNITED STATES COURTS, U.S. COURTS OF APPEALS ADDITIONAL AUTHORIZED JUDGESHIPS 1, http:// www.uscourts.gov/uscourts/JudgesJudgeships/docs/appeals-judgeships.pdf (last visited Aug. 22, 2012).

19 This is not only a possibility; it is a requirement we impose upon the Clerk of Court in devising each term's calendar.

20 The court resolved in 1994 not to have visitors unless essential to getting the work of the court done in a timely fashion; we have not had a visitor since then. In fact, the steadily declining workload of the court over the last decade has seen some of our judges, both senior and active, sitting in other circuits and, under the rules of the Judicial Conference, for reasons of economy, a court cannot both a borrower and a lender be. See Guidelines for the Intercircuit Assignment of Article III Judges 6 (approved by the Chief Justice Feb. 16, 2012) (on file).

21 I replicated the methodology of the authors: "We tabulated the number of opinions with dissents...(both published and unpublished opinions) in each year from 1990 through 2007 from Lexis searches and divided by the number of cases terminated on the merits...each year." Epstein et al., supra n. 1, at 265 tbl. 6.3. Like the authors, I obtained the latter figures from the statistical compilations done by the Administrative Office and released annually for the 12 months ending March 31 of the nominal year. See generally ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, some years available at http:// www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx (last visited August 23, 2013). For consistency, I used the March 31 statistical year when running the Lexis searches as well.

22 For the reason given in n. 21, their dissents are included in the data through 1995 and 2000 respectively.

23 Epstein et al., supra n. 1, at 265 tbl. 6.3.

24 See, e.g., Neil A. Lewis, An Ideological Flap Ruffles a Court's Two Wings, N.Y. Times, Mar. 13, 1992, at B16; Nancy Lewis, Factions' Squabbling Rocks U.S. Court of Appeals Here, Wash. Post., Aug. 1, 1987, at A1.

25 Douglas H. Ginsburg & Donald Falk, The Court En Banc: 1981-1990, 59 GEO. WASH. L. REV. 1008, 1056 (1991).

26 Douglas H. Ginsburg & Brian M. Boynton, The Court En Banc: 1991-2002, 70 GEO. WASH. L. REV. 259, 259 (2002).

27 According to internal statistics, the D.C. Circuit reheard just nine cases en banc in the 10 years from October 2002 to September 2012.

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28 Epstein et al., supra n. 1, at 199.

29 William S. Jordan III, Judges, Ideology, and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules, 53 ADMIN. L. REV. 45, 61 (2001).

30 Id. at 52. In Hazardous Waste Treatment Council v. EPA, for example, the court upheld an EPA rule governing the land disposal of certain hazardous waste products but remanded for the agency to "clarify its reasons for adopting the Final Rule in preference to the Proposed Rule." 886 F.2d 355, 365 (D.C. Cir. 1989). Cf. Allied-Signal, Inc. v. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

31 Jordan, supra n. 29, at 56.

32 Id.

33 Id.

34 To illustrate, I consider myself a policy "conservative" but appear in Professor Jordan's data as the second most pro-environment judge, trailing only Judge Buckley. Id. at 77 tbl. VII(A), 78 tbl. VII(B). This is consistent, however, with Professor Jordan's also finding I am one of the judges most likely to defer to the EPA. Id. at 79 tbl. VII(C), 80 tbl. VII(D).

35 Id. at 99, 77 tbl. VII(A), 78 tbl. VII(B).

36 The authors experiment with other measures but rely heavily upon the party of the appointing president as a proxy for ex ante ideology. See Epstein et al., supra n. 1, at 47.

37 Jordan, supra n. 29, at 81; see also id. at 60.

38 Epstein et al., supra n. 1, at 71.

39 Jordan, supra n. 29, at 79 tbl. VII(C).

40 Id. at 99.

41 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

42 Jordan, supra n. 29, at 55.

43 Id. at 87 tbl. IX(B).

44 Richard A. Posner, Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function, 56 S. CAL. L. REV. 761, 790 (1983). ("[T]he D.C. Circuit has tended-by its own report-to see its responsibility in relation to the administrative agencies it reviews as being not to act as a buffer between the agencies and the citizens they are trying to coerce, but to spur the agencies to regulate more effectively").

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