
VIRGINIA LAW REVIEW

VOLUME 92

MAY 2006

NUMBER 3

LECTURE

WHAT MAKES THE D.C. CIRCUIT DIFFERENT? A HISTORICAL VIEW

*John G. Roberts, Jr.**

INTRODUCTION

EACH of the federal circuit courts of appeals has its own unique character. This distinctiveness is the result of local legal cultures, differences in rules, and differences in the personalities that have sat on the bench at each of the circuits and have impressed their own character on the institution. For example, I am sure you are familiar with the tradition in the Court of Appeals for the Fourth Circuit, where at the end of oral argument the judges come down from the bench and shake hands with the lawyers. It is a very endearing custom emblematic of the grace and hospitality of the region encompassed by the Fourth Circuit.

Things are different in the District of Columbia Circuit. Judges there also come down sometimes and mingle with the lawyers after argument. There is a famous episode from the early nineteenth

* Chief Justice of the United States; Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, 2003–2005. A version of this Lecture was delivered as the Ola B. Smith Lecture at the University of Virginia School of Law on April 20, 2005.

In compiling the materials presented in this Lecture, I am particularly indebted to three histories of the D.C. Circuit: Jeffrey Brandon Morris, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit* (2001); E. Barrett Prettyman, Jr. et al., *History of The United States Court of Appeals for The District of Columbia Circuit in The Country's Bicentennial Year* (1977); Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 *Geo. L.J.* 549 (2002).

century involving Judge Buckner Thruston, who was in the habit of finding the lawyers appearing before him deficient in many respects, and in the habit of giving voice to that view. On one occasion, a lawyer responded in kind, letting Judge Thruston know that he, the lawyer, found the Judge equally deficient. *The Evening Star* explained what happened next: “Judge Thruston’s reaction was to hustle down from the bench and berate his critic as ‘a scoundrel and poltroon,’ whom he challenged to step ‘outside and fight.’”¹ Perhaps those sorts of beginnings explain why the tradition never really caught hold in D.C. as it has in Richmond.

When I joined the D.C. Circuit three years ago, I began to appreciate that the court was different in significant respects from the other courts of appeals with which I was familiar around the country. Some of these differences are very obvious. For example, all the D.C. Circuit judges are in the same building, along with all the district court judges. This allows the circuit judges the unique opportunity of sitting down to lunch right next to a judge who, moments before, they had announced was guilty of abuse of discretion or clear error. It can make for a very short lunch.

The judges on the D.C. Circuit are chosen from beyond the boundaries of the circuit itself. I was fortunate to sit on that court with people like Stephen Williams from Colorado, Harry Edwards from Michigan, Karen Henderson from South Carolina, and David Sentelle from North Carolina. That is not true of the other circuits.

Geographically, of course, the circuit is quite small, and that has consequences for its work. For example, the circuit is so small that it does not have a federal prison within its boundaries, so prisoner petitions—which make up a notable portion of the docket nationwide on other courts of appeals—are a less significant part of its work.² It is when you look at the docket that you really see the differences between the D.C. Circuit and the other courts. One-third of the D.C. Circuit appeals are from agency decisions. That figure

¹ New Building Culminates Struggle That Began 149 Years Ago, *The Evening Star* (Wash., D.C.), June 27, 1950, at A5.

² See Leonidas Ralph Mecham, *Judicial Business of the United States Courts: 2004 Annual Report of the Director 77–80* (Table B-1: U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending Sept. 30, 2004), available at <http://www.uscourts.gov/judbus2004/appendices/b1.pdf>.

2006]

Historical View of the D.C. Circuit

377

is less than twenty percent nationwide. About one-quarter of the D.C. Circuit's cases are other civil cases involving the federal government; nationwide that figure is only five percent. All told, about two-thirds of the cases before the D.C. Circuit involve the federal government in some civil capacity, while that figure is less than twenty-five percent nationwide.³

You may think there is no great mystery to this. The D.C. Circuit just happens to be in the Nation's capital, and that would explain why it has more cases involving the federal government. But there is nothing inevitable about assigning jurisdiction to review government decisions to the District of Columbia Circuit. It would be just as logical, it seems, to assign the jurisdiction to the circuit in which the impact of the government decision is felt, or even on some rotating basis. It turns out that the reason the D.C. Circuit has such a unique role with respect to reviewing legal challenges and decisions of the national government has at least as much to do with its unique history as it does with its physical location.

I. BEGINNINGS

The differences between the D.C. Circuit and the other federal courts of appeals go back to the very beginning—to the Judiciary Act of 1801 and John Adams's midnight judges. The Federalists lost the election of 1800; they were losing the White House; they were losing the Congress. Jeffersonian Republicans were coming into power. Everybody knew, though, that the federal judiciary needed reforming, and the Federalists thought that the period between the election and Jefferson's inauguration was as good a time as any to take care of that problem.⁴ So, they passed the Judiciary Act of 1801,⁵ setting up new circuit courts around the country, with new circuit court judgeships to which John Adams promptly nominated and the outgoing Senate promptly confirmed Federalist appointees. When the Jeffersonians took power, they repealed the 1801 Act and abolished the judgeships.⁶

³ Id. at 77.

⁴ See Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* 15 (1971); Erwin C. Surrency, *History of the Federal Courts* 27 (2d ed. 2002).

⁵ Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (repealed 1802).

⁶ See generally Surrency, *supra* note 4, at 30–31.

One lonely federal circuit court with its three lonely federal circuit court judgeships survived the Jeffersonian purge. It was the Circuit Court of the District of Columbia.⁷ It survived because it was set up by a separate act—the second Judiciary Act of 1801—passed two weeks after the more famous one.⁸

This story of survival was remarkable for a number of reasons. First, one of the appointees, one of the three surviving judges, was James Marshall, the younger brother of the new Chief Justice, John Marshall.⁹ John Marshall, of course, was an arch rival of Thomas Jefferson, and you would think that Jefferson would have his eyes on the court on which Marshall's younger brother sat. One of the other three judges was William Cranch, John Adams's nephew.¹⁰ Again, you would think the Jeffersonians would have their eyes out for the court on which two of the three judges were James Marshall and Adams's nephew.

Even more remarkable is that James Marshall and William Cranch were not keeping a low profile. Shortly after they took office, the *National Intelligencer*, the Jeffersonian house press organ, published a letter critical of the new court, and Marshall and Cranch reacted by prevailing upon the United States Attorney to issue a writ of common law libel against the editor of the newspaper.¹¹ The episode became a *cause célèbre*, and again, you would think that if any court was going to be targeted for extinction, it would be this court.

Why was the court saved? I think the primary reason it was saved was that the court was not just a federal circuit court, but also the local court for the District of Columbia. Its jurisdiction included all the jurisdiction of the federal circuit courts, and all the jurisdiction that the Maryland state courts had exercised on the

⁷ Id. at 32. Although called a circuit court, this new court served as both a trial and an appellate court, as did its successor, the Supreme Court of the District of Columbia. See Jeffrey Brandon Morris, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit* 6, 37 (2001). It was only in 1893 that federal courts in the District of Columbia were separated into distinct trial and appellate institutions staffed by different sets of judges. Id. at 59–60.

⁸ Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103, 105–06 (repealed 1863).

⁹ Morris, *supra* note 7, at 7–8.

¹⁰ Id. at 8.

¹¹ See Ellis, *supra* note 4, at 40; 1 Charles Warren, *The Supreme Court in United States History* 195–98 (2d ed. 1926).

Maryland side of the Potomac and that the Virginia state courts had exercised on the Virginia side.¹² If the Jeffersonians had abolished it, they would have had to start from scratch and create a new court for the District of Columbia.

There is another reason why the court may have been saved. I have discussed two of the three appointees so far, but I have not mentioned the third. Marshall and Cranch were definitely the undercard of President Adams's appointments; the headliner was the nominee for the position of chief judge, Thomas Johnson. I assume his name falls upon unfamiliar ears today.

Two hundred years ago, you would have known who Thomas Johnson was. He was a delegate to the Constitutional Congress, former Governor of Maryland, former Chief Justice of the Maryland General Court, and even a Justice on the U.S. Supreme Court for two years.¹³ One scholar has said that it was a sign of the high regard in which President Adams held the new D.C. circuit court that he nominated Thomas Johnson to be its first chief judge.¹⁴ Well, perhaps it was a sign of the regard that Thomas Johnson had for the new court that he promptly declined to serve.¹⁵ The result was that there was a vacancy to be filled.

Keep in mind, Johnson was one of the midnight judges. He was nominated on February 28, 1801, and confirmed by the Senate on March 3, 1801.¹⁶ President Jefferson took the oath on March 4, so when Johnson declined to serve on this new court, it was Jefferson who appointed the new chief judge, and he appointed a good Jeffersonian Republican, William Kilty.¹⁷ This is evidence of the political diversity that has characterized the D.C. Circuit from the very beginning and also perhaps the main reason that the court

¹² See Act of Feb. 27, 1801, ch. 15, §§ 1–3, 5, 2 Stat. 103, 103–06 (repealed 1863); Morris, *supra* note 7, at 6.

¹³ Morris, *supra* note 7, at 7; Susan Low Bloch & Ruth Bader Ginsburg, Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia, 90 *Geo. L.J.* 549, 551 (2002).

¹⁴ Morris, *supra* note 7, at 7.

¹⁵ *Id.* Officially, Johnson attributed his retirement from the Supreme Court to “the rigors of riding circuit,” and vowed at that time to decline any future government post. Bloch & Ginsburg, *supra* note 13, at 551.

¹⁶ E. Barrett Prettyman, Jr. et al., *History of The United States Court of Appeals for The District of Columbia Circuit in the Country's Bicentennial Year* 1 n.1 (1977).

¹⁷ *Id.*; Ellis, *supra* note 4, at 40.

managed to survive the purge—its chief judge was one of the Jeffersonians' own.

II. WILLIAM CRANCH AND THE *KENDALL* CASE

In the early period, from the establishment of the court to the end of the Civil War, the character of this new D.C. Circuit was defined by one man, the least likely of the original nominees, William Cranch. Say what you will about nepotism; sometimes the best person for the job just happens to be your nephew, and that was the case here. You probably recognize the name William Cranch, and to some extent that is a pity. He served on the D.C. Circuit Court for fifty-four years, forty-nine of those years as chief judge.¹⁸ He is one of the greatest federal appellate judges who have ever sat in this country, and yet he is only remembered for his moonlighting job reporting the decisions of the Supreme Court, which sat in the same room in the Capitol where the D.C. Circuit sat.¹⁹

His significant role in defining what the D.C. Circuit would become largely traces to his authorship of the *Kendall* decision in 1837.²⁰ This important case arose over a dispute about personal contracts. Before we had much of a postal service, the Postmaster General would give out contracts to private contractors to deliver the mail. Andrew Jackson thought there was a lot of fraud involved in these contracts, as did his successor, Martin Van Buren, and both refused to honor them, even when the contractor had obtained a certificate from the Treasury Department acknowledging that the money was owed.²¹ One of those contractors sought a writ of mandamus from the D.C. Circuit to get the Postmaster General to pay his bill. It was an unlikely approach. The Supreme Court had already held in a case entitled *M'Intire v. Wood*²² that the lower federal courts did not have the authority to issue writs of mandamus, and it had held in a case called *M'Clung v. Silliman*²³ that the *state* courts could not issue writs of mandamus against *federal* offi-

¹⁸ Morris, *supra* note 7, at 365.

¹⁹ *Id.* at 18; Bloch & Ginsburg, *supra* note 13, at 552 & n.11.

²⁰ United States *ex rel.* Stokes *v.* Kendall, 5 D.C. (5 Cranch) 163 (1837).

²¹ See Morris, *supra* note 7, at 25.

²² 11 U.S. (7 Cranch) 504, 504–05 (1813).

²³ 19 U.S. (6 Wheat.) 598, 603–05 (1821).

cial. It was hard to see why the D.C. Circuit would be any different.

The process of deciding this case reflected the uncertain status and stature of the new D.C. Circuit Court. The Postmaster General did not even enter an appearance; he just sent a letter to William Cranch as the chief judge.²⁴ The tone of the letter was dismissive of the authority of the court: The Postmaster General said that he doubted “whether any portion of the judiciary of the United States, and much more whether a court established in this district for purposes entirely local could constitutionally inquire into the official conduct of the President, or heads of Departments”²⁵

William Cranch addressed that challenge directly. He said it was not so that his court was created for purposes entirely local.²⁶ He explained that it had all the federal jurisdiction that had been enjoyed by the short-lived circuit courts created by the Act of 1801 and all the local jurisdiction of the state courts of Maryland.²⁷ According to Cranch, the whole was bigger than the sum of its parts. Because it had state court jurisdiction, his court, unlike the other federal courts, had the authority as a general matter to issue writs of mandamus. Because his court was also a federal court, it had the authority to issue those writs against federal officials.²⁸

For the next 125 years, the Circuit Court for the District of Columbia would be the only court that could issue writs of mandamus challenging official conduct by the new national government. It was not until the Mandamus and Venue Act of 1962 that other federal courts were given that authority.²⁹ Long before Congress thought of conferring special jurisdiction on the D.C. Circuit to review acts of the national government, the court—on the basis of its local jurisdiction—had asserted that authority.

The *Kendall* case is also emblematic in another respect. To the extent the D.C. Circuit was going to set itself apart from the other federal courts in asserting authority to review acts of the new national government, it had to expect that the national government

²⁴ *Kendall*, 5 D.C. (5 Cranch) at 166.

²⁵ *Id.* (quoting the letter of Amos Kendall, Postmaster General, dated June 1, 1837).

²⁶ *Id.* at 188–89.

²⁷ *Id.* at 174.

²⁸ *See id.* at 185–89.

²⁹ *Morris*, *supra* note 7, at 26–27.

was going to react. If you look at Martin Van Buren's 1838 State of the Union message, you will find several pages devoted to the case, urging Congress to take this mandamus authority away from the D.C. Circuit. Van Buren explained that the *Kendall* case was the first time money had been taken from the U.S. Treasury by judicial compulsion, and that Congress should make sure it was the last time.³⁰ The proposal passed the Senate but failed in the House.³¹

III. POLITICAL PRESSURES DURING THE CIVIL WAR

The D.C. Circuit would not be so lucky in its next brush with the political branches. During the Civil War, the three judges on the D.C. Circuit found themselves at loggerheads with the Lincoln administration. The court was led in this struggle by Judge William Merrick, a Democrat who had been appointed by Franklin Pierce and who was deeply suspected by the Lincoln administration of harboring secessionist sympathies.³² The question facing the court was whether habeas corpus could issue against the Army to secure the release of minors who had enlisted without their parents' consent. Judge Merrick held in one decision that it could and secured the release of minors from the Army. When he tried again two weeks later to do the same thing in another case, President Lincoln reacted. He ordered the Army not to comply with the judicial process. He further ordered the Comptroller General not to pay the salaries of the three judges, and he sent an armed sentry to stand guard outside Judge Merrick's house. There is a lot of confusion and debate about exactly what was going on, but Judge Merrick chose to regard himself as confined to his house, and so he wrote a letter to his two colleagues to explain why he could not come to court the next day.³³

Judge Merrick's colleagues, in solidarity with their imprisoned—perhaps—colleague, issued an order to the Provost Marshal of the District of Columbia to show cause why he should not be held in

³⁰ Martin Van Buren, Second Annual Message (Dec. 3, 1838), in 3 A Compilation of the Messages and Papers of the Presidents, 1789–1897, at 503–05 (James D. Richardson ed., 1896).

³¹ Morris, *supra* note 7, at 26.

³² *Id.* at 35.

³³ See *id.*; William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 48–49 (1998); Bloch & Ginsburg, *supra* note 13, at 553.

contempt for these actions against Judge Merrick.³⁴ One of the judges, Judge Morsel, said, “I intend to do my duty, and vindicate the character of this court as long as I sit here.”³⁵ He then added, in my view somewhat ambiguously, “I am an old man.”³⁶ This last statement seemed to detract from the threat, but maybe he was being maudlin in saying it was not going to be very long.

In any event, President Lincoln did not back down. He sent Army officials to the court to announce that he had suspended the writ of habeas corpus in the District of Columbia. The court questioned whether Lincoln had the authority to do that retrospectively, as they put it, but they concluded that in the face of military authority there was nothing more that they could do, and that they would consider the case closed and accept no further filings in it.³⁷

President Lincoln and the Republican Congress did not consider the case closed. They abolished the court and terminated the judgeships, creating in the place of the abolished court a new court called the Supreme Court of the District of Columbia.³⁸ It looked a lot like the old court, except for the fact that it now had four vacancies to which President Lincoln appointed, and the Senate confirmed, four new appointees—a former Republican Congressman from New York; a Republican Congressman from Delaware; an Ohio delegate to the Republican convention that nominated Lincoln; and Andrew Wylie.³⁹ Wylie was reputed to be the only person in Alexandria who had voted for Lincoln.⁴⁰

This Civil War episode is significant in two respects. First, I believe it is a unique episode in American legal history, in which reaction to a particular decision resulted in the abolition of the court and termination of the judgeships. Second, it shows what has been a characteristic of the District of Columbia Circuit from the beginning—that to the extent the court asserts unique authority in the

³⁴ United States ex rel. Murphy v. Porter, 27 F. Cas. 599, 601 (C.C.D.C. 1861) (No. 16,074a).

³⁵ Id.

³⁶ Id.

³⁷ Id. at 601–02; Morris, supra note 7, at 36; Rehnquist, supra note 33, at 49; Bloch & Ginsburg, supra note 13, at 554–55.

³⁸ Morris, supra note 7, at 36–37; Prettyman, supra note 16, at 2.

³⁹ Matthew F. McGuire, *An Anecdotal History of the United States District Court for the District of Columbia, 1801–1976*, at 45–46 (1977).

⁴⁰ Id. at 46.

area of reviewing decisions of the national government, it is also uniquely vulnerable. Lincoln could not have ordered the Comptroller General to stop paying all the federal judges in the country, but he could order him to stop paying the judges in the District of Columbia. He could not, with the Republican Congress, have abolished all the federal courts in the country, replacing them with new courts and his appointees; but he could do that with respect to the District of Columbia Circuit, a small court in his backyard.

IV. THE ESTABLISHMENT OF A NATIONAL COURT

Following the Civil War, the D.C. Circuit began to sort out its schizophrenic nature. It was peculiarly local—it had a local jurisdiction that no other federal circuit court had. At the same time, it was peculiarly national. As a result of the *Kendall* decision, it could exercise authority that no other federal circuit court could on the national stage.

After the Civil War, the circuit's character as a national court was developed by its appointees. Starting with the Lincoln presidency, appointees tended to have, as Lincoln said his appointees would, a "national reputation."⁴¹ Lincoln's appointees hailed from outside the District of Columbia—from states like New York, Delaware, and Ohio. Grover Cleveland continued the trend with his appointments, except for one.⁴²

One of Cleveland's appointees was Seth Shepard from Texas, who served for twenty-four years.⁴³ Teddy Roosevelt continued the tradition with appointees like Josiah Van Orsdel from Wyoming, who served for thirty years.⁴⁴

⁴¹ Id. at 45 (quoting *The Evening Star*).

⁴² In 1885, a vacancy arose on what was still known as the Supreme Court of the District of Columbia. Cleveland, the first Democratic president to regain the White House since the Civil War, knew exactly whom he wanted to appoint to this first vacancy during his presidency—William Merrick, who was nearly seventy years old at the time. Merrick would sit for three more years on the court that was created for the sole purpose of removing him from the federal bench. See Morris, *supra* note 7, at 38.

⁴³ Morris, *supra* note 7, at 64. Shepard was "widely recognized as a lawyer of great learning and high character." Prettyman, *supra* note 16, at 4.

⁴⁴ Morris, *supra* note 7, at 67–68. Considered "an early pioneer in the area of administrative law," *id.*, Van Orsdel also authored the court's opinion in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which established a long-serving national standard for the admittance of expert testimony at trial. See Prettyman, *supra* note 16, at 15–18.

The reason those presidents could look for appointees nationwide was that the District of Columbia had no senators to enforce the locality requirements that are applicable as a practical matter in the other circuits. This has been an important feature of the D.C. Circuit's history through the modern age. Perhaps the most significant modern example is that of J. Skelly Wright. Wright, as a district judge in New Orleans, heroically desegregated the New Orleans public schools, which earned him the enmity of certain government officials and many people in Louisiana.⁴⁵ President Kennedy wanted to elevate Wright to the Fifth Circuit, but Russell Long—a Democratic Senator from Louisiana—told Kennedy that if Wright were elevated, it would result in Long losing re-election.⁴⁶ So President Kennedy offered to appoint Wright to the D.C. Circuit—an offer which, the papers show, Judge Wright struggled with at the time, because it was considered an uncertain step to move to this small court in Washington instead of to the Fifth Circuit.⁴⁷

Another development in the period after the Civil War that helped define the national character of the D.C. Circuit came in 1870 when Congress, for the first time, gave the court exclusive authority to review the decisions of a federal agency—the Commissioner of Patents.⁴⁸ The jurisdiction was taken away in 1929 and given to a specialized Court of Customs and Patent Appeals,⁴⁹ but the initial decision in 1870 would serve as a prototype for many more that would follow. In giving the D.C. Circuit authority to review decisions of the national government, Congress was following the path laid out—for very different reasons—in the *Kendall* decision.

Despite these developments that highlighted the national character of the D.C. Circuit, in the period between the Civil War and World War II the court did not look much like a national court. The court's historian, Jeffrey Morris, examined the court's docket

⁴⁵ Morris, *supra* note 7, at 195–96 & n.8.

⁴⁶ Joseph C. Goulden, *The Benchwarmers: The Private World of the Powerful Federal Judges* 272 (1974).

⁴⁷ Interview by Susan L. Carney with Helen Patton Wright (Jan. 28, 1996), *in* Helen Patton Wright: Oral History Project, The Historical Society of the District of Columbia Circuit 85, 86–87 (1998), available at http://www.dcchs.org/HelenPWright/helenpwright_complete.pdf.

⁴⁸ See Act of July 8, 1870, ch. 230, § 48, 16 Stat. 198, 205 (repealed 1929).

⁴⁹ Prettyman, *supra* note 16, at 20.

from particular years in this period and found that half of the cases resembled typical state supreme court cases and half were patent appeals.⁵⁰ During much of this period, the court actually sat in the D.C. City Hall,⁵¹ which hardly suggests a national court.

When the Evarts Act of 1891 was passed, setting up the other federal circuit courts of appeals in their current form, the D.C. Circuit was not even included. It was the subject of a separate Act passed in 1893.⁵² The court's status was so uncertain that in 1932, in a Depression-era measure in which Congress voted to cut the salaries of federal officials by about ten percent, the judges on the D.C. Circuit were included: The Comptroller General issued an opinion saying they were not entitled to the protection against salary diminution that other federal circuit judges enjoyed because they were local judges. The judges did not like having their pay cut, so they sued.⁵³

The case eventually made it all the way to the Supreme Court, and the judges made a very fateful, and good, decision to hire John W. Davis to argue their cause. Davis's argument was a fascinating one. He noted the D.C. Circuit had federal jurisdiction like the other federal courts of appeals. He recognized that it had state jurisdiction—we know that from the *Kendall* case. But then he asserted the court had a third category of jurisdiction:

[T]he novel and peculiar jurisdiction which has been conferred upon [the D.C. courts] from time to time over controversies which are national in character, and which have no relation to the District other than the fact that the executive and legislative branches of the Government are located in and perform their important functions at the Capital.⁵⁴

Davis's point was that so much authority to review national government decisions had been given to these D.C. judges that they had to be considered Article III judges.

That is precisely what Justice Sutherland held in the 6-3 decision confirming that D.C. Circuit judges were entitled to Article III pro-

⁵⁰ See Morris, *supra* note 7, at 68–69, 71.

⁵¹ See *id.* at 177.

⁵² Act of Feb. 9, 1893, ch. 74, 27 Stat. 434 (current version at 28 U.S.C. § 41 (2000)).

⁵³ See Bloch & Ginsburg, *supra* note 13, at 560–61.

⁵⁴ *O'Donoghue v. United States*, 289 U.S. 516, 521 (1933).

2006]

Historical View of the D.C. Circuit

387

tection. After detailing the reasons why the Constitution protects federal judges against having their salaries cut, Justice Sutherland wrote that

[T]he[se] reasons . . . apply with even greater force to the courts of the District than to the inferior courts of the United States located elsewhere, because the judges of the former courts are in closer contact with, and more immediately open to the influences of, the legislative department, and exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments.⁵⁵

In other words, he accepted Davis's argument and established the status of the D.C. Circuit as a national court.

Congress symbolically went along with the decision, passing a law the next year that added "United States" to the court's title.⁵⁶ In 1947, Congress then authorized the construction of a proper federal court building—much more fitting than City Hall if you are trying to establish yourself as a national court.⁵⁷ In 1948, for the first time since its creation, the D.C. Circuit was listed in the U.S. Code as one of the circuit courts of appeals of the United States.⁵⁸

Coming out of World War II, then, the court was set, on a national level, to assume an important role as the country experienced a huge growth in the administrative state. The D.C. Circuit was poised as a national court to exercise its commensurate role in reviewing the conduct of the national government. Interestingly enough, however, the other aspect of its character—its local jurisdiction—would have one last, fatal, flowering.

V. THE LOSS OF LOCAL JURISDICTION AND THE RISE OF AGENCY REVIEW

In the 1950s and 1960s, the D.C. Circuit achieved its greatest prominence not in the areas of national law but in the areas of state and local law—the areas in which it was the only federal court of appeals that could exercise jurisdiction. It produced cases still read

⁵⁵ Id. at 535.

⁵⁶ Act of June 7, 1934, ch. 426, 48 Stat. 926 (current version at 28 U.S.C. § 43 (2000)).

⁵⁷ Act of May 29, 1947, ch. 86, 61 Stat. 120, 120–21.

⁵⁸ Act of June 25, 1948, ch. 646, § 41, 62 Stat. 869, 870 (current version at 28 U.S.C. § 41 (2000)).

in law school—cases like *Durham v. United States*,⁵⁹ reformulating the test for insanity in criminal cases, and *Williams v. Walker-Thomas Furniture Co.*,⁶⁰ applying the unconscionability doctrine to contracts in the consumer context—cases that would not have been before the D.C. Circuit but for the fact that it was, in addition to a federal court, the local court of the District of Columbia. These decisions led to a great conflict on the court between what would become known as the Bazelon wing and the Burger wing—after Circuit Judges David Bazelon and (later Chief Justice) Warren Burger—and that conflict would define the character of the court for that entire period of the mid-1950s through the 1960s.⁶¹

Ironically, the conflict contributed to the loss of local jurisdiction by the D.C. Circuit. In 1970, reform legislation was passed with the backing of the Nixon administration, establishing a local court system for the District of Columbia.⁶² In a move that has led to immense confusion to this day, the local court was named the District of Columbia Court of Appeals. The federal court is known as the Court of Appeals for the District of Columbia Circuit. As you can imagine, the two courts get a lot of each other's mail.

The District of Columbia Court of Appeals was given all the local jurisdiction that had been enjoyed since 1801 by the D.C. Circuit, and review of those decisions went directly to the U.S. Supreme Court.⁶³ This was uniformly regarded as a progressive reform. It was part of a package of "Home Rule" legislation that was intended to give greater say in local government to the residents of the District of Columbia. But, as many have noted, the benefits of taking vast areas of criminal jurisdiction and local legal questions out of the hands of Judges Bazelon and Wright were not lost on the administration.⁶⁴

The growth of the administrative state in the 1960s and 1970s led to the rise of agency appeals that more than made up for the loss of this local jurisdiction by the D.C. Circuit. The first decision to give

⁵⁹ 214 F.2d 862 (D.C. Cir. 1954).

⁶⁰ 350 F.2d 445 (D.C. Cir. 1965).

⁶¹ See generally Goulden, *supra* note 46, at 250–75; Morris, *supra* note 7, at 202–03.

⁶² District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

⁶³ See Prettyman, *supra* note 16, at 80–81.

⁶⁴ See, e.g., Morris, *supra* note 7, at 233 & n.88.

2006]

Historical View of the D.C. Circuit

389

administrative jurisdiction to the D.C. Circuit in 1870, as well as a handful of similar decisions in the early twentieth century, became prototypes for a succession of legislative grants of authority to review decisions of the FCC, the Federal Power Agency (later FERC), the EPA, the NLRB, the FTC, and the FAA.⁶⁵ Whatever combination of letters you can put together, it is likely that jurisdiction to review that agency's decision is vested in the D.C. Circuit. Even when the jurisdiction is concurrent, as it often is—decisions of the NLRB, for example, can be reviewed in the D.C. Circuit, in the circuit where the petitioner resides, or in the circuit where the events giving rise to the matter took place⁶⁶—lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other circuits.

* * *

The 1970 reform legislation setting up the local D.C. courts resolved the duality in the D.C. Circuit that had been its defining characteristic since 1801. Its local jurisdiction had allowed the court to survive the Jeffersonian purge in 1802, and had given rise to its first assertion of authority to review decisions of the national government in the *Kendall* case in 1837. That authority, in turn, made it easy for Congress to think of the D.C. Circuit as the natural repository for jurisdiction to review agency decisions, and those cumulative decisions helped persuade the Supreme Court that the D.C. Circuit's status was that of a national court and not simply a local court. By the time it lost local jurisdiction in 1970, the D.C. Circuit's unique character, as a court with special responsibility to review legal challenges to the conduct of the national government, had been firmly established.

⁶⁵ See Prettyman, *supra* note 16, at 79–80.

⁶⁶ 29 U.S.C. § 160(f) (2000).