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## The Jurisdiction of the D.C. Circuit

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# THE JURISDICTION OF THE D.C. CIRCUIT

*Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence  
& Stephen A. Calhoun\**

*The U.S. Court of Appeals for the D.C. Circuit is unique among federal courts, well known for an unusual caseload that is disproportionately weighted toward administrative law. What explains that unusual caseload? This Article explores that question. We identify several factors that “push” some types of cases away from the Circuit and several factors that “pull” other cases to it. We give particular focus to the jurisdictional provisions of federal statutes, which reveal congressional intent about the types of actions over which the D.C. Circuit should have special jurisdiction. Through a comprehensive examination of the U.S. Code, we identify several trends. First, the Congress is more likely to give the D.C. Circuit exclusive jurisdiction over the review of administrative rulemaking than over the review of agency decisions imposing a penalty. Second, the Congress is more likely to give the D.C. Circuit exclusive jurisdiction over the review of independent agency actions than over the review of executive agency actions. Finally, the Congress tends to grant the D.C. Circuit exclusive jurisdiction over matters that are likely to have a national effect. In sum, we explore what makes this court unique, from its history to its modern docket and jurisdiction.*

INTRODUCTION .....	132
I. BACKGROUND .....	134
A. <i>Formation and History of the D.C. Circuit</i> .....	134
B. <i>Potpourri</i> .....	136
II. A DIFFERENT DOCKET .....	137
III. DOCKET DRIVERS: “PUSH” AND “PULL” EXPLANATIONS FOR A UNIQUE CASELOAD .....	140
A. <i>The “Push”: Fewer Typical Federal Cases</i> .....	141
B. <i>The “Pull”: More Administrative Cases</i> .....	142
IV. WHY AND WHEN DOES THE CONGRESS “PULL” ADMINISTRATIVE LAW TO THE D.C. CIRCUIT? .....	144

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A. <i>Possible Reasons for Treating the D.C. Circuit Differently</i> .....	145
B. <i>Findings</i> .....	148
1. Special Treatment by Subject Matter .....	149
2. Special Treatment by Type of Agency Action ...	150
3. Special Treatment by the Decision Maker .....	151
CONCLUSION.....	152

## INTRODUCTION

The U.S. Court of Appeals for the D.C. Circuit, commonly referred to as the D.C. Circuit, has a reputation as a unique federal court. Created separately from the other circuit courts, the D.C. Circuit remains today a special creature of the United States Congress. For example, in the course of a characteristically contentious battle over the nomination of a judge to the court, then-Senator Barack Obama repeated the accepted wisdom that the D.C. Circuit is “a special court” that tackles a disproportionate share of thorny administrative and regulatory cases affecting a wide range of important national public policy issues.<sup>1</sup> Not surprisingly, in light of this perception, scholarly commentary has paid particular attention to the D.C. Circuit.<sup>2</sup>

In this Article we offer a new take on the jurisdiction of the D.C. Circuit. It is old news that the D.C. Circuit hears proportionately more cases involving administrative law than do the other circuit courts.<sup>3</sup> We dig under that statistic to paint a richer picture of how and why the D.C. Circuit’s jurisdiction and caseload are unique. We do this by investigating not what members of the Congress *say* about the D.C. Circuit during confirmation battles, but rather how they treat the D.C. Circuit when they legislate.

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<sup>1</sup> Barack Obama, Nomination of Justice Janice Rogers Brown Remarks (June 8, 2005), available at <http://obamaspeeches.com/021-Nomination-of-Justice-Janice-Rogers-Brown-Obama-Speech.htm>.

<sup>2</sup> See, e.g., John G. Roberts, Jr., Lecture, *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376 (2006) (noting that one-third of D.C. Circuit appeals are from agency decisions); Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159, 159 (1993) (discussing the bipartisan tradition of nationwide recruitment to the D.C. Circuit and how this tradition has yielded some of the best American judges); Patricia M. Wald, Lecture, *Life on the District of Columbia Circuit: Literally and Figuratively Halfway Between the Capitol and the White House*, 72 MINN. L. REV. 1, 2–3 (1987) (noting that the D.C. Circuit receives the majority of “political” cases).

<sup>3</sup> Although the percentage of administrative law cases nationwide has declined somewhat in recent years, petitions for review of administrative decisions filed in the D.C. Circuit have increased from twenty-eight percent of the national total in 1986 to a high of thirty-eight percent in 2007 and thirty-six percent in 2010. Douglas H. Ginsburg, Remarks, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J.L. & PUB. POL’Y 1, 2–3 (2012).

This Article is the first to examine every provision of the U.S. Code that specifically references the D.C. Circuit. Our analysis indicates that the Congress has indeed paid special attention to the D.C. Circuit and that, when viewed systematically, the Congress's choices regarding when and how to give the Circuit special treatment reveal underlying patterns. We found that the D.C. Circuit has special jurisdiction not only over certain substantive areas of the law, notably those areas involving "national subjects," such as immigration and foreign relations, but also over controversies that are more likely than others to have a "national effect."<sup>4</sup> As to the latter point, the Congress is more likely to make the D.C. Circuit's jurisdiction exclusive when the agency action at issue is a rulemaking. In contrast, the Congress is more likely to make the D.C. Circuit's jurisdiction parallel when the agency action imposes a fine or other penalty.<sup>5</sup>

The decisions by the Congress to carve out certain areas of federal law as the special preserve of the D.C. Circuit and the infrequency with which the Supreme Court considers, let alone reverses, the Circuit's decisions combine to give the court the final say—and the only appellate say—over numerous laws and rules affecting the entire nation. Understanding the Congress's patterns in assigning special jurisdiction to the Circuit is an important step toward understanding the policy tradeoffs at play. These patterns can also help us understand whether new administrative laws should grant the D.C. Circuit a special role or take that special role away.<sup>6</sup>

We begin this Article by briefly discussing the history of the District of Columbia's federal courts and looking for clues about the historical and modern jurisdictional bounds of the federal judiciary. This historical overview emphasizes the role the Congress has played in treating the D.C. Circuit differently from other circuits.<sup>7</sup> Second, we provide a rich, descriptive picture of the D.C. Circuit's modern docket that includes statistics about the types of cases the court hears, how its caseload compares to that of other circuits, and the manner in which it resolves these cases.<sup>8</sup> Third, we discuss the two main drivers of the D.C. Circuit's unique docket: primarily demographic "push" factors, which prevent the D.C. Circuit from hearing many of the bread and butter cases forming the diet of the other circuits, and predominantly statutory "pull" factors, which attract a disproportionate number of other kinds of federal cases to the Circuit.<sup>9</sup> Those pull factors reflect both the Congress's deci-

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<sup>4</sup> See discussion *infra* Part IV.B.

<sup>5</sup> See discussion *infra* Part IV.B.2.

<sup>6</sup> See discussion *infra* Part IV.

<sup>7</sup> See discussion *infra* Part I.A.

<sup>8</sup> See discussion *infra* Part II.

<sup>9</sup> See discussion *infra* Part III.

sion to grant the D.C. Circuit either exclusive or non-exclusive jurisdiction over a large number of administrative petitions and the choices made by private litigants to bring their cases to the D.C. Circuit.<sup>10</sup> Fourth, we suggest some reasons why the Congress may have opted to confer special jurisdiction on the D.C. Circuit and conduct an examination of the statutes in the U.S. Code granting exclusive or non-exclusive jurisdiction to the D.C. Circuit.<sup>11</sup>

## I. BACKGROUND

Law professor and constitutional law scholar Thomas Baker once noted that “[a]ny study of the federal courts or their jurisdiction must be informed by some sense of history.”<sup>12</sup> Because our examination of the D.C. Circuit is no exception, a brief history of the D.C. Circuit will help explain some of its unique features and illustrate that the D.C. Circuit has long been a special creature of the Congress, treated differently than other circuit courts.<sup>13</sup>

### A. Formation and History of the D.C. Circuit

In late February of 1801, two weeks after the Judiciary Act of 1801 established several other circuit courts,<sup>14</sup> the Congress created the Circuit Court of the District of Columbia.<sup>15</sup> That quirk of creation saved the court from destruction the following year when the Judiciary Act was repealed, thus abolishing the circuit courts and judgeships it had created.<sup>16</sup>

The D.C. Circuit’s jurisdiction was unusual from the very beginning. It not only had “all the jurisdiction” vested in the other newly created circuit courts,<sup>17</sup> but also inherited general jurisdiction from state courts in Virginia and Maryland over what is now known as the District of Columbia, a region which, at the time, included the incorporated cities

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<sup>10</sup> See discussion *infra* Part III.B.

<sup>11</sup> See discussion *infra* Part IV.

<sup>12</sup> Thomas E. Baker, A PRIMER ON THE JURISDICTION OF THE U.S. COURT OF APPEALS 4 (2d ed. 2009).

<sup>13</sup> See, e.g., Obama, *supra* note 1 (noting that the D.C. Circuit is “a special court” that tackles a disproportionate share of administrative and regulatory cases affecting a wide range of important national public policy issues).

<sup>14</sup> Act of Feb. 13, 1801, ch. 4, §6, 2 Stat. 89, 89–90 (also known as the Midnight Judges Act) (repealed 1802).

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

<sup>16</sup> For speculation as to why the court did not suffer the same fate, see Roberts, *supra* note 2, at 377–80.

<sup>17</sup> *Id.* at 378–79.

of Alexandria, Georgetown, and Washington.<sup>18</sup> This dual jurisdiction over federal and local issues led to some peculiar cases, including *United States ex rel. Stokes v. Kendall*, the first case successfully to issue a writ of mandamus to a federal official.<sup>19</sup> Before *Kendall*, the Supreme Court had held that federal circuit courts lacked the authority to issue a writ<sup>20</sup> and state courts lacked the authority to issue a writ against a federal official.<sup>21</sup> Together these decisions seemed to foreclose the possibility of any writ against a federal official. Yet the D.C. Circuit asserted that it could do what no other court could. Armed with the powers of a Maryland state court to issue a writ and of a federal circuit court to exercise jurisdiction over a federal official, the D.C. Circuit issued the writ.<sup>22</sup> The Supreme Court affirmed the validity of the writ,<sup>23</sup> leaving the D.C. Circuit as the only court with the power to issue such a writ for more than a hundred years.<sup>24</sup>

Although the D.C. Circuit retained its dual jurisdiction from 1801 to 1970, the names and structures of the District's courts changed several times over that period. For the thirty years between 1863 and 1893, the D.C. Circuit was called the Supreme Court of the District of Columbia.<sup>25</sup> That court, expressly created with "general jurisdiction," combined the powers of the previous circuit court, district court, and criminal court of the District.<sup>26</sup> Any single judge (called justices at the time) could hold district or criminal court.<sup>27</sup>

By 1893, the District's courts finally had the structure, but not the names, of the present federal Article III courts: a district court, a circuit court, and the constitutionally required Supreme Court of the United States. Dual jurisdiction remained during this period. In that year the Congress created a new court, the Court of Appeals of the District of Columbia, to hear appeals from the Supreme Court of the District of Columbia.<sup>28</sup> In 1934 the name of the Court of Appeals of the District of Columbia changed to the United States Court of Appeals for the District

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<sup>18</sup> See *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 706–07 (C.C.D.C. 1837); JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT* 6 (2001).

<sup>19</sup> MORRIS, *supra* note 18, at 25.

<sup>20</sup> *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504, 505 (1813).

<sup>21</sup> *M'Clung v. Silliman*, 19 U.S. (6 Wheat.) 598, 599 (1821).

<sup>22</sup> See *Kendall*, 26 F. Cas. at 706–07.

<sup>23</sup> *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 524 (1838).

<sup>24</sup> In 1962 the Mandamus and Venue Act extended the power to federal district courts. See Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744 (current version at 28 U.S.C. §§ 1361, 1391(e) (2006)).

<sup>25</sup> See MORRIS, *supra* note 18, at 34–38; see also Act of Mar. 3, 1863, ch. 91 § 1, 12 Stat. 762, 763.

<sup>26</sup> See Act of Mar. 3, 1863, ch. 91, § 1, 12 Stat. 762, 763.

<sup>27</sup> *Id.*

<sup>28</sup> See Act of Feb. 9, 1893, ch. 74, § 9, 27 Stat. 434, 436.

of Columbia.<sup>29</sup> In 1948 the court's name changed to its present name, the United States Court of Appeals for the District of Columbia Circuit, and the circuit "justices" came to be called "judges."<sup>30</sup> The District's other courts also changed in structure and name several times during the same time period.<sup>31</sup>

It was not until 1970 that the Congress finally split the District's courts and assigned matters traditionally handled by state courts to one set, and matters traditionally handled by federal courts to the other. After the District of Columbia Court Reform and Criminal Procedure Act of July 29, 1970, the District Court and U.S. Court of Appeals for the D.C. Circuit, both of which were created under Article III of the Constitution, retained the federal jurisdiction of other Article III courts.<sup>32</sup> The Act also created two new courts: the Superior Court (a trial court) and the District of Columbia Court of Appeals (an appellate court).<sup>33</sup> These courts, created under Article I of the Constitution, have local jurisdiction similar to that of state courts.

### B. *Potpourri*

The D.C. Circuit has received special attention from the Congress over the last two centuries in a number of smaller, yet no less interesting ways. For example, the D.C. Circuit enjoys a special statutory provision giving its judges—but not those of the other circuits—borrowing privileges from the Library of Congress.<sup>34</sup> Also unique among the courts of appeals, the D.C. Circuit has its own case reporter.<sup>35</sup>

The D.C. Circuit's composition also reflects its status as a national court and the special attention it receives from the Congress. With no local senators to block nominations or to require local nominees, a president may nominate someone from any part of the country to serve on the Circuit.<sup>36</sup> This flexibility is codified as follows: "Except in the District of Columbia, each circuit judge shall be a resident of the circuit for

<sup>29</sup> See Act of June 7, 1934, ch. 426, 48 Stat. 926.

<sup>30</sup> See Act of June 25, 1948, ch. 646, § 41, 62 Stat. 86.

<sup>31</sup> See MORRIS, *supra* note 18, at 60–61.

<sup>32</sup> See District of Columbia Court Reform and Criminal Procedure Act of 1970, 91 Pub. L. No. 358, 84 Stat. 473 (1970).

<sup>33</sup> *Id.*

<sup>34</sup> 2 U.S.C. § 137c (2006) ("The chief judge and associate judges of the United States Court of Appeals for the District of Columbia and the chief judge and associate judges of the United States District Court for the District of Columbia are authorized to use and take books from the Library of Congress in the same manner and subject to the same regulations as justices of the Supreme Court of the United States.").

<sup>35</sup> The first volume of this reporter, which is still published today, emerged in 1893 when the newly created Court of Appeals of the District of Columbia heard its first case, *Bush v. District of Columbia*. See generally *Bush v. District of Columbia*, 1 App. D.C. 1 (D.C. Cir. 1893).

<sup>36</sup> See Roberts, *supra* note 2, at 385.

which appointed at the time of his appointment and thereafter while in active service.”<sup>37</sup> Indeed, every president since Franklin Delano Roosevelt has nominated someone from outside the District of Columbia to serve on the D.C. Circuit.<sup>38</sup> Interestingly, some of those nominees were rejected as candidates for their home circuits before being successfully confirmed to the D.C. Circuit.<sup>39</sup> Although the D.C. Bar has repeatedly tried to encourage the nomination of local lawyers, the practice of pulling nominees from a nationwide pool continues.<sup>40</sup> In addition, the D.C. Circuit often serves as a way station for judges whom presidents would like to make Justices; no other circuit has sent more judges to the Supreme Court than the D.C. Circuit.<sup>41</sup> For example, four Supreme Court Justices were appointed after serving on the D.C. Circuit for five or fewer years.<sup>42</sup>

## II. A DIFFERENT DOCKET

One of the most significant differences between the D.C. Circuit and the other circuit courts is the mix of cases the D.C. Circuit courts hears. More than 30% of filings in the D.C. Circuit are administrative appeals, compared to 16% nationwide. Moreover, many of the administrative filings in the other circuits involve appeals, such as those arising from the Social Security Administration, that do not typically require the resolution of complex issues of administrative law. The differences between the D.C. Circuit and other circuits are even more pronounced in civil suits involving the federal government. Those cases include, for example, suits against administrative agencies that are not classified as administrative appeals, such as constitutional challenges to federal pro-

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<sup>37</sup> 28 U.S.C. § 44(c) (2006).

<sup>38</sup> See Tobias, *supra* note 2, at 159. Also, some of the out-of-state nominees had experience serving in the federal government, an attribute which may be viewed as being particularly helpful for serving on the D.C. Circuit in Washington. See also Susan Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 563 (2002) (“While the district court judges come primarily from the D.C. area, court of appeals judges continue to be drawn from a nationwide pool.”).

<sup>39</sup> See Tobias, *supra* note 2, at 165.

<sup>40</sup> See generally *id.*

<sup>41</sup> See Bloch & Ginsburg, *supra* note 38, at 564 (“[M]ore Supreme Court Justices have come from the D.C. Circuit than from any other federal circuit court.”).

<sup>42</sup> Chief Justice John Roberts was appointed to the D.C. Circuit in 2003 and to the Supreme Court in 2005. *Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Aug. 13, 2013). Associate Justice Clarence Thomas joined the Supreme Court in 1991 after being appointed to the D.C. Circuit in 1990. *Id.* Associate Justice Antonin Scalia was appointed to the D.C. Circuit in 1982 and to the Supreme Court in 1986. *Id.* Finally, Associate Justice Wiley Rutledge was appointed to the Supreme Court in 1943 after being appointed to the D.C. Circuit in 1939. *William B. Rutledge, 1943-1949*, SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/wiley-rutledge-1943-1949/> (last visited Sept. 30, 2013).



grams.<sup>43</sup> The D.C. Circuit hears proportionally four times as many of those suits as the overall national rate.<sup>44</sup> In total, those administrative and civil suits involving the federal government comprise nearly 50% of the D.C. Circuit’s docket, compared to the nationwide average of 20%.<sup>45</sup>

The D.C. Circuit is also an outlier in the areas of criminal cases and prisoner petitions. Criminal cases occupy less than 10% of its docket, or just over a third of the national rate.<sup>46</sup> Although prisoner petitions against state and local governments are a significant fraction of the caseload of other federal courts of appeal, the D.C. Circuit hears almost none.<sup>47</sup> Yet, the D.C. Circuit hears more than double the proportional number of prisoner petitions against the federal government.

The differences continue in ordinary private civil cases and bankruptcy cases. For example, the fraction of the court’s docket comprising private civil cases is half the national rate. The difference is even more pronounced for bankruptcy appeals, which typically number in the single digits per year in the D.C. Circuit.

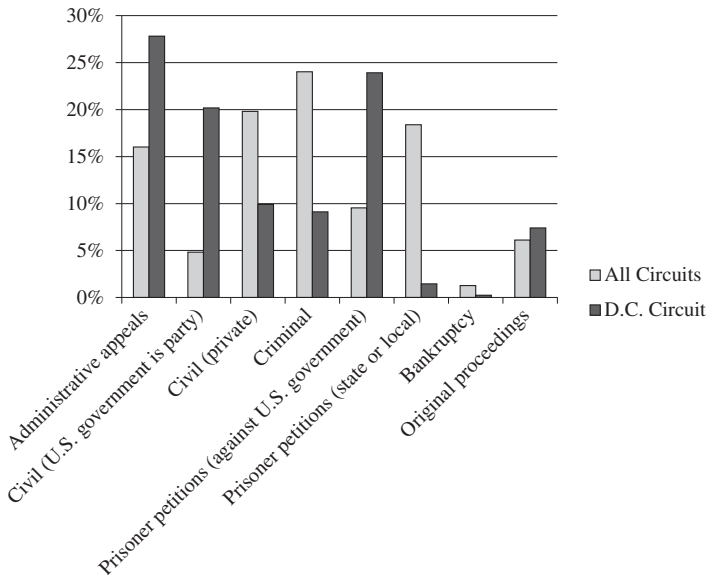


FIGURE 1: APPEALS COMMENCED<sup>48</sup>

<sup>43</sup> *E.g.*, *In re Navy Chaplaincy*, 534 F.3d 756, 759 (D.C. Cir. 2008) (constitutional challenge to operation of United States Navy Chaplain Corps).

<sup>44</sup> *Infra* Figure 1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Table B-1. U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending December 31, 2009*, U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2009/dec09/B01Dec>

The difference between the cases handled by the D.C. Circuit and those heard in the other circuits may help account for other statistical differences such as, for example, the frequency at which the D.C. Circuit hears argument. The D.C. Circuit hears oral arguments in 44% of the cases it decides on the merits.<sup>49</sup> In contrast, circuit courts nationwide hear oral argument only 29% of the time, deciding more than two-thirds of their cases based upon the parties' briefs.<sup>50</sup> This may be due to the fact that "agency reviews are often disproportionately complex, esoteric, and difficult."<sup>51</sup> On the other hand, the D.C. Circuit's lower volume of cases and the fact that all of its judges are located in one courthouse in Washington, D.C. may explain part of that difference. For example, in 2009, the average active D.C. Circuit judge participated in 168 cases terminated on the merits, compared to the nationwide average of 495.<sup>52</sup> In other words, a typical federal appellate judge may expect to participate in nearly three times the number of merits cases per year than a judge on the D.C. Circuit.<sup>53</sup> Moreover, the ratio of signed opinions to unsigned dispositions, such as *per curiam* judgments, is roughly the same for the D.C. Circuit as all other circuits.<sup>54</sup> Although circuit courts nationwide issue published opinions in only 15% of cases, the D.C. Circuit issues published opinions nearly 40% of the time.<sup>55</sup> The large numbers of unpublished opinions in the other circuits make up for some of this difference. Although the nationwide average for unpublished opinions is 21% of dispositions, the D.C. Circuit issues none.<sup>56</sup>

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09.pdf (last visited July 2, 2013) [hereinafter *Statistical Tables for the Federal Judiciary 2009*].

<sup>49</sup> See *infra* Figure 2.

<sup>50</sup> *Id.*

<sup>51</sup> BAKER, *supra* note 12, at 85.

<sup>52</sup> *Statistical Tables for the Federal Judiciary 2009*, *supra* note 48.

<sup>53</sup> These numbers include cases considered by both active resident and visiting judges terminated on the merits. The numbers exclude resident senior judges, but include visiting senior judges. However, we expect that the contributions of visiting senior judges do not significantly affect these numbers because the practice is comparatively rare. In addition, these calculations are based upon the number of active judges as of January 1, 2011, rather than the number of authorized judgeships. In other words, these numbers take into account the seventeen vacancies as of that date. One of those vacancies has since been filled. See *Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx> (last visited Mar. 14, 2013).

<sup>54</sup> See *infra* Figure 3.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

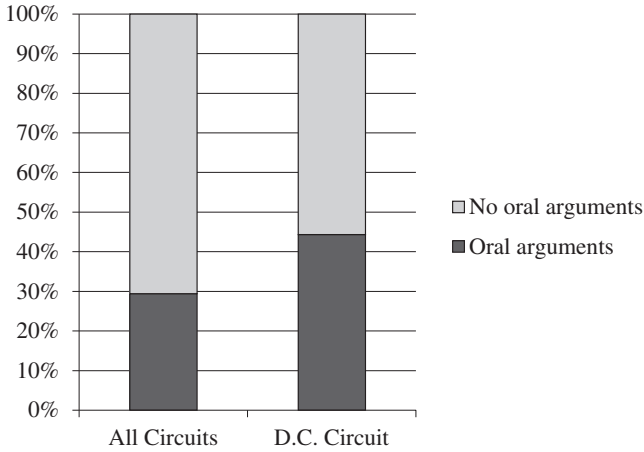


FIGURE 2: FREQUENCY OF ORAL ARGUMENTS FOR MERITS CASES<sup>57</sup>

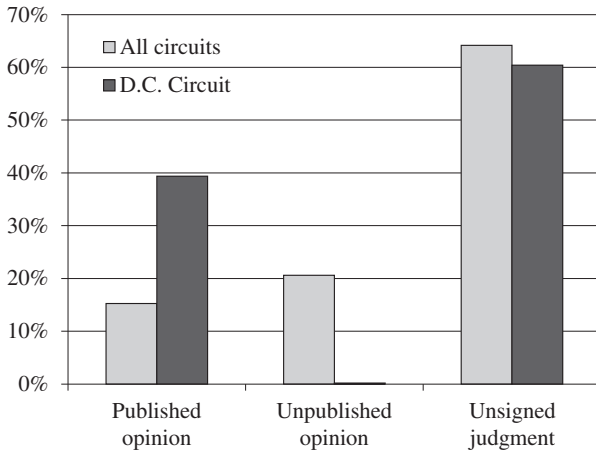


FIGURE 3: TYPES OF DISPOSITIONS FOR MERITS CASES<sup>58</sup>

### III. DOCKET DRIVERS: “PUSH” AND “PULL” EXPLANATIONS FOR A UNIQUE CASELOAD

The D.C. Circuit’s docket is a product of three sorts of drivers. First, geographic and demographic “push” factors cause the D.C. Circuit to hear fewer cases in some categories than do the other circuits. Second, congressional choice is a “pull” factor that attracts more cases in some categories to the D.C. Circuit than to the other circuits. Third,

<sup>57</sup> *Statistical Tables for the Federal Judiciary 2009*, *supra* note 48.

<sup>58</sup> Table S-3. *U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2009*, U.S. COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/tables/S03Sep09.pdf> (last visited July 2, 2013).

where litigants have a choice of forum, their choices are a third sort of driver that, depending upon their perceptions about the desirability of the trial and appellate level federal courts in the District and any alternatives, may either push cases away from the D.C. Circuit or pull them in.

#### A. *The “Push”: Fewer Typical Federal Cases*

The D.C. Circuit hears fewer commercial and criminal cases than do other circuit courts. Part of this can be explained through basic geography and demographics. The D.C. Circuit is simply far smaller and has far fewer people living in it compared to any other circuit. About 600,000 people live within the geographic jurisdiction of the D.C. Circuit.<sup>59</sup> The Congress has authorized eleven appellate judgeships for the D.C. Circuit, compared to 167 authorized judgeships for all of the federal courts of appeal<sup>60</sup> serving a national population of over 316 million.<sup>61</sup> In other words, Washington, D.C. has about 1.8 authorized federal circuit judgeships per 100,000 people, compared to the national average of 0.05 per 100,000 people—a 34-fold difference. Geography tells a similar story. The District spans about sixty-one square miles, compared to the over 3.5 million square miles that make up the United States.<sup>62</sup> On average there is one authorized Circuit judgeship per five and a half square miles in the D.C. Circuit, compared to the national average of one judgeship per 21,000 square miles.

With so many judges presiding over so few people across such a small area, the docket of the D.C. Circuit naturally is different from that of other circuits.<sup>63</sup> For example, the number of criminal cases per judge is much lower, notwithstanding the high crime rate of the District. As a result, the Court sees proportionally fewer federal criminal cases. In addition, the government employs nearly one third of all employees in the District.<sup>64</sup> With less private commercial activity in the District than in the rest of the country proportionally per judge, the Court sees fewer

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<sup>59</sup> *State & County Quickfacts*, U.S. CENSUS BUREAU (June 27, 2013, 1:52 PM), <http://quickfacts.census.gov/qfd/states/11000.html>.

<sup>60</sup> See 28 U.S.C. § 44(a) (2011). Note that these data do not include the Federal Circuit.

<sup>61</sup> *U.S. & World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/main/www/popclock.html> (last visited July 2, 2013).

<sup>62</sup> *Profile of the People and Land of the United States*, NATIONALATLAS.GOV, [http://nationalatlas.gov/articles/mapping/a\\_general.html](http://nationalatlas.gov/articles/mapping/a_general.html) (last modified Jan. 14, 2013).

<sup>63</sup> See, e.g., Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1362 n.103 (2008) (“Personal jurisdiction and venue essentially dictate the subject matter jurisdiction of the D.C. Circuit. . . . [T]he small geographic size of the District of Columbia means that relatively few organizations and individuals reside there, limiting the district court’s personal jurisdiction as well as its venue.”).

<sup>64</sup> *District of Columbia Wage and Salary Employment by Industry and Place of Work a/ (In Thousands)*, DOES.DC.GOV, [http://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/DOES\\_CESdc\\_May12.pdf](http://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/DOES_CESdc_May12.pdf) (last visited July 10, 2012).

ordinary commercial disputes. Because there are no immigration courts within the District of Columbia, the D.C. Circuit hears no immigration appeals.<sup>65</sup> Finally, a lawsuit challenging the denial of benefits under the Social Security Act may be brought only in the forum in which the claimant resides.<sup>66</sup> As a result, although Social Security cases may be brought in the District and be appealed to the D.C. Circuit,<sup>67</sup> the District's relatively low population makes these cases relatively rare in the D.C. Circuit.

### *B. The "Pull": More Administrative Cases*

The "push" factors discussed above would tend toward a light docket if it were not for the types of cases the D.C. Circuit hears in disproportionately large numbers.<sup>68</sup> As then-Senator Barack Obama explained:

[Under the D.C. Circuit's] jurisdiction fall laws relating to all sorts of Federal agencies and regulations. . . . It has jurisdiction that other appeals courts do not have. The judges on this court are entrusted with the power to make decisions affecting the health of the environment, the amount of money we allow in politics, the right of workers to bargain for fair wages and find freedom from discrimination, and the Social Security that our seniors will receive.<sup>69</sup>

The D.C. Circuit reviews, as a percentage of its docket, almost twice as many cases involving administrative law and petitions concerning the federal government as do the other circuits. Moreover, the share of total administrative reviews in the country conducted by the D.C. Circuit has been growing steadily over time, from 28% of the national total in 1986 to 36% in 2010.<sup>70</sup>

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<sup>65</sup> John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 21 (2005) ("The current venue rule is that [an immigration] petition must be filed in the circuit in which the IJ completed proceedings. As a practical matter, this means that only the First through the Eleventh Circuits have jurisdiction over petitions for review, since there are no immigration courts located within the territory of the District of Columbia Circuit. Before April 1, 1997, a petition could be filed in either the circuit in which the IJ 'conducted [proceedings] in whole or in part' or the circuit in which the petitioner resided.").

<sup>66</sup> See 42 U.S.C. § 405(g) (2011).

<sup>67</sup> See *Rossello v. Astrue*, 529 F.3d 1181 (D.C. Cir. 2008).

<sup>68</sup> Although there are surely judges in other circuits who would say the D.C. Circuit's docket is light even with its special jurisdiction, the relative workloads of judges on the various circuits is beyond the scope of this Article.

<sup>69</sup> Obama, *supra* note 1.

<sup>70</sup> Ginsburg, *supra* note 3, at 3.

One key reason for the concentration of administrative review in the D.C. Circuit is the Congress's choice to grant the D.C. Circuit jurisdiction over certain types of cases. For example, the Appendix<sup>71</sup> contains more than 150 statutory provisions that specifically refer to the D.C. Circuit, with over 130 of these specifically relating to jurisdiction. In addition, over a third of those jurisdictional provisions grant exclusive jurisdiction to the D.C. Circuit. The provisions that grant exclusive jurisdiction establish appellate review but restrict that review to the D.C. Circuit by using a phrase such as the following:

Notwithstanding any other provision of law . . . the final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia Circuit. There shall be no right of appeal in such proceedings to any other circuit court of appeals.<sup>72</sup>

In the other provisions, the Congress permits appellate review in any circuit that is proper, usually the home forum of the petitioner, and also expressly allows review in the D.C. Circuit even if review there otherwise would be improper. The following example comes from a statute concerning "court review of orders and rules" for the Securities and Exchange Commission:

A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.<sup>73</sup>

These 130 jurisdictional provisions do not include all of the general provisions establishing appellate review that do not specifically mention the

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<sup>71</sup> For our data set we compiled all the statutory provisions in the United States Code that single out the D.C. Circuit for special treatment by searching the text of the U.S. Code in Westlaw using the search: <te("court of appeals for the district of columbia") te("district of columbia circuit")>. We also searched for similar statutory provisions that singled out other circuits, but found that there are only a few: nineteen in total for the other regional circuits, and sixty-eight for the Federal Circuit. We then catalogued the following for each provision we found: (1) U.S. Code Title; (2) whether it grants parallel jurisdiction to the D.C. Circuit, makes such jurisdiction exclusive, or did something else; (3) subject matter, (4) the officer whose decisions the provision subjects to review; (5) the nature of the decision that the provision subjects to review; and (relatedly) (6) whether the decision subject to review is a rulemaking, licensing decision, imposed a fine or penalty, or related to some other adjudication.

<sup>72</sup> 8 U.S.C. § 1226a(b)(3) (2011) (statute addressing mandatory detention of terrorism suspects).

<sup>73</sup> 15 U.S.C. § 78y(a)(1) (2006).

D.C. Circuit, such as this one, from a statute concerning administrative review of pesticides:

In the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely affected by such order and who had been a party to the proceedings may obtain judicial review by filing in the United States court of appeals for the circuit wherein such person resides or has a place of business, within 60 days after the entry of such order, a petition praying that the order be set aside in whole or in part.<sup>74</sup>

In those general provisions, a resident or proprietor in the District may still seek review in the D.C. Circuit, but such provisions are not included in the statistics presented in this section of the Article. Provisions providing for direct review in the District Court for the District of Columbia, with appellate review in the D.C. Circuit by operation of the general appellate jurisdiction statute,<sup>75</sup> are not included, either.

Although congressional choice plays a direct role in shifting administrative review from other circuits to the D.C. Circuit, it also plays an indirect role. Not all agency decisions must be reviewed solely by the D.C. Circuit and, as a matter of fact, many statutes give a plaintiff the choice between the D.C. Circuit and another circuit court. In such instances, the Congress has still chosen the D.C. Circuit as a forum for administrative review, but has also given the ultimate choice to the litigants.

#### IV. WHY AND WHEN DOES THE CONGRESS “PULL” ADMINISTRATIVE LAW TO THE D.C. CIRCUIT?

The preceding sections demonstrate in detail what most administrative law students, scholars, and practitioners already know: the D.C. Circuit plays a special role in administrative law, as well as in other important, quintessentially federal subject matter areas like national defense. After digging past this initial clarity, however, meaning is hard to come by. *Why* exactly is the D.C. Circuit special? Is the Circuit’s special role the product of place? People? Historical accident? Is there “nothing inevitable about assigning jurisdiction to review government decisions to the District of Columbia Circuit,” as Chief Justice Roberts would have it,<sup>76</sup> or does the court’s “location in the nation’s capital and [ ] dual jurisdiction as both federal and local forum[ ] . . . destine[ ]” it to

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<sup>74</sup> 7 U.S.C. § 136n(b) (2006).

<sup>75</sup> 28 U.S.C. § 1291 (2000).

<sup>76</sup> Roberts, *supra* note 2, at 377.

“make substantial contributions to American jurisprudence,” as Associate Justice Ginsburg explains?<sup>77</sup>

These questions are not merely academic. The Congress crafts new judicial review provisions all the time and, when it does so, it makes venue decisions that are relevant here: should jurisdiction lie in the D.C. Circuit and should it be exclusive? As “the choice of forums inevitably affects the scope of the substantive right to be vindicated,”<sup>78</sup> the answers to these questions matter to plaintiffs, defendants, judges, and sometimes, to the country as a whole.

A comprehensive explanation of when jurisdiction should lie in the D.C. Circuit is beyond the scope of this Article and no doubt depends, in large part, upon the unique circumstances of each statute and judicial review provision. Rather, as a starting point, in the first section that follows we offer some possible hypotheses for why the Congress might choose to treat the D.C. Circuit differently. In the subsequent section we review the Congress’s actual decisions to explore our hypotheses.

#### A. *Possible Reasons for Treating the D.C. Circuit Differently*

As we discussed, one of the main drivers of the D.C. Circuit’s unique docket is the prevalence of administrative law cases. The Congress has authorized the D.C. Circuit to review a large number of government actions either exclusively—no other circuit can review the decision—or at the option of the plaintiff who may opt to file either in the circuit court in which the decision being reviewed took place or in the D.C. Circuit.

Why vest such broad jurisdiction in the D.C. Circuit? We can think of several plausible explanations for the Congress’s decision to concentrate the authority to review agency actions in the D.C. Circuit. We think it likely that each of these explanations goes some way towards painting the full picture.

First, the Congress may believe that it is more efficient to have a single court provide guidance about administrative proceedings. That way, a federal agency regulating on a national scale need tailor its action to only one body of precedent, rather than to a patchwork of potentially conflicting cases in multiple circuits. But although the Congress could have given the D.C. Circuit exclusive jurisdiction over all administrative law, as it did with the Federal Circuit over patent law,<sup>79</sup> it did not go quite this far.

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<sup>77</sup> Bloch & Ginsburg, *supra* note 38, at 549.

<sup>78</sup> U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 359–60 (1971).

<sup>79</sup> See 28 USC § 1295(a)(1) (2006).



Second, there may be a positive feedback effect because the D.C. Circuit is perceived by many in the Congress, as well as perhaps by the President, the public, and the press, to be the circuit with the greatest expertise in administrative law. For instance, in a recent confirmation hearing, Senator Charles Schumer of New York remarked:

[W]e are talking about nothing less momentous than a lifetime appointment to what is generally regarded as the second-most important court in the land, a court of great importance to those of us who sit in the Senate or the House, because it has such jurisdiction over governmental issues, and years after this nomination, this court is going to influence a great deal what this Congress and future Congresses have done.<sup>80</sup>

The example above is only one of many that demonstrate that senators perceive a special role for the D.C. Circuit.<sup>81</sup>

Third, the D.C. Circuit's expertise may exist not only in the eye of the congressional beholder. It is reasonable to believe that the Circuit has a particular expertise in administrative law simply because of the nature of its docket over the last few decades. In addition, a large percentage of the members of the court have experience in either the executive or the legislative branches, a perspective that undoubtedly helps inform their decisions addressing the government and its agencies.<sup>82</sup>

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<sup>80</sup> *Confirmation Hearing on the Nomination of Brett Kavanaugh to be Circuit Judge for the District of Columbia Circuit: Before the Comm. on the Judiciary of the United States S., 109th Cong. 3 (2006), available at <http://www.coherentbabble.com/Congress/SenHrgJudComm050906.pdf>.*

<sup>81</sup> Illinois Senator Dick Durbin also spoke during Judge Kavanaugh's nomination hearing, noting that the D.C. Circuit is the "second-highest court in the land." *Id.* at 26. In addition, Massachusetts Senator Edward Kennedy acknowledged the D.C. Circuit's "special jurisdiction" and the significant role it plays in various legislative areas of national importance, such as those regarding the National Labor Relations Board, "the relationship of workers and what happens to workers, discrimination against workers in the workplace," and environmental issues. *Id.* at 30. Senator Kennedy also noted that so many of the D.C. Circuit's judgments become law that very few are ever heard by the Supreme Court. *Id.*

<sup>82</sup> In 1987, Judge Patricia Wald explained: "[O]ur members include three ex-Senators or Representatives and seven others who previously held senior executive branch positions. A stint in one of the other branches seems almost a prerequisite to service on our court." *See* Wald, *supra* note 2. Since she wrote those words, new additions to the D.C. Circuit have also brought similar executive or legislative experience. For example, Judge Kavanaugh served as Senior Associate Counsel to President George W. Bush, Judge Griffith served as Senate Legal Counsel of the United States, and Judge Garland was Principal Associate Deputy Attorney General. List of D.C. Circuit Judges and Their Biographies, [CADC.USCOURTS.GOV](http://www.cadc.uscourts.gov/internet/home.nsf/Content/Judges), <http://www.cadc.uscourts.gov/internet/home.nsf/Content/Judges> (last visited July 2, 2013).

Former D.C. Circuit judge John Roberts was Principal Deputy Solicitor General, and former judge Clarence Thomas was Chairman of the U.S. Equal Employment Opportunity Commission. *See* <http://www.supremecourt.gov/about/biographies.aspx>. Other nominees to the Circuit have also had executive branch experience. Current Justice Elena Kagan was Deputy Assistant to President Clinton for Domestic Policy, and Caitlin Halligan, a recent nominee,

Fourth, the Congress—or the interest groups influencing the Congress’s choices about jurisdiction—may approve of decisions the D.C. Circuit reaches or of its administrative law precedent generally. Although it is difficult to determine whether this is the case, the Supreme Court’s rulings provide one proxy. The Supreme Court is, after all, the last word on administrative law and the other cases the D.C. Circuit hears. Over the last five terms, the D.C. Circuit’s Supreme Court batting average (cases affirmed divided by cases taken by the Supreme Court) is significantly better than the overall average.<sup>83</sup>

Fifth, the D.C. Circuit is geographically close to many of the agencies and entities whose decisions it has jurisdiction to review. The Congress likely recognizes that it is significantly more convenient for those agencies to litigate appeals in a court that is close by. As one former judge put it, “When individual legislators or the leadership in the two Houses decide to enter the judicial arena, they find it an easy walk or subway ride to [the D.C. Circuit] courthouse.”<sup>84</sup>

Each of these factors may also help to explain why some private litigants opt for review in the D.C. Circuit when the Congress, through a statute granting non-exclusive jurisdiction, has given them the option of doing so. Each litigant’s decision may either push a case away from the D.C. Circuit or pull one in. Because the D.C. Circuit has greater experience with and may have greater expertise in administrative law, a litigant who believes he will benefit from that expertise may choose to file in that Circuit. In contrast, a litigant who feels that the Circuit’s expertise could hurt him will go elsewhere. In addition to expertise, a litigant is likely to opt for the D.C. Circuit when he believes that Circuit is more likely to reverse an agency decision than the other available circuits. The D.C. Circuit has a higher reversal rate of agency decisions than do the other circuits,<sup>85</sup> and is regarded by some as a “relatively strict overseer of agencies.”<sup>86</sup> Furthermore, the litigant in a particular case might prefer the D.C. Circuit’s precedent regarding an issue of administrative or sub-

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was Solicitor General of the State of New York. *See id.*; Ashley Parker, *Republicans Block Judicial Nominee’s Confirmation for a Second Time*, N.Y. TIMES (Mar. 6, 2013), <http://www.nytimes.com/2013/03/07/us/politics/republicans-again-block-confirmation-of-judicial-nominee-halligan.html>.

<sup>83</sup> *See generally* Tom Goldstein, *Stat Pack Archive*, SCOTUSBLOG.COM, <http://www.scotusblog.com/reference/stat-pack> (last visited July 2, 2013) (a compilation of Supreme Court statistics).

<sup>84</sup> Wald, *supra* note 2, at 2.

<sup>85</sup> *See* Ginsburg, *supra* note 3, at 4. Of course, the D.C. Circuit’s higher reversal rate may *itself* be the result of a sample selection bias. Petitioners with cases worthy of reversal may flock disproportionately to the D.C. Circuit for some of the other reasons we have identified.

<sup>86</sup> Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1202 (1992).

stantive law. For example, unlike the First and Ninth Circuits, the D.C. Circuit requires that an agency issue a rule subject to public notice and comment before changing the way it interprets its own regulation.<sup>87</sup>

Geography likely also plays a role in litigants' choice of venue. Trade associations, consumer organizations, and other groups who are frequent challengers of agency regulations concentrate in the District of Columbia.<sup>88</sup> The proximity of the headquarters of those groups to the D.C. Circuit likely makes the Circuit an appealing venue, as does the expertise in administrative law that local law firms have developed.

It is likely that each of the factors we have identified contributes at least somewhat to the decision by the Congress to confer on the D.C. Circuit extensive jurisdiction over administrative review. But can more be said about why the Congress treats the D.C. Circuit differently than other circuits?

### B. Findings

We reviewed how the Congress has treated the D.C. Circuit in the past, as reflected in the U.S. Code, in the hopes of revealing trends that can guide future decision-making and show what the Congress thinks about the D.C. Circuit's special role. In short, we set out to discover why the *Congress* thinks the D.C. Circuit is special. We also hope this analysis serves as a starting point for developing a broader normative framework for evaluating when the D.C. Circuit should be given jurisdiction and when that jurisdiction should be exclusive.

Our dataset, which is discussed below, allows us to analyze how the Congress gives the D.C. Circuit special treatment across three cuts: by the subject matter over which a statutory provision grants review; by the nature of the decision it places under review; and by the type of decision maker whose decision it puts under review.<sup>89</sup> Each cut is discussed below.

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<sup>87</sup> Compare *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999) (requiring notice and comment for an FAA Notice to Operators), with *Warder v. Shalala*, 149 F.3d 73 (1st Cir. 1998) (holding that an interpretative rule was not invalidated by the lack of notice and comment procedures), and *Erringer v. Thompson*, 371 F.3d 625 (9th Cir. 2004) (holding that no notice and comment is necessary for an interpretive rule).

<sup>88</sup> See *MORRIS*, *supra* note 18, at 293–94 (“Because of the location of the agencies and the new public interest organizations in Washington . . . Congress entrusted the Court with more exclusive jurisdiction.”); Bruff, *supra* note 86, at 1202 (“[S]pecialized segments of the bar that handle administrative litigation, for example communications lawyers, cluster in Washington.”).

<sup>89</sup> Because our dataset focuses upon statutes specifically addressing the D.C. Circuit, it does not account for the underlying frequency of these categories across the U.S. Code and federal judiciary.

### 1. Special Treatment by Subject Matter

As Table 1 shows, the distribution of references to the D.C. Circuit in the U.S. Code is not uniform. Specifically, only ten titles have more than five references: 7 (Agriculture), 8 (Aliens and Nationality), 12 (Banks and Banking), 15 (Commerce and Trade), 21 (Food and Drugs), 26 (Internal Revenue Code), 28 (Judiciary and Judicial Procedure), 30 (Mineral Lands and Mining), 42 (The Public Health and Welfare), and 49 (Transportation).

U.S. Code Title	Total references
2 The Congress	1
5 Government Organization and Employees	2
7 Agriculture	11
8 Aliens and Nationality	10
10 Armed Forces	4
12 Banks and Banking	11
15 Commerce and Trade	20
16 Conservation	2
17 Copyrights	3
18 Crimes and Criminal Procedure	1
19 Custom Duties	1
20 Education	2
21 Food and Drugs	15
22 Foreign Relations and Intercourse	4
25 Indians	2
26 Internal Revenue Code	5
27 Intoxicating Liquors	1
28 Judiciary and Judicial Procedure	5
29 Labor	3
30 Mineral Lands and Mining	5
33 Navigation and Navigable Waters	4
38 Veterans' Benefits	1
39 Postal Service	1
40 Public Buildings, Property, and Works	1
42 The Public Health and Welfare	12
43 Public Lands	1
45 Railroads	2
47 Telegraphs, Telephones, and Radiotelegraphs	2
49 Transportation	12
50 War and National Defense	1

TABLE 1: REFERENCES TO THE D.C. CIRCUIT  
IN THE U.S. CODE BY TITLE<sup>90</sup>

<sup>90</sup> Note that five additional references are contained in public laws not yet codified into the U.S. Code.

The distribution of exclusive and non-exclusive jurisdictional provisions also is not uniform. Table 2 shows the four titles that have more than five jurisdictional provisions, of which at least fifty percent are exclusive. They include Titles 8 (Aliens and Nationality, 100 percent), 22 (Foreign Relations and Intercourse, fifty percent), 26 (Internal Revenue Code, sixty percent), and 42 (The Public Health and Welfare, seventy-three percent). Similarly, Table 3 shows the major non-exclusive titles, defined as having more than five jurisdictional provisions, of which less than fifty percent are exclusive. Only seven titles fit this definition and three have no exclusive provisions.

U.S. Code Title		Exclusive Jurisdiction
8	Aliens and Nationality	100%
22	Foreign Relations and Intercourse	50%
26	Internal Revenue Code	60%
42	The Public Health and Welfare	73%

TABLE 2: MAJOR TITLES WITH EXCLUSIVE JURISDICTION

U.S. Code Title		Exclusive Jurisdiction
7	Agriculture	9%
12	Banks and Banking	27%
15	Commerce and Trade	15%
21	Food and Drugs	0%
30	Mineral Lands and Mining	40%
33	Navigation and Navigable Waters	0%
49	Transportation	0%

TABLE 3: MAJOR TITLES WITH NON-EXCLUSIVE JURISDICTION

## 2. Special Treatment by Type of Agency Action

Another way to examine the special treatment the D.C. Circuit receives from the Congress is to consider what type of action each special review provision concerns. The jurisdictional provisions include reviews of two licensing provisions, thirty-five provisions for fines or penalties, twenty-four rulemaking provisions, and seventy-six other adjudications.<sup>91</sup> Notably, only three, or 9%, of the thirty-five provisions involv-

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<sup>91</sup> Note that some provisions involve the review of more than one type of action.

ing fines or penalties give the D.C. Circuit exclusive jurisdiction, while 46% of the rulemaking provisions give the Circuit exclusive review.

Three considerations might explain the significantly greater likelihood that the Congress will make the D.C. Circuit's jurisdiction over a rulemaking decision, as opposed to a fine or penalty decision, exclusive. First, a regulation is more likely to have a national effect than a fine or penalty, which may have no national effect beyond its potential to act as persuasive precedent. Second, the Congress may believe that the presumption that a plaintiff should be able to choose his forum is stronger in the context of a challenge to a penalty or fine, where a particular plaintiff has been subjected to direct agency action, than in the context of a regulation, which usually is a statement of general applicability with future effect.<sup>92</sup> Third, most federal agencies are headquartered in the District or nearby, so it is reasonable to assume that the personnel and materials relevant to a rulemaking are located there as well.

### 3. Special Treatment by the Decision Maker

Our dataset also allows us to compare the Congress's special treatment of the D.C. Circuit based upon the placement of the decision maker in the constitutional structure. The majority of U.S. Code provisions providing for exclusive jurisdiction in the D.C. Circuit govern review of quasi-judicial decisions, such as those of the Copyright Royalty judges,<sup>93</sup> certain military commissions,<sup>94</sup> and, in certain situations, the Tax Court.<sup>95</sup>

As for administrative agencies, in our dataset the D.C. Circuit's jurisdiction to review the decision of an *independent* agency is almost twice as likely to be exclusive (29% of review provisions) than is its jurisdiction to review the decision of an agency whose head is subject to the President's removal (16% of review provisions). There are two theoretical explanations for this trend, but we can only speculate about what the Congress really has in mind.

First, for better or worse, independent agencies are insulated from political influence, making the judiciary a relatively more important check upon their decision-making. The Congress may leave judicial review in the exclusive hands of the D.C. Circuit in hopes that a single court articulating a single body of law will be able to maintain a closer watch over the actions of a particular agency than can thirteen circuits.

Second, the insulation afforded independent agencies often is intended to allow them to make decisions based upon expertise in compli-

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<sup>92</sup> See 5 U.S.C. § 551 (2006).

<sup>93</sup> 17 U.S.C. § 803(d)(1) (2006).

<sup>94</sup> 10 U.S.C. § 950g(a) (2006).

<sup>95</sup> 26 U.S.C. § 7482(b)(1) (2006).

cated regulatory areas. The Congress may leave judicial review of such decisions in the exclusive hands of the D.C. Circuit upon the assumption that, for all the reasons discussed above, the Circuit is in the best position to consider complicated administrative decisions while paying due deference to the acting agency's expertise.

#### CONCLUSION

From its initial formation, the D.C. Circuit has heard different types of cases than the other federal courts of appeal. The modern D.C. Circuit hears a disproportionate share of administrative petitions and other cases involving the federal government because of a number of factors. Notably, the Congress has expressly given the D.C. Circuit jurisdiction over many types of administrative issues. In particular, the D.C. Circuit tends to have exclusive jurisdiction over review of rules promulgated by federal administrative agencies and, specifically, independent agencies. There are many possible explanations for the differences, including accidents of history and geography and congressional preferences for a court with expertise in administrative law.

Opportunities for further investigation regarding the D.C. Circuit abound. First, research is needed to put flesh on the statutory bones we have identified and to supplement our analysis. Which specific kinds of administrative cases comprise the D.C. Circuit docket? In other words, does the D.C. Circuit's docket substantially reflect cases over which the Congress gave it exclusive jurisdiction, or does the Circuit's administrative diet consist largely of cases that could have been brought anywhere but were brought to the District at the choice of private litigants? Other questions include, for example, whether the Congress has consistently created statutes granting exclusive or non-exclusive jurisdiction to the D.C. Circuit, or whether those special grants have arisen episodically across the nation's history depending upon the political or social forces of the day?

Furthermore, while our analysis takes into account only statutes that specifically mention the D.C. Circuit, statutes that specifically grant jurisdiction in federal district court in the District of Columbia also channel review through the D.C. Circuit. Additional research could supplement our analysis to account for these types of cases and explore the Congress's choice in vesting initial jurisdiction over agency action in either a district court or in a court of appeals.

Second, more research is needed to explore the consequences of the D.C. Circuit's unique jurisdiction and caseload. Although the Federal Circuit also enjoys a unique docket, commentators have given the conse-

quences of that court's jurisdiction decidedly mixed reviews.<sup>96</sup> Although a specialized court could lead to more consistent results, it could also lead to institutional tunnel vision caused by a lack of the collective wisdom of many different courts addressing similar questions somewhat independently, as is typically the case in federal courts. It would be hard to evaluate empirically the success of the areas over which the D.C. Circuit has exclusive jurisdiction, but the areas of nonexclusive jurisdiction leave room for exploration. For example, we have not ventured to quantify whether other circuits tend to agree with the D.C. Circuit's administrative decisions, how often litigants choose to file in the D.C. Circuit when given a choice, or whether part of a litigant's decision to file in the D.C. Circuit is because of petitioner-favorable precedent. Nor have we assessed the normative implications of a specialized court.

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<sup>96</sup> See generally, e.g., Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787 (2008).



APPENDIX  
(all statutes included in the analysis)

2 U.S.C. § 137c	15 U.S.C. § 57a(e)(5)(B)
5 U.S.C. § 552b(g)	15 U.S.C. § 77i(a)
5 U.S.C. § 7123(a)	15 U.S.C. § 78o(i)(5)(A)
7 U.S.C. § 2(a)(1)(C)(v)(VI)	15 U.S.C. § 78y(a)(1)
7 U.S.C. § 12a(9)	15 U.S.C. § 78y(b)(1)
7 U.S.C. § 27d(c)(1)	15 U.S.C. § 80a-42(a)
7 U.S.C. § 2621(b)(2)	15 U.S.C. § 80b-13(a)
7 U.S.C. § 2714(b)(2)	15 U.S.C. § 687e(f)(4)(B)
7 U.S.C. § 4314(b)(2)	15 U.S.C. § 717r(b)
7 U.S.C. § 4610(b)(2)	15 U.S.C. § 719h(c)(1)
7 U.S.C. § 4815(b)(2)(A)	15 U.S.C. § 720e(a), (c)
7 U.S.C. § 4910(b)(2)	15 U.S.C. § 766(c)
7 U.S.C. § 7107(d)(1)	15 U.S.C. § 1710(a)
7 U.S.C. § 7419(d)(1)	15 U.S.C. § 1825(b)(2)
8 U.S.C. § 1189(c)(1)	15 U.S.C. § 2060(a)
8 U.S.C. § 1226a(b)(2)(A)	15 U.S.C. § 2615(a)(3)
8 U.S.C. § 1226a(b)(3)	15 U.S.C. § 2618(a)(1)(A)
8 U.S.C. § 1226a(b)(4)	15 U.S.C. § 3416(a)(4)
8 U.S.C. § 1535(a)(1)	15 U.S.C. § 6714(a)
8 U.S.C. § 1535(b)(1)	16 U.S.C. § 4016(b)(2)(A)
8 U.S.C. § 1535(c)(1)	16 U.S.C. § 825l(b)
8 U.S.C. § 1535(c)(2)(A)	17 U.S.C. § 114(f)(5)(D)
8 U.S.C. § 1535(e)(1)	17 U.S.C. § 802(f)(1)(D)
8 U.S.C. § 1535(e)(2)	17 U.S.C. § 803(d)(1)
10 U.S.C. § 950g	18 U.S.C. § 3006A(k)
10 U.S.C. § 950h(b)	19 U.S.C. § 1516a(g)(4)(A)
10 U.S.C. § 950h(c)	20 U.S.C. § 6083(f)(5)
10 U.S.C. § 950i	20 U.S.C. § 7183(e)(5)
12 U.S.C. § 1467a(j)	21 U.S.C. § 333(f)(6)
12 U.S.C. § 1786(j)(2)	21 U.S.C. § 335a(j)(1)
12 U.S.C. § 1817(j)(5)	21 U.S.C. § 335b(c)
12 U.S.C. § 1818(h)(2)	21 U.S.C. § 335c(d)
12 U.S.C. § 1848	21 U.S.C. § 346a(h)(1)
12 U.S.C. § 2266(b)	21 U.S.C. § 348(g)(1)
12 U.S.C. § 2268(d)	21 U.S.C. § 355(h)
12 U.S.C. § 3105(f)(1)	21 U.S.C. § 360g(a)
12 U.S.C. § 4583(a)	21 U.S.C. § 457(d)
12 U.S.C. § 4623(a)	21 U.S.C. § 607(d)
12 U.S.C. § 4634(a)	21 U.S.C. § 877
15 U.S.C. § 57a(e)(1)(A)	21 U.S.C. § 1036(b)

- 21 U.S.C. § 1041(c)(2)(A)  
21 U.S.C. § 1047  
22 U.S.C. § 4109(a) & (b)  
22 U.S.C. § 6761(a)(5)  
22 U.S.C. § 8142(a)(4)  
25 U.S.C. § 4161(d)(1)(A)  
25 U.S.C. § 4237(d)(1)(A) (I)  
25 U.S.C. § 4237(d)(1)(A) (II)  
26 U.S.C. § 3310(a)  
26 U.S.C. § 7482(b)(1)  
26 U.S.C. § 7482(b)(3)  
26 U.S.C. § 9011(a)  
26 U.S.C. § 9041(a)  
27 U.S.C. § 204(h)  
28 U.S.C. § 49(a) & (d)  
28 U.S.C. § 292(c)  
28 U.S.C. § 297(a)  
28 U.S.C. § 456(b)  
28 U.S.C. § 1294(2)  
28 U.S.C. § 1294(3)  
28 U.S.C. § 1294(4)  
28 U.S.C. § 2265(c)(2)  
28 U.S.C. § 2343  
29 U.S.C. § 160(f)  
29 U.S.C. § 210(a)  
29 U.S.C. § 660(a)  
30 U.S.C. § 811(d)  
30 U.S.C. § 816(a)(1)  
30 U.S.C. § 931(b)  
30 U.S.C. § 953(d)  
30 U.S.C. § 1276(a)  
33 U.S.C. § 907(j)(4)  
33 U.S.C. § 988(a)  
33 U.S.C. § 1319(g)(8)  
33 U.S.C. § 1321(b)(6)(G)  
38 U.S.C. § 7422(e)  
39 U.S.C. § 3663  
40 U.S.C. § 8164  
42 U.S.C. § 247d-6d(e)(10)  
42 U.S.C. § 300j-7  
PL 111-203 § 1053(b)(4)  
21 U.S.C. § 3871(a)(1)(B)  
22 U.S.C. § 1631f(b)  
42 U.S.C. § 504(a)  
42 U.S.C. § 4915(a)  
42 U.S.C. § 5311(c)(1)  
42 U.S.C. § 6384(b)  
42 U.S.C. § 6976(a)(1)  
42 U.S.C. § 7607(b)(1)  
42 U.S.C. § 9125  
42 U.S.C. § 9609(b)  
42 U.S.C. § 10139(a)(2)  
42 U.S.C. § 17373(i)(1)(A)  
43 U.S.C. § 1656(d)  
45 U.S.C. § 151  
45 U.S.C. § 355(f)  
45 U.S.C. § 719(g)  
47 U.S.C. § 325(e)(11)(B)  
47 U.S.C. § 402(b)  
48 U.S.C. § 1424-3  
48 U.S.C. § 1424b(a)  
48 U.S.C. § 1613  
48 U.S.C. § 1613a(c), (d)  
48 U.S.C. § 1821(b)(2)  
48 U.S.C. § 1823(c)  
49 U.S.C. § 521(b)(9)  
49 U.S.C. § 1153(b)(1)  
49 U.S.C. § 5127(a)  
49 U.S.C. § 31141(f)  
49 U.S.C. § 32503(a)  
49 U.S.C. § 32909(a)  
49 U.S.C. § 32915  
49 U.S.C. § 46110(a)  
49 U.S.C. § 47106(d)(3)  
49 U.S.C. § 47111(d)(3)  
49 U.S.C. § 47129(c)(5)  
49 U.S.C. § 60119(a)  
50 App. U.S.C. § 2412(c)(3)  
PL 111-203 § 202(a)(2)(A)  
PL 111-203 § 712(c)(1)(A)  
PL 111-203 § 718(b)(1)  
PL 111-260 § 717(a)(6)