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Susan Low Bloch

Georgetown University Law Center, bloch@law.georgetown.edu

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Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia

SUSAN LOW BLOCH* AND RUTH BADER GINSBURG**

INTRODUCTION

February 27, 2001 marked the 200th anniversary of the federal courts of the District of Columbia, the courts we know today as the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The history of these courts is complex, and sometimes enigmatic. Their names changed no fewer than six times since their creation; for some thirty years, from 1863 until 1893, the two courts existed as one umbrella tribunal, named the Supreme Court of the District of Columbia.¹ The courts' location in the nation's capital and their dual jurisdiction as both federal and local forums rendered the District of Columbia courts unique tribunals destined to make substantial contributions to American jurisprudence.

This Essay describes the evolution of these courts from a three-judge circuit court with both trial and appellate jurisdiction to the two courts whose 200th anniversary we celebrated this past year.² It then examines two main themes characteristic of these unique tribunals. First, as principal reviewers of government action, the courts of the District have protected the rule of law against nonobservance, neglect, or abuse by federal officials. Second, these courts have responded to the pleas and plight of vulnerable populations within the city, including African-Americans, women, the poor, the disabled, political protestors, and criminal defendants. While the District's courts were constrained by the

* Professor of Law, Georgetown University Law Center.

** Associate Justice, United States Supreme Court.

Justice Ginsburg and Professor Bloch jointly developed the themes for this Essay and for the keynote address delivered by Justice Ginsburg on March 8, 2001 for the Symposium, Bicentennial Celebration of the District of Columbia Circuit, 204 F.R.D. 499 (2002). In composing the keynote address for the Symposium, Justice Ginsburg relied in large part on research undertaken by Professor Bloch. Justice Ginsburg was also aided in preparing her lecture by her 2000 term law clerks Nick Bravin, Robert Gordon, Goodwin Liu, and Linda Lye. Professor Bloch composed this Essay using the full fruits of her research, including material that could not be accommodated in the time span of Justice Ginsburg's lecture. Professor Bloch regularly consulted with Justice Ginsburg, who reviewed drafts of the Essay as the work progressed. Professor Bloch would like to thank her friend and colleague, Vicki Jackson, for her support and inspiration, her research assistants, Nathan Daschle, Matthew Dunne, Julie Gurley, and Eric Parnes, and the Georgetown University Law Center for its generous writer's grants.

1. In 1893, Congress created the Court of Appeals of the District of Columbia, giving it the appellate authority of the D.C. Supreme Court. The court of first instance retained the title Supreme Court of the District of Columbia until 1936, when it became the District Court of the United States for the District of Columbia. *See infra* notes 47–48, 58 and accompanying text.

2. For a more complete history, see JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT* (2001); *see also*, MATTHEW F. MCGUIRE, *AN ANECDOTAL HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 1801–1976* (1977); E. BARRETT PRETTYMAN ET AL., *HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE COUNTRY'S BICENTENNIAL YEAR* (1976).

often restrictive laws, traditional habits of thoughts, and customs of the times, their opinions, particularly those voiced in dissent, sometimes broke new ground in ways both notable and influential.

I. HISTORY OF THE COURTS

On February 27, 1801, three months after the federal government moved to the District of Columbia,³ President John Adams signed a bill creating a judicial system for the District. That formative measure established a circuit court composed of three judges, commissioned to serve “during good behaviour.”⁴ The following year, on April 29, 1802, Congress instructed that the chief judge of the circuit court should also “hold a district court,” armed with the same

3. In 1790, Congress decreed that the capital would be located in a district not more than ten miles square along the Potomac River, on land ceded to the United States by Maryland and Virginia. Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130, 130. The statute provided that the government would not actually move to the Potomac location until December 1800. In the interim, Philadelphia served as the temporary seat of government. *Id.* § 5. John Adams was the first President to reside in the District, moving into the White House on November 1, 1800. But Adams’s time there was brief. On March 4, 1801, four months after Adams moved to Washington, Thomas Jefferson was sworn in as President and moved into the White House. WHITE HOUSE HISTORICAL SOC’Y, *THE LIVING WHITE HOUSE* 15 (1996).

4. Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103, 105. The circuit court was to meet four times per year, in each of the two counties that composed the District of Columbia, Washington and Alexandria County. For Washington, the designated dates were the fourth Monday of March, June, September, and December. For Alexandria, the dates were the second Monday of January, April, July, and the first Monday of October. *Id.* § 4, 2 Stat. at 106. Any two of the judges would constitute a quorum. *Id.* § 3, 2 Stat. at 105. The chief judge’s salary was \$2000 per year; each assistant judge’s salary was \$1600 per year. *Id.* § 10, 2 Stat. at 106–07. Appeals could be made to the United States Supreme Court if the matter in dispute exceeded \$100. *Id.* § 8, 2 Stat. at 106. The amount was raised to \$1000 in 1816. Act of Apr. 2, 1816, ch. 39, § 1, 3 Stat. 261, 261. For matters between \$100 and \$1000, the losing party could petition a Justice of the Supreme Court who had discretion to allow an appeal, if he believed that errors in the proceedings of the court “involve[d] questions of law of such extensive interest and operation as to render the final decision of them by the . . . Supreme Court desirable.” *Id.* § 2.

In addition to creating the circuit court, the 1801 Act also provided for an orphans’ court for each of the District’s two counties to deal with trust and probate matters, Act of Feb. 27, 1801 § 3, 2 Stat. at 105–06, and as many justices of the peace as the President thought “expedient,” *id.* § 11, 2 Stat. at 107. Serving five-year terms, the justices of the peace were responsible for setting bail, issuing arrest warrants, and trying cases in which the amount in controversy was under \$20. *Id.* President Adams, in one of his last acts as President, nominated forty-two justices of the peace; the Senate confirmed these nominations, but some of the commissions were not delivered. Four nominees who did not receive their commissions sued, thereby launching the case that yielded the Supreme Court’s momentous decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See discussion *infra* note 77.

Under the 1801 law, the circuit court was to apply the law and procedures of the state, Virginia or Maryland, in which it was sitting. Act of Feb. 27, 1801 § 1, 2 Stat. at 103. The court continued in this manner until the County of Alexandria was retroceded to Virginia. See Act of July 9, 1846, ch. 35, 9 Stat. 35. The 1846 Act provided that the Circuit Court of the District of Columbia in the County of Alexandria would be abolished upon formal approval of retrocession, *id.* § 3, 9 Stat. at 36, which occurred September 7, 1846. Fed. Judicial Ctr., *Circuit Court of the District of Columbia, 1801–1863: Legislative History*, at http://air.fjc.gov/history/uscc/uscc_dc_frm.html (last visited Jan. 8, 2002).

While it seems reasonable to assume that Congress took the phrase “during good behaviour” from Article III of the Constitution, the circuit court’s status as an Article III court was not settled until well into the next century. See *infra* notes 54–60 and accompanying text.

powers and jurisdiction as those vested in the nation's other district courts.⁵

As the first associate justices of the circuit court, President Adams appointed James Marshall, younger brother of John Marshall, the newly appointed Chief Justice of the United States Supreme Court, and William Cranch, President Adams's nephew.⁶ To serve as the court's first chief judge, Adams named and the Senate confirmed Thomas Johnson. Johnson had served on the United States Supreme Court from 1791 until 1793. He resigned from that post upon finding the rigors of riding circuit hazardous to his health.⁷ He vowed at his resignation to refuse all future public offices. True to that vow, Johnson declined Adams's appointment to the circuit court, but not soon enough to allow Adams to nominate another. Thus, President Jefferson, not President Adams, in fact

5. Act of Apr. 29, 1802, ch. 31, § 24, 2 Stat. 156, 166. The jurisdiction of the district courts throughout the country was much narrower than that of today's district courts. See ERWIN C. SURRENCY, *FEDERAL DISTRICT COURT JUDGES AND THE HISTORY OF THEIR COURTS* 3 (1965).

The Act of April 29, 1802 was not Congress's first effort to create a district court for the District. On February 13, 1801, in the waning days of the Adams Presidency, Congress passed a sweeping bill called the Judiciary Act of 1801, which reorganized the federal courts of the country, creating several new district and circuit courts, among them a district court for the District of Potomac that included the territory of the District of Columbia. See Judiciary Act of 1801, ch. 4, § 21, 2 Stat. 89, 96. On March 3, 1801, shortly after creating the circuit court for the District, Congress authorized the chief judge of the circuit court to hold the district court for the district of Potomac. Act of Mar. 3, 1801, ch. 32, § 7, 2 Stat. 123, 124. But on March 8, 1802, the newly elected Jeffersonian Congress, angry that the outgoing Federalists had created so many new courts and had thereby stacked the judiciary with many new Federalist judges, repealed both the Judiciary Act of 1801 and the Act of March 3, 1801. See Act of Mar. 8, 1802, ch. 8, §§ 1–2, 2 Stat. 132, 132. Section 3 of the March 8 Act revived the judiciary acts that had been in effect before the passage of the two 1801 acts. *Id.* § 3. Among other consequences, these repeals and revivals had the effect of abolishing the district court for the Potomac district. But Congress did not intend to deprive the District of Columbia of a district court. Accordingly, a month later, in the Judiciary Act of April 29, 1802, Congress authorized the chief judge of the circuit court of the District of Columbia to hold a district court for the District twice a year, with the same powers as other district courts in the country. Act of Apr. 29, 1802, ch. 31, § 24, 2 Stat. 156, 166.

6. William Cranch was the son of Mary Smith Cranch, the sister of the First Lady, Abigail Smith Adams. See CONSTANCE McLAUGHLIN GREEN, *WASHINGTON: VILLAGE AND CAPITAL, 1800–1878*, at 19 (1962). Well-known as a reporter of Supreme Court opinions, Cranch became the circuit court's chief judge in 1806 and remained on the court's bench for fifty-four years. He served on the circuit court from 1801 until 1855, reporting its decisions from 1801 until 1840. PRETTYMAN ET AL., *supra* note 2, at 1. Cranch was also the Supreme Court reporter from 1801 until 1815, replacing the first reporter, A.J. Dallas, who reported the Supreme Court's opinions between 1789 and 1800. Both Dallas and Cranch did this reporting without an official commission. MCGUIRE, *supra* note 2, at 13; Frank D. Wagner, *The Role of the Supreme Court Reporter in History*, 26 J. SUP. CT. HIST. 9, 15 (2001). Cranch's report of *Marbury v. Madison* has been hailed as "the most significant synopsis by a Reporter of Decisions in United States Reports." *Id.* at 17–18 (quoting Paul R. Baier & Henry Putzel, Jr., *Double Revolving Peripatetic Nitpicker*, 1980 SUP. CT. HIST. SOC'Y Y.B. 10, 13 (interview of Baier by Putzel)).

7. James O'Hara, *Thomas Johnson, 1792–1793*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1995*, at 31, 35 (Claire Cushman ed., 2d ed. 1995). Johnson had also turned down President Washington's 1795 offer to serve as Secretary of State. *Id.* Unfortunately for the Federalists, Johnson declined Adams's appointment too late for Adams to pick another chief judge. Johnson, Cranch, and Marshall, were all confirmed on March 3, the last day of Adams's term. Fed. Judicial Ctr., *Judges of the United States Courts*, at http://air.fjc.gov/history/judges_frm.html (last updated Feb. 22, 2002).

named the first chief judge of the circuit court, William Kilty.⁸ Notwithstanding Johnson's refusal to accept the appointment, his portrait hangs in the Ceremonial Courtroom of the E. Barrett Prettyman United States Courthouse, home to the United States federal courts for the District of Columbia. His name also appears on the marble wall in the lobby of the courthouse, with the designation "1801–1801 C.J." Art, one might say, sometimes fabricates history.

For most of its first hundred years, the Circuit Court of the District of Columbia, like other federal circuit courts in the country, operated as both a trial and an appellate court. Unlike other circuit courts, however, the Circuit Court of the District of Columbia served not only as a federal court but also as a local or state court, adjudicating local criminal and civil cases.⁹ The court operated with only three judges and, until the mid-1820's, no building.¹⁰ In its early years, the court convened in the basement of the Capitol when the Supreme Court was not using it;¹¹ when the Supreme Court was in session, the circuit court sat in boarding houses, private homes, and even taverns.¹²

The circuit court retained essentially this structure—a three-judge court that operated as both a trial and an appellate court¹³—until the Civil War, when it

8. Kilty received a recess appointment from Jefferson on March 23, 1801, was officially nominated on January 6, 1802, confirmed by the Senate on January 26, 1802, and received his commission on January 26, 1802. Fed. Judicial Ctr., *Judges of the United States Courts: William Kilty*, at http://air.fjc.gov/history/uscc/uscc_dc_frm.html (last visited Jan. 8, 2002).

9. See Act of Feb. 27, 1801 § 5, 2 Stat. at 106. Indeed, most of the cases on its early docket presented issues of local law. See MORRIS, *supra* note 2, at 21–24. One of the first cases heard by the circuit court concerned the court's jurisdiction to try a suspect for a theft that had occurred on February 26, 1801, one day before the circuit court was created. The court, in an opinion by Judge Cranch, concluded that it had jurisdiction. *United States v. Hammond*, 1 D.C. (1 Cranch) 15, 15 (1801). Chief Judge Kilty dissented without opinion. *Id.* at 20.

In addition to its judicial docket, the circuit court exercised significant administrative functions such as appointing constables, granting licenses to operate ferries, and establishing liquor prices for taverns. MORRIS, *supra* note 2, at 7. In 1820, because of a significant backlog in the civil caseload of the court, Congress raised the required amount in controversy from \$20 to \$50, thereby reducing the civil caseload from 1300 to 150 cases. *Id.* at 29. By 1838, the criminal docket of the court had significantly increased, and Congress created a specialized Criminal Court of the District of Columbia, with appeals to be heard by the circuit court. Act of July 7, 1838, ch. 192, 5 Stat. 306.

10. The cornerstone for the city hall, which was to house the circuit and district courts, was laid on August 22, 1820. The judges moved into the building in 1822 even though construction was not complete until 1849. See F. REGIS NOEL, *THE COURTHOUSE OF THE DISTRICT OF COLUMBIA* 16–18, 31 (1939).

11. Because the Supreme Court's docket was fairly modest in the early years, the Court met no more than twice a year. Moreover, the Justices spent a considerable amount of their time outside of Washington riding circuit. That left ample time for use of the basement of the Capitol by the circuit court. See ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* 137–41 (1978); 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 554, 662–65 (Paul A. Freund ed., 1971).

12. See MCGUIRE, *supra* note 2, at 19; MORRIS, *supra* note 2, at 7.

13. See *supra* note 4 for some minor jurisdictional changes in the first half of the nineteenth century. From 1801 until 1840, the court issued 2100 opinions reported by Cranch. MORRIS, *supra* note 2, at 19. During the period from 1815 to 1845, the same three judges served on the court: William Cranch for fifty-four years, James Morsell for forty-eight, and Buckner Thruston for thirty-six. *Id.* at 17.

confronted habeas corpus petitions from parents seeking release of their young sons from underage enlistment in the Union Army. At first, the court faced down the Army General. When Mr. Lyons sought the release of his son Jeremiah, the Army asserted that in a national emergency, such as the ongoing Civil War, military, not civil, law governed and that under military law, infancy was not a valid reason for discharge. The court rejected the Army's argument and ordered the General to produce Jeremiah the next day or be held in contempt. Writing for the court, Judge William Matthew Merrick warned: "At all times, and particularly in times of war, the civil order should be preserved and made superior to the military."¹⁴ Jeremiah was brought to court and discharged from the Army.¹⁵

Judge Merrick issued a similar writ two weeks later, ordering General Andrew Porter to release seventeen-year-old James Murphy. President Lincoln thwarted that endeavor; he commanded the military to refuse to honor the writ and to station a guard in front of the judge's house.¹⁶ An angered Judge Merrick thereupon explained his absence from the bench in a letter he asked to be read publicly:

Armed sentries . . . have been stationed in front of my house. Thus it appears that a military officer [Porter] against whom a writ in the appointed form of law has issued, first threatened with and afterwards arrested and imprisoned [Murphy's] attorney who rightfully served the writ upon him. [General Porter] continued, and still continues, in contempt and disregard of the mandate of the law, and has ignominiously placed an armed guard to insult and intimidate by its presence the judge who ordered the writ to issue, and still keeps up this armed array at his door, in defiance and contempt of the justice of the land. Under the circumstances I respectfully request the chief judge of the circuit court to cause this memorandum to be read in open court, to show the reasons for my absence from my place upon the bench, and that he will cause this paper to be entered at length on the minutes of the court alongside the record of my absence, to show through all time the reason why I do not, this 22d of October, 1861, appear in my accustomed place.¹⁷

Judge Merrick's colleagues strenuously objected to the treatment of Merrick. They ordered that a rule be served upon General Porter to show cause why he should not be held in contempt for obstructing justice and preventing a judge from taking his seat. The circuit's Judge Morsell conveyed these sentiments to his colleagues:

[T]his was a palpable and gross obstruction to the administration of justice, to prevent a judge of this court from taking his seat because he issued a

14. See MORRIS, *supra* note 2, at 35 (citing an unpublished manuscript, H. Westwood, Questioned Loyalty in the District of Columbia Government 7–9 (1986)).

15. See *id.*

16. United States *ex rel.* Murphy v. Porter, 27 F. Cas. 599, 600 (C.C.D.C. 1861) (No. 16,074a); MORRIS, *supra* note 2, at 35–36.

17. *Murphy*, 27 F. Cas. at 600–01 (internal quotation marks omitted).

writ . . . as the law requires The court has its duty to do . . . the administration of justice according to law If martial law is to be our guide, we look to the president . . . to say so. [I do] not pretend to controvert the right of the president to proclaim martial law, but let him issue his proclamation. The judges have their duty to do under the law, and are liable to be punished if they do not do it. I intend to do my duty, and vindicate the character of this court as long as I sit here. I am an old man.¹⁸

The Executive again defied the court's process. The deputy-marshal reported that President Lincoln had blocked service of the show-cause order on General Porter and, in fact, had suspended the writ of habeas corpus in the District of Columbia.¹⁹ Chief Judge James Dunlop lamented:

[T]hough we do not doubt our power to regard [the response of the deputy marshal] as insufficient in law, and [to] proceed against the officer who has made it, [t]he existing condition of the country makes it plain that that officer is powerless against the vast military force of the executive [T]he case presented is without a parallel in the judicial history of the United States The president, charged by the constitution to take care that the laws be executed, has seen fit to arrest the process of this court, and to forbid the deputy marshal to execute it. It does not involve merely the question of the power of the executive in civil war to suspend the great writ of freedom, the habeas corpus [N]o notice had been given by the president to the courts

18. *Id.* at 601 (internal quotation marks omitted). The order to show cause was issued to General Porter on October 22, 1861. *Id.*

19. *Id.* On April 27, 1861, President Lincoln authorized General Scott to disregard any writ of habeas corpus issued to him and to say that the President had suspended the writ in regard to soldiers in the Army of the United States within the District of Columbia. See Sidney George Fisher, *The Suspension of Habeas Corpus During the War of the Rebellion*, 3 POL. SCI. Q. 454, 456 (1888). In Lincoln's words:

You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the City of Philadelphia and the City of Washington, you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally or through the officer in command, at the point at which resistance occurs, are authorized to suspend the writ.

Id. at 455–56 n.1 (internal quotation marks omitted); see MARK E. NEELY, JR., *THE FATE OF LIBERTY, ABRAHAM LINCOLN AND CIVIL LIBERTIES* 11 (1991). Several similar orders were issued thereafter for other regions of the country. *Id.*; see William Riker, *Sidney George Fisher and the Separation of Powers During the Civil War*, 15 J. HIST. IDEAS 397, 402 n.17 (1954). A year and a half later, on September 24, 1862, Lincoln issued a more general and more formal proclamation, suspending the writ “in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court martial or military commission.” Proclamation of Sept. 24, 1862, 13 Stat. 730, 730. Ultimately, on March 3, 1863, Congress weighed in, giving the President discretionary power—power he believed he already had—to suspend the writ during the continuance of the rebellion. Act of Mar. 3, 1863, ch. 81, 12 Stat. 755; Fisher, *supra*, at 456 n.2. These events provoked a lively debate in the media as to whether the President had the constitutional authority unilaterally to suspend the writ or whether only Congress could suspend it or authorize the President to do so. *Id.* at 457–84.

of the country of such suspension here, now first announced to us, and it will hardly be maintained that the suspension could be retrospective . . . [But] we have no physical power to enforce the lawful process of this court on [a] military subordinate[] against the president's prohibition.²⁰

The court resolved that, having “exhausted every practical remedy to uphold the lawful authority of this court,” it would issue no further orders and would close the case.²¹ But not before Judge Morsell fired his parting shot:

I wish it understood that notwithstanding the blow levelled at this court, I . . . assert the following principles: (1) That the law in this country knows no superior. (2) That the supremacy of the civil authority over the military cannot be denied; that it has been established by the ablest jurists, and . . . recognized and respected by the great father of the country during the Revolutionary War. (3) That this court ought to be respected by every one as the guardian of the personal liberty of the citizen, in giving ready and effectual aid by that most valuable means, the writ of habeas corpus. (4) I therefore respectfully protest against the right claimed to interrupt the proceedings in this case.²²

The circuit court's reluctance to bend to the war's exigencies led Lincoln to suspect the judges of harboring Southern sympathies. Lincoln's response was bold and immediate: Sack the court. Lincoln convinced Congress to abolish the District's courts and to establish, instead, “a court . . . of judges of national reputation with positive and strong convictions in accord with the policies of the administration on all important questions then disturbing the country.”²³ And so, in 1863, the tenure of the judges of the circuit court created in 1801 unceremoniously ended, without impeachments to test the judges' “good behaviour.”²⁴

20. *Murphy*, 27 F. Cas. at 602.

21. *Id.*; see *MORRIS*, *supra* note 2, at 36.

22. *Murphy*, 27 F. Cas. at 602.

23. *McGUIRE*, *supra* note 2, at 45 (as reported by the *Evening Star*) (internal quotation mark omitted).

24. Act of Mar. 3, 1863, ch. 91, § 1, 12 Stat. 762, 762–63. Judge Merrick was the judge most suspected. In the congressional debate on the Bill of Reorganization, Senator Daniel Clark of New Hampshire called Merrick a “secessionist,” *CONG. GLOBE*, 37th Cong., 3d Sess. 1139 (1863) (statement of Sen. Clark); Senator Henry Wilson of Massachusetts accused him of having a heart “sweltering with treason,” *id.* (statement of Sen. Wilson). However, as Justice Job Barnard later observed, no charges of disloyalty to the government were ever lodged against the circuit court's judges. Job Barnard, *The Early Days of the Supreme Court of the District of Columbia*, 36 *WASH. L. REP.* 30, 30 (1908) (transcript of speech by Justice Job Barnard, associate justice of the Supreme Court of the District of Columbia). Moreover, twenty years later, in 1886, President Cleveland appointed Judge Merrick to serve on the Supreme Court of the District of Columbia, the court that had replaced the District's court on which Merrick first served. *McGUIRE*, *supra* note 2, at 50. Born in 1818, Merrick was sixty-eight at the time of this appointment.

The propriety and constitutionality of abolishing a federal court were not taken for granted; several legislators questioned whether Congress could or should abolish a court. Senator Powell of Kentucky, for example, argued that judges “should not be subject to be turned out or put into office by conventions and parties. Whenever you do that you degrade the judiciary.” *CONG. GLOBE*, 37th Cong., 3d Sess. 1129 (1863)

In its place, Congress created the Supreme Court of the District of Columbia, composed of four justices, to replace the three exiting judges.²⁵ Lincoln's appointees, not surprisingly, were Republicans from Northern states; indeed, two of them, George Fisher and Abram Olin, had been members of the thirty-seventh Congress that abolished the old court and created the new one.²⁶ Modeled on New York's judiciary, the District's new supreme court sat in "special terms" with one judge conducting trials, and in "general terms" during which the full bench reviewed single-judge dispositions.²⁷

(statement of Sen. Powell). Senator Davis of Kentucky argued that judges of these constitutional courts could be removed by impeachment only. *Id.* (statement of Sen. Davis). While Congress has discretion whether or not to create lower federal courts, that did not give Congress power over the tenure of office of the judges of the court. In Davis's words: "[I]f that had been the intention of the members of the [Constitutional] Convention, the tenure of their office would have been 'during good behavior and the continuance of their courts.'" *Id.* at 1136. For Congress to have this power, Davis said, would undermine the "independence and integrity of the judiciary . . . bringing it into the arena of politics, and clothing a succession of political hacks with the ermine of the judge, according to the rise and fall of parties." *Id.* But these objections were rejected. Senator Harris of New York, after initially pretending that the bill was simply to reform the court, *id.* at 1051 (statement of Sen. Harris), ultimately convinced his brethren that, because Congress has discretion to decide whether or not to create inferior courts, it has power to abolish them and thereby remove the judges, *id.* at 1137. The bill was adopted by a vote of 19 to 16. CONG. GLOBE, 37th Cong., 3d Sess. 1140 (1863) (statement of Sen. Saulsbury). See generally Barnard, *supra*, at 30; Walter S. Cox, *Reminiscences of the Courts of the District*, 23 WASH. L. REP. 498 (1895) (transcript of speech by Justice Walter S. Cox, associate justice of the Supreme Court of the District of Columbia). Notably, all the discussants assumed that federal courts in the District were Article III courts, a status not clearly established until 1933. See discussion *infra* notes 55–56.

25. Act of Mar. 3, 1863 § 1. The main differences between the new and old court were the number of judges and their titles. Each justice could hold a district court similar to United States district courts elsewhere; each could also hold a criminal court with the same jurisdiction as the old criminal court. The new statute eliminated the old two-judge quorum requirement. Instead, during "special terms," a single judge could try a case; these single-judge decisions were reviewable by the entire court during the "general term." Act of Mar. 3, 1863 § 1.

26. Lincoln appointed David Kellogg Carter of Ohio as chief justice, and George P. Fisher, a Republican congressman from Delaware, Abram Baldwin Olin, a Republican congressman from New York, and Andrew Wylie of the District and formerly of Pennsylvania, as associate justices. All were strong Lincoln supporters. See McGUIRE, *supra* note 2, at 46. The appointment of Fisher and Olin raised no questions under the Ineligibility Clause of the Constitution because both had left Congress before their appointments. See U.S. CONST. art. I, § 6, cl. 2. They were appointed March 11, 1863, eight days after their congressional terms had expired. See RECORDS OF THE COLUMBIA HISTORICAL SOCIETY 2–4 (John B. Larner ed., 1971); Fed. Judicial Ctr., *supra* note 7.

During this period, Congress also experimented with more home rule for the District, deciding in 1871 to make the District a territory with a number of locally elected officials. See Act of Feb. 21, 1871, ch. 62, 16 Stat. 419. The experiment lasted only three years and had little impact on the courts in the District. But there were some dramatic improvements in the quality of life in the District, improvements that were sorely needed. In 1871, there had been talk of moving the capital to St. Louis, because, as Horace Greeley noted, the District was "not a nice place to live." MORRIS, *supra* note 2, at 43–44 (internal quotation mark omitted). In 1874, after the District was essentially bankrupt, Congress abolished the territorial status of the District and eliminated all elected offices. See Act of June 20, 1874, ch. 337, § 1, 18 Stat. 116, 116; *The City's Pretty New Face*, WASH. POST, Nov. 8, 2000, at A1. Instead, the District would be governed by a three-person Commission appointed by the President. See Act of June 11, 1878, ch. 180, § 2, 20 Stat. 102, 103. See generally STEPHEN J. MARKMAN, STATEHOOD FOR THE DISTRICT OF COLUMBIA: IS IT CONSTITUTIONAL? IS IT WISE? IS IT NECESSARY? 87–88 (1988).

27. Senator Harris from New York, the main proponent of the bill, explicitly noted his reliance on the structure of New York's system. CONG. GLOBE, 37th Cong., 3d Sess. 1052 (1863) (statement of Sen. Harris); see also *Metro. R.R. v. Moore*, 121 U.S. 558, 571–73 (1887) (observing that arranging the

The newly created Supreme Court of the District of Columbia soon encountered its own challenges from the Civil War and its aftermath. Shortly after Lincoln's assassination, Mary Surratt and several others were arrested for conspiring with John Wilkes Booth to assassinate Lincoln and thereafter helping Booth to escape.²⁸ They were tried and convicted by a specially created military commission, the Hunter Commission, established by newly installed President Andrew Johnson.²⁹ On June 30, 1865, Mary Surratt and her convicted coconspirators George Atzerodt, David Herold, and Lewis Payne were sentenced to death; Dr. Samuel Mudd, who had ministered to Booth's wounds, was sentenced to life imprisonment.³⁰ On July 7, the scheduled execution day, Ms. Surratt sought habeas from the Supreme Court of the District of Columbia, contending that as a civilian, she had a constitutional right to a jury trial in a civilian court and that her trial by a military commission was unlawful.³¹ Justice Andrew Wylie of the Supreme Court of the District of Columbia promptly issued the writ,³² but at 11:30 a.m. on July 7, Major-General W.S. Hancock, accompanied by Attorney General James Speed, announced to Justice Wylie that, by order of the President

court into special and general terms was a system well established in New York and that the statutes that created the Supreme Court of the District of Columbia were almost identical to those that had established procedures for the highest court of New York).

As was true of the replaced circuit court, authority to review judgments of the new supreme court was lodged in the United States Supreme Court, upon writ of error or appeal. Act of Mar. 3, 1863 § 11, 12 Stat. at 764. Initially the jurisdictional amount required for review in the Supreme Court was set at \$1000, but Congress increased the amount to \$2500 in 1879. Act of Feb. 25, 1879, ch. 99, § 4, 20 Stat. 320, 321.

28. The alleged conspiracy also included plotting to assassinate Andrew Johnson, William Seward, and Ulysses Grant. See J. Holt, *Charge and Specification Against David E. Herold, George A. Atzerodt, Lewis Payne, Michael O'Laughlin, Edward Spangler, Samuel Arnold, Mary E. Surratt, and Samuel A. Mudd*, <http://www.surratt.org/documents/dcharges.html> (last visited Jan. 8, 2002). The other coconspirators included Mary Surratt's son, John Surratt, George A. Atzerodt, David E. Herold, Lewis Payne, Michael O'Laughlin, Samuel Arnold, Samuel Mudd, and Edward Spangler. *Id.* Mary Surratt had met Booth, a friend of her son, sometime after she had moved to Washington, D.C. to open a boardinghouse at 541 H St., N.W. in October 1864. See Surratt Soc'y, *Mrs. Surratt's Story*, at http://www.surratt.org/su_hist.html (last updated Mar. 5, 1999).

29. The Hunter Commission was created by President Johnson's order of May 1, 1865. The President ordered that "the Assistant Adjutant-General [W.A. Nichols] detail nine competent military officers to serve as a Commission for the trial of said parties, and that the Judge Advocate General proceed to prefer charges against said parties for their alleged offenses." *Proceedings of a Military Commission*, http://www.surratt.org/su_docs.html (last updated Oct. 2, 2001). Assistant Adjutant-General W.A. Nichols named Major-General David Hunter to serve as the presiding officer of the Commission. *Id.*

30. T.M. HARRIS, *ASSASSINATION OF LINCOLN: A HISTORY OF THE GREAT CONSPIRACY* 112-14 (1892) (Harris had been a member of the Hunter Commission). O'Laughlin and Arnold were also sentenced to life; Spangler was sentenced to six years. *Id.* Mary's son, John Surratt, had fled to Canada to avoid prosecution. See *infra* note 39.

31. See *Application for a Writ of Habeas Corpus in Behalf of Mary E. Surratt* (July 7, 1865), <http://www.surratt.org/documents/Bplact13.pdf>.

32. Justice Wylie wrote, "Let the writ issue as prayed, returnable before the criminal court of the District of Columbia, now sitting at the hour of ten o'clock a.m., this 7th day of July, 1865." HARRIS, *supra* note 30, at 115 (internal quotation mark omitted).

of the United States, the Major-General would not produce Mary Surratt.³³ President Johnson had suspended the writ of habeas corpus “in such cases as this.”³⁴ The President’s order declared: “I, ANDREW JOHNSON, President of the United States, do hereby declare that the writ of *habeas corpus* has been heretofore suspended in such cases as this, and . . . direct that you proceed to execute the order heretofore given upon the judgment of the military commission, and you will give this order in return to the writ.”³⁵ The court yielded to the President’s order³⁶ and, that same afternoon, July 7, 1865, Mary Surratt became the first woman executed by the United States government.³⁷

Whether Mary Surratt was lawfully tried remains uncertain; indeed, the underlying question of the military commission’s jurisdiction is still *sub judice*. Her claim was not frivolous, and Justice Wylie seems to have appropriately issued the writ of habeas corpus to gain time to determine the lawfulness of her conviction. In a leading case pending during Mary Surratt’s trial but not decided until the following year, *Ex parte Milligan*,³⁸ the United States Supreme Court held that a military court has no jurisdiction in civilian cases, if the civilian courts are open.³⁹ And the civilian courts of the District of Columbia were definitely open at the time of Mary Surratt’s trial. When Dr. Mudd, one of her co-conspirators, tried to rely on the *Milligan* decision, however, his effort failed. Mudd sought a writ of habeas corpus in 1868. In response to his argument that the Hunter Commission lacked jurisdiction, the District Court for the Southern District of Florida (where Mudd was imprisoned)⁴⁰ distinguished *Milligan*.⁴¹ In that court’s view, assassinating the Commander in Chief during a civil war ranked as a military offense properly tried by a military tribunal.⁴² Mudd

33. See *Application for a Writ of Habeas Corpus in Behalf of Mary E. Surratt*, *supra* note 31.

34. HARRIS, *supra* note 30, at 115.

35. *Id.*

36. *Id.* at 114–16.

37. Surratt Soc’y, *Welcome to the Surratt House Museum*, at <http://www.surratt.org> (last updated Dec. 19, 2001). Her coconspirators—Herold, Payne, and Atzerodt—were also executed on July 7, 1865. Surratt Soc’y, *supra* note 28.

38. 71 U.S. 2 (1866) (mem.).

39. *Id.* at 118–19, 126 (“[I]t is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could well be said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.”). When Mary’s son, John Surratt, was eventually captured in 1867, he was tried by a civilian jury that split: Eight voted not guilty, four voted guilty. The charges were dropped in 1868. One may speculate whether the different outcomes reflected the difference in tribunals or the lowering of passions. Surely, however, the dramatically different endings cannot be attributed to John’s being less culpable than his mother. Both Booth and John Surratt were alleged to be the masterminds behind the whole plot. Mary, on the other hand, was accused only of being a helper. KAREN ZEINERT, *THE LINCOLN MURDER PLOT* 68–69 (1999).

40. Mudd was imprisoned at Fort Jefferson, Garden Key, Florida, until his release in March of 1869. SAMUEL CARTER III, *THE RIDDLE OF DR. MUDD* 335–37 (1974).

41. *Ex parte* Mudd, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9899).

42. See *id.* (“The President was assassinated not from private animosity, nor any other reason than a desire to impair the effectiveness of military operations, and enable the rebellion to establish itself into a Government; the act was committed in a fortified city, which had been invaded during the war . . .

appealed the denial of his habeas petition, but his 1869 pardon by President Johnson prompted the dismissal of the appeal as moot.⁴³ Mudd's 100-year-old grandson, Dr. Richard Mudd, has kept the controversy alive, asking the current federal courts of the District of Columbia to order the Army to void his grandfather's conviction.⁴⁴

The federal courts of the District maintained the same structure—one unified Supreme Court of the District of Columbia—until the 1890s when Congress questioned the wisdom of having judges participate in appellate review of their own first-instance decisions. The legislators wondered whether, in the words of the day, appeals should go “from Philip drunk to Philip sober.”⁴⁵ Accordingly, in 1891, Congress separated the trial and appellate functions for most of the federal courts in the country, making the district courts responsible for trials and transforming the regional circuit courts into courts with solely appellate jurisdiction.⁴⁶ Two years later, Congress adopted this model for the District of Columbia. The Act of February 9, 1893 continued the Supreme Court of the District of Columbia as a trial court, but “abrogated and abolished” its appellate jurisdiction.⁴⁷ Congress gave the appellate jurisdiction previously exercised by the Supreme Court of the District of Columbia to a newly created three-member Court of Appeals of the District of Columbia.⁴⁸

[This] offense [was] a military one . . . [and] the proper tribunal . . . was a military one.”). The original records from the Southern District of Florida for this period are lost, so exact pages are not accessible. But a report of Judge Thomas J. Boynton's opinion appears in an unsourced newspaper clipping included in the Lincoln Obsequies Scrapbook in the Library of Congress, discovered by James O. Hall, and authenticated by Mr. James E.T. Lange and Ms. Katherine DeWitt of the Surratt Society.

43. It appears that Justice Salmon Chase, acting alone as circuit justice, dismissed the appeal, but there is no record of any opinion, a matter the Mudd family is still investigating. CARTER, *supra* note 40, at 366 n.6.

44. Mudd v. Caldera, 26 F. Supp. 2d 113, 119, 124 (D.D.C. 1998) (refusing to dismiss the application as moot and remanding to the Army for reconsideration of the jurisdiction of the military tribunal). On remand, the Army again refused to overturn the conviction, and Richard Mudd returned to the district court. This time, District Judge Paul Friedman reached the merits. Distinguishing *Milligan* on the ground that assassination of the President violated the law of war, the court concluded that Mudd was properly tried by a military commission. Mudd v. Caldera, 134 F. Supp. 2d 138, 146–47 (D.D.C. 2001). The case is now pending in the court of appeals. Mudd v. White, No. 01-5103 (D.C. Cir.).

45. See MORRIS, *supra* note 2, at 59 (internal quotation marks omitted); Walter B. Hill, *The Federal Judicial System*, 12 A.B.A. REP. 289, 307 (1899).

46. The 1891 law modifying the circuit courts of the country was the Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. Authority to review their decisions continued to be lodged in the United States Supreme Court, by writ of error or appeal. *Id.*

47. Act of Feb. 9, 1893, ch. 74, § 7, 27 Stat. 434, 435–36.

48. *Id.* The newly created court of appeals was given the powers of the General Term, as well as the power to hear and determine appeals from decisions of the Commissioner of Patents in interference cases, and appeals from

all interlocutory orders of the supreme court of the District of Columbia, or by any justice thereof, whereby the possession of property is changed or affected . . . and also from any other interlocutory order, in the discretion of said court of appeals, whenever it is made to appear to said court upon petition that it will be in the interest of justice to allow such an appeal.

Id. Following the pattern for the country generally, the same recourse to the U.S. Supreme Court was provided for review of decisions of the Court of Appeals for the District of Columbia. *Id.* § 8, 27 Stat. at 436.

President Grover Cleveland's appointments to this new appellate court, like Lincoln's in 1863, aimed to create a court with a national, rather than local, character. Cleveland appointed Richard Alvey, a judge for twenty-six years, ten of them as chief justice of Maryland's highest court; Seth Shepard, a Texas judge for twenty-four years; and Martin Morris, a law professor from Georgetown who had chaired the committee pressing for these reforms restructuring the D.C. federal courts.⁴⁹ The new court of appeals was not reticent in exercising its appellate authority. In its first six months, from June 6, 1893 to December 4, 1893, it reversed the lower court's judgment in more than one-third of the cases on its docket.⁵⁰ That is considerably higher than the modern reversal rate, which in the last thirty years has ranged from ten to twenty percent.⁵¹

During the first half of the twentieth century, the nation's capital and the federal government grew in prestige and power. For much of this period, the D.C. courts' dockets, with their mixture of local and federal cases, continued to resemble state court calendars more than the dockets of other federal courts.⁵² But even when the District's federal courts adjudicated local cases, they often set precedents that attracted national adherence. For example, when the Court of Appeals for the District of Columbia addressed the question of the admissibility of expert scientific testimony in a local murder trial in 1923, the court prescribed a test, ultimately known as the *Frye* test, that became the standard for the country for much of the rest of the century.⁵³

1933 was a signal year for the status of the District's federal courts. One year

49. See MORRIS, *supra* note 2, at 63–64. As observed *infra* note 65, the fact that the District has no Senators has historically given Presidents much more leeway in appointing judges to the courts of the District of Columbia. See Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159, 165 (1993).

50. See generally 1 CHARLES COWLES TUCKER, REPORTS OF CASES ADJUDGED IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA (1894) (reversing judgments in twenty-three of the fifty-nine appeals on its docket).

51. See the 1979 to 1999 volumes of *Management Statistics for the U.S. Courts*, by the Director of the Administrative Office of the United States Courts; and the 1970 to 1999 volumes of *Judicial Business of the United States Courts*, by the Administrative Office of the United States Courts.

52. MORRIS, *supra* note 2, at 88. The federal appeals consisted mainly of patent and trademark appeals until 1929 when Congress transferred authority to review decisions of the Commissioner of Patents to the Court of Customs and Patent Appeals. See Act of Mar. 2, 1929, ch. 488, 45 Stat. 1475. This court was later replaced by the U.S. Court of Appeals for the Federal Circuit. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 103, 127, 96 Stat. 25, 26, 37–39.

53. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. 1923). Mrs. Frye had challenged her conviction for second-degree murder because it was based on the relatively new “systolic blood pressure deception” test; the court ruled that before evidence in the form of expert scientific testimony can be introduced at trial, it must first be recognized and have standing in the scientific field. The “systolic blood pressure deception” test had not yet gained such recognition. *Id.* This “general acceptance” test became the prevailing standard nationwide for much of the twentieth century, until the Supreme Court in 1993 said that the Federal Rules of Evidence had adopted a “not-only-relevant-but-reliable” standard to replace the *Frye* “general acceptance” standard for expert scientific testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); Martin L.C. Feldman, *May I Have the Next Dance, Mrs. Frye?*, 69 TUL. L. REV. 793, 795 (1995) (“For the last seventy years, the common law approach announced in *Frye* has been the prevailing standard for admissibility of scientific evidence.”).

before, the Comptroller General had concluded that a salary reduction passed by Congress applied to the D.C. federal courts and accordingly lowered the salary of retired judges of the D.C. Supreme Court and the Court of Appeals.⁵⁴ Daniel O'Donoghue, a retired associate justice of the D.C. Supreme Court, and William Hitz, a retired associated justice of the court of appeals, challenged the constitutionality of this decision. The United States Supreme Court agreed with the retired judges; the reduction was unconstitutional, the Court concluded, because these D.C. courts were Article III courts and their judges' salaries were therefore protected.⁵⁵ Writing for the majority, Justice Sutherland, joined by Justices McReynolds, Brandeis, Butler, Stone, and Roberts, relied on several considerations: the judges were appointed to serve "during good behaviour"; the independence of the judiciary is of prime importance; the close proximity of D.C. judges to the Congress made these judges' independence all the more important; and unlike territorial courts, the D.C. Supreme Court and Court of Appeals were not temporary.⁵⁶ Chief Justice Hughes, joined by Justices Van Devanter and Cardozo dissented, concluding that the courts in question were established under Congress's Article I authority to provide for the governance of the District of Columbia and thus did not have Article III protection.⁵⁷

Congress promptly modified the names of the courts to make their Article III status clear. In 1934, it placed the term "United States" before the name of the court of appeals—making it the United States Court of Appeals for the District of Columbia.⁵⁸ In 1936, Congress renamed the Supreme Court of the District of Columbia, designating it the District Court of the United States for the District of Columbia.⁵⁹ Congress further recognized the Article III security of the courts in 1948 when it explicitly designated the District of Columbia one of the then eleven judicial circuits of the United States. The court of appeals was named the United States Court of Appeals for the District of Columbia Circuit, the chief justice became chief judge, and the associate justices became circuit judges.⁶⁰ The federal courts of the District of Columbia thereby acquired the names by which they are known today.

Twenty-two years later, in 1970, a significant structural change gave the

54. Legislative Appropriations Act of 1932, ch. 314, § 106, 47 Stat. 382, 401.

55. *O'Donoghue v. United States*, 289 U.S. 516, 549, 551 (1933). The challenges were initially brought in the court of claims, which certified the question to the Supreme Court. *Id.* at 525. Hitz and O'Donoghue originally brought separate suits, but the suits were subsequently combined because they involved the same question. *Id.*

56. Although these same factors applied to the circuit court judges terminated by President Lincoln and the Congress in 1863, no challenger had brought that matter before the Supreme Court. Several legislators, however, had raised the question. See discussion *supra* note 24.

57. *O'Donoghue*, 289 U.S. at 551–53 (Hughes, C.J., dissenting).

58. Act of June 7, 1934, ch. 426, 48 Stat. 926. Also during this period Congress enlarged the court, increasing the number of judges from three to five. See Act of June 19, 1930, ch. 537, 46 Stat. 785. In 1938, Congress added a sixth seat. See Act of May 31, 1938, ch. 290, § 2, 52 Stat. 584, 584.

59. Act of June 25, 1936, ch. 804, 49 Stat. 1921.

60. Act of June 25, 1948, ch. 646, §§ 41, 45, 62 Stat. 869, 870, 871. In 1949, Congress increased the number of D.C. Circuit judges from six to nine. See Act of Aug. 3, 1949, ch. 387, § 1, 63 Stat. 493, 493.

District of Columbia's federal courts their modern character. In the Reform Act of 1970, Congress created a discrete and complete set of local courts for the District—the Superior Court and the District of Columbia Court of Appeals.⁶¹ These local courts, analogous to state courts, were designed for the adjudication of local cases. The federal courts were thereby positioned to concentrate on federal cases and to achieve through them enhanced prominence in matters of national import. They became specialists in both separation of powers disputes and oversight of administrative actions taken by the federal agencies burgeoning in number and in business. As the weight of federal cases grew heavier,⁶² Congress created new federal judgeships for the District. The United States Court of Appeals for the District of Columbia Circuit, originating with three judges, now has an authorized complement of twelve,⁶³ while the D.C. District

61. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 111, 84 Stat. 473, 475 (1970). The Act gave the power to review superior court decisions to the D.C. Court of Appeals, identifying it as the highest local court for the District of Columbia. *Id.* Like its state counterparts, decisions of the D.C. Court of Appeals are not directly reviewable by any federal court other than the Supreme Court. *Id.* For a good description of the evolution of the local courts leading up to 1970, see MORRIS, *supra* note 2, at 187–89. In 1973, the U.S. Supreme Court held that these local courts were Article I, not Article III, courts. *Palmore v. United States*, 411 U.S. 389, 390 (1973).

While Congress acted on the view that the existing system of criminal justice was “simply incapable of coping with the local crime problem,” 91 CONG. REC. S25554 (daily ed. July 23, 1970) (statement of Sen. Hruska), there is little doubt that the reform was also sparked, at least in part, by the legislators’ desire to get local cases, especially criminal and mental health matters, out of the hands of Judges David L. Bazelon and J. Skelly Wright, jurists perceived by the legislators as excessively interventionist. See CHRISTOPHER P. BANKS, *JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT* 15, 28 (1999); MORRIS, *supra* note 2, at 233; Patricia M. Wald, *Ghosts of Judges Past*, 62 GEO. WASH. L. REV. 675, 680–81 (1994).

62. In the early 1970s, the court of appeals docketed about 120 appeals annually. See DIR. OF ADMIN. OFFICE OF THE U.S. COURTS, *MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS* 11 (1974). By the late 1970s, the number was closer to 400, and by 1985, the number was greater than 600. See DIR. OF ADMIN. OFFICE OF THE U.S. COURTS, *MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS* 2 (1993).

63. In 1978, Congress added two seats to the court of appeals, bringing the number of circuit judges to eleven. See Act of Oct. 20, 1978, Pub. L. No. 95-486, § 3, 92 Stat. 1629, 1632. President Carter appointed Patricia M. Wald, the first woman on the court, and Abner J. Mikva to those newly created seats. In addition, President Carter appointed Harry T. Edwards to the bench when Judge Bazelon took senior status and Ruth Bader Ginsburg to the seat vacated upon Judge Harold Leventhal’s death. See Fed. Judicial Ctr., *supra* note 26. The 1978 Act enlarged the number of seats on the other circuits as well. § 3. Shortly thereafter, in 1984, Congress added one more judgeship to the court of appeals, giving the court the twelve seats it has today. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 201, 98 Stat. 333, 346–47. With the addition of this new seat and several resignations, President Reagan was able to appoint eight judges to the court of appeals, including Robert Bork, Antonin Scalia, Kenneth Starr, Laurence Silberman, James Buckley, Stephen Williams, Douglas Ginsburg, and David Sentelle. See Fed. Judicial Ctr., *supra* note 7. President George H.W. Bush appointed two judges during his four-year tenure: Karen Le Craft Henderson and A. Raymond Randolph, both appointed in 1990. In his eight years, President William Jefferson Clinton appointed three judges; Judith W. Rogers and David S. Tatel in 1994, and Merrick Garland in 1997. For a complete history of the membership of the circuit court, see 28 U.S.C. § 44 (1994).

During President Clinton’s Administration, Congress questioned whether the court of appeals in fact needs twelve judges. See Jonathan Groner, *Circuit Pick Caught in the Middle: GOP Senator Questions Need to Fill Vacancy*, LEGAL TIMES, June 1, 2000, at 1 (recounting the Edwards-Silberman testimony before Congress on whether the D.C. Circuit’s caseload still warrants twelve judges).

Court's complement stands at fifteen.⁶⁴

The federal courts of the District are notable for their diverse membership, measured by geography, gender, and race. While the district court judges come primarily from the D.C. area, court of appeals judges continue to be drawn from a nationwide pool.⁶⁵ For example, J. Skelly Wright came to the D.C. Circuit from a district court in New Orleans and Karen LeCraft Henderson came from a district court in South Carolina.⁶⁶ The D.C. District Court was the first federal district court on which a woman served: Burnita Shelton Matthews was appointed to that court by President Truman in 1949.⁶⁷ Spottswood Robinson III, appointed by President Lyndon Johnson in 1964, was the first African-American on the D.C. District Court.⁶⁸ Two years later, Judge Robinson became the first African-American to serve on the Court of Appeals for the District of Columbia

64. The district court also saw a significant increase in its caseload, and the number of judges has grown from the twelve seats authorized in 1948, *see* Act of June 25, 1948, § 133, 62 Stat. at 895–96, to the present number of fifteen. Act of Aug. 3, 1949, ch. 387, 63 Stat. 493; ADMIN. OFFICE OF THE U.S. COURTS, UNDERSTANDING THE FEDERAL COURTS 43 (1999). For a complete history of the district court's membership, *see* 28 U.S.C. § 133 (1994).

65. More than most circuit courts, this court of appeals has been a national court. In part, because the District of Columbia has no Senators, Presidents have been able to appoint judges from a national, rather than a regional, pool. This feature of the court has been evident at least from the time President Lincoln made his appointments to the newly created supreme court in 1863. *See generally* Tobias, *supra* note 49.

66. J. Skelly Wright was appointed by President Kennedy on March 30, 1962. *See* Fed. Judicial Ctr., *supra* note 7. Because of his lead role in cases enforcing *Brown v. Board of Education*, 347 U.S. 483 (1954), and desegregating the public schools in New Orleans, Judge Wright was not a popular figure in the Fifth Circuit, and many in that community were pleased to see him move to Washington. *See* J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 221–29 (1971). President Bush appointed Karen LeCraft Henderson in 1990. *See* Fed. Judicial Ctr., *supra* note 7.

67. Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 *FORDHAM L. REV.* 281, 284 (1995). Judge Matthews received a recess appointment from President Truman on October 21, 1949 and began sitting in November 1949. The following year, she was nominated, confirmed, and, on April 7, 1950, received her commission. Cynthia Harrison, *Burnita Shelton Matthews*, in *WOMEN IN LAW: A BIO-BIBLIOGRAPHICAL SOURCEBOOK* 150, 154 (Rebecca Mae Salokar & Mary L. Volcansek eds., 1966); Julia Kazaks, *Architectural Archeology: Women in the United States Courthouse for the District of Columbia*, 83 *GEO. L.J.* 559, 560 (1994). But Judge Matthews was not the country's first female Article III judge. That honor belongs to Florence Allen, who was appointed to the Sixth Circuit by President Franklin Delano Roosevelt in 1934. Ginsburg & Brill, *supra*, at 281–83. President Carter appointed the first woman to be seated on the D.C. Circuit, Patricia Wald. Editor-in-Chief, *Tribute to the Honorable Patricia M. Wald*, 52 *ADMIN. L. REV.* 1, 1 (2000). Indeed, President Carter changed the face of the federal bench. Previously women were appointed to the federal bench only in token numbers, but President Carter appointed some forty women. Ginsburg & Brill, *supra*, at 287–88. While that number may seem unremarkable today, it was unprecedented in its time. *Id.* President Carter also appointed fifty-five minorities, thirty-eight of them African-Americans. Susan Moloney Smith, Comment, *Diversifying the Judiciary: The Influence of Gender and Race On Judging*, 28 *U. RICH. L. REV.* 179, 181 (1994). These numbers, too, were unprecedented. *Id.* at 182.

68. GERALDINE R. SEGA, *BLACKS IN THE LAW* 201–02 (1983). The first black federal district judge in the continental United States was James Benton Parson, appointed by John F. Kennedy to the U.S. District Court for the Northern District of Illinois in 1961. ALTON HORNSBY, JR., *CHRONOLOGY OF AFRICAN AMERICAN HISTORY* 177 (2d ed. 1997). The first black on a federal court of appeals was William H. Hastie, a 1949 Truman appointee to the Third Circuit. SEGA, *supra*, at 201.

Circuit,⁶⁹ and several years later became its first African-American chief judge.⁷⁰

Two other significant features characterize the composition of the D.C. Circuit. Many prominent academics have served on the D.C. Circuit, earning the court the unofficial title “Court of Appeals for the Academic Circuit.”⁷¹ And more Supreme Court Justices have come from the D.C. Circuit than from any other federal circuit court: Wiley Blount Rutledge, appointed in 1943, Frederick Moore Vinson in 1946, Warren Earl Burger in 1969, Antonin Scalia in 1986, Clarence Thomas in 1992, and Ruth Bader Ginsburg in 1993.⁷²

That, in a nutshell, is how these courts came to look as they do today. Now, we turn to the work these courts have done in the past 200 years. Moving from structure to content, two themes best describe the work of the D.C. courts: protector of the rule of law and responder to the pleas of the vulnerable.

II. OVERSEER OF THE GOVERNMENT

Situated in the nation’s capital where central officialdom dwells, with the federal government serving as a litigant in over seventy percent of their cases,⁷³ the federal courts of the District of Columbia may be characterized as ombudsmen within our national government.⁷⁴ They have taken a lead role in carrying out the judicial responsibilities first described by Chief Justice John Marshall in *Marbury v. Madison*:⁷⁵ “to say what the law is” and to make sure the government stays within it.⁷⁶

Ironically, *Marbury v. Madison* was not brought in these courts, though hindsight suggests it could have been. William Marbury chose to go directly to the Supreme Court to seek a writ of mandamus ordering Secretary of State James Madison to deliver the commission appointing Marbury justice of the peace. Looking back, it appears that the D.C. Circuit Court had jurisdiction to grant the writ—although we do not know whether the court’s authority was so comprehended at the time or whether the circuit court would have granted the writ.⁷⁷ But had Marbury filed his complaint initially in the D.C. Circuit Court,

69. President Johnson appointed Robinson to the court of appeals in 1966. See Fed. Judicial Ctr., *supra* note 7.

70. SEGA, *supra* note 68, at 201.

71. During the 1980s, many of its sitting judges had been full-time law professors before they became judges, and many continued to teach as adjuncts. MORRIS, *supra* note 2, at 324. The seven former academics were Spottswood Robinson, Ruth Bader Ginsburg, Harry Edwards, Robert Bork, Antonin Scalia, Douglas Ginsburg, and Stephen Williams.

72. JOSEPH GOULDEN, *THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES* 250 (1974) (calling the D.C. Circuit the “Mini Supreme Court”). In second place is the Sixth Circuit, with five of its judges going to the Supreme Court. See Fed. Judicial Ctr., *supra* note 7. They include Howell Edmunds Jackson, William Rufus Day, Horace Harmon Lurton, William Howard Taft, and Potter Stewart. *Id.*

73. Ruth Bader Ginsburg, *Foreword* to MORRIS, *supra* note 2, at xi, xi.

74. See MORRIS, *supra* note 2, at 148, 279; Patricia Wald, *Life on the District of Columbia Circuit: Literally and Figuratively Halfway Between the Capitol and the White House*, 72 MINN. L. REV. 1, 1 (1987).

75. 5 U.S. (1 Cranch) 137 (1803).

76. *Id.* at 177.

77. William Marbury filed his claim in the U.S. Supreme Court in the December 1801 Term, even though the circuit court of the District had already been created, staffed, and in session as early as

the Supreme Court probably would not have had the opportunity to use the case to announce that the judiciary has the power to review the constitutionality of executive and legislative actions.⁷⁸ Of monumental importance to the courts of the D.C. Circuit, and to the entire country, William Marbury's choice of forum positioned the Supreme Court to announce these powers—without ordering anyone to do anything—and the courts have spent the last 200 years exercising that authority.

A. OVERSEER OF THE EXECUTIVE AND LEGISLATIVE BRANCHES

Initially, the D.C. courts' role as ombudsmen focused mainly on overseeing the coordinate branches—the executive and legislative branches. Then, in the twentieth century, these courts became heavily engaged as well in review of the actions of the myriad administrative agencies established during and after the New Deal.

The D.C. Circuit Court's role as ombudsman began to take shape in its first decade. In 1807, six years after Congress established the Circuit Court of the District of Columbia as the capital's main tribunal, the United States Attorney for the District, acting on direct orders from President Jefferson, asked the court for a warrant to arrest Erick Bollman and Samuel Swartout on charges of treason.⁷⁹ An Army general had accused the two of planning, in collaboration with Aaron Burr, the seizure of New Orleans and the invasion of Mexico. A divided court issued the warrant, but Chief Judge Cranch found the evidence insufficient to establish probable cause and authored a powerful dissent:

In times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be particularly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the

March 23, 1801. *See, e.g.*, *United States v. Hammond*, 26 F. Cas. 96 (C.C.D.C. 1801) (No. 15,293); discussion *supra* note 9. In hindsight, it seems reasonably clear that Marbury could have filed his claim in the circuit court instead of trying, unsuccessfully, to invoke the original jurisdiction of the Supreme Court. However, we do not know whether people at the time understood that the circuit court could issue a writ of mandamus commanding action by the Secretary of State. For discussion of this issue, see Susan Low Bloch, *The Marbury Mystery, Why Did William Marbury Sue in The Supreme Court?*, 18 CONST. COMMENT. (forthcoming Mar. 2002).

78. It almost certainly could not have done so in a way that required no one—neither the President nor the Congress nor the judiciary—to do anything. If Marbury had filed in the circuit court, and if that court had issued the writ and the Supreme Court affirmed, the case would have established judicial review over executive actions, but not over legislative actions. Moreover, by mandamusing Madison, the courts would have given Jefferson and Madison the opportunity to ignore the judiciary. If the circuit court had denied the writ, and the Supreme Court affirmed, little would have been established. *See* Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 335–37.

79. *United States v. Bollman*, 24 F. Cas. 1189, 1189 (C.C.D.C. 1807) (No. 14,622).

Constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which a hundred innocent persons may suffer. The Constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude In cases of emergency it is for the executive department of the government to act upon its own responsibility, and to rely upon the necessity of the case for its justification; but this Court is bound by the law and the Constitution in all events.⁸⁰

Cranch's warning has echoed through the years⁸¹ and began a venerable tradition in the D.C. federal courts: the leeway afforded the "great dissenter" whose well-stated views, initially expressed in opposition to the court's judgment, eventually become the prevailing view.⁸² In this particular case, "eventually" was virtually immediately. Shortly after the D.C. Circuit Court ruled, the Supreme Court reversed.⁸³ Writing for the Court, Chief Justice Marshall agreed with Cranch, found the evidence insufficient, and ordered the release of Bollman and Swartout.⁸⁴ Cranch was elated:

Although I have not for a moment doubted the correctness of my opinion, yet it is a source of great satisfaction to find it confirmed by the highest judicial tribunal in the Nation. I congratulate my country upon this triumph of reason and law over popular passion and injustice—upon the final triumph of civil over the military authority, and of the practical principles of substantial personal liberty over the theoretical doctrine of philosophic civil liberty.⁸⁵

Bollman and Swartout's case was the first of many challenging the D.C. federal courts to bind the executive branch to the rule of law in "times of commotion."⁸⁶ A few years later, in 1837, the D.C. Circuit Court finally confronted the question William Marbury had spared it—whether it had the power to issue a writ of mandamus ordering a cabinet official to perform his duty. In *United States ex rel. Stokes v. Kendall*,⁸⁷ William Stokes, a government contractor, sought a writ of mandamus ordering Postmaster General Amos Kendall to pay the money the government owed Stokes. The Postmaster argued

80. *Id.* at 1192 (Cranch, C.J., dissenting).

81. For similar views, see Justice Jackson's famous dissent in *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting).

82. See discussion *infra* notes 218–35 and accompanying text.

83. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

84. *Id.* at 135–37.

85. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 308 (rev. ed. 1926) (quoting Cranch) (internal quotation marks omitted).

86. *United States v. Bollman*, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (No. 14,622). (Cranch, C.J., dissenting).

87. 5 D.C. (5 Cranch) 163 (1837).

that the court lacked jurisdiction to inquire into the official conduct of the President and the heads of departments. In Postmaster Kendall's view, only the President, not the courts, could compel the head of a department to perform even a mandatory duty. The circuit court disagreed. In the words of Chief Judge Cranch: "This Court has the power to call before it every person found in the district, from the highest to the lowest; and it is upon this power that they all depend for that protection which the law extends over them."⁸⁸ The Supreme Court affirmed, and Kendall was ordered to pay Stokes.⁸⁹ This power, to issue writs of mandamus ordering government officials to do what the law requires, has continued to be a weighty part of this circuit's business;⁹⁰ for many years, no other circuit possessed this authority.⁹¹

While the Circuit Court of the District of Columbia had occasion in its first decade to review actions of the executive branch, the successor Supreme Court of the District of Columbia had occasion in its first decade to review congressional actions. In 1876, a congressional committee subpoenaed Hallett Kilbourn to testify about a bankrupt Washington real estate venture that owed the government money.⁹² When Kilbourn refused to answer the committee's questions, the House cited him for contempt and immediately jailed him.⁹³ During his confinement, Kilbourn was indicted under an 1857 law authorizing prosecution of uncooperative congressional witnesses in federal court for criminal contempt.⁹⁴ Kilbourn petitioned the Supreme Court of the District of Columbia for a writ of habeas corpus, arguing that Congress, by investing the courts with authority to punish contempt, had deprived itself of that authority. The D.C. Supreme Court agreed and ordered Kilbourn's release.⁹⁵

Thereafter, Kilbourn filed a false imprisonment suit against several members of Congress as well as the sergeant at arms, John Thompson, who had arrested

88. *Id.* at 174–75.

89. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 626 (1838). Three Justices dissented on the ground that Congress had not given the court the power to issue a writ of mandamus against an executive official, but all three dissenters agreed with the majority that nothing in the Constitution prevented Congress from doing so. *Id.* at 626 (Taney, C.J., dissenting); *id.* at 641–42 (Barbour, J., dissenting). Justice Catron concurred in both of the dissenting opinions. *Id.* at 653.

90. *See, e.g., Cotonificio Bustese, S.A., v. Morgenthau*, 121 F.2d 884, 886 (D.C. Cir. 1941) ("Where an administrator erroneously holds himself to be without power to consider a claim, relief in the nature of mandamus generally may be given.")

91. In 1821, in *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821), the Supreme Court had held that other circuit courts lacked the statutory authority to issue writs of mandamus against government officials. *See* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 455 n.62 (1989). Congress finally conferred that power to the other circuits in the Mandamus and Venue Act of 1962, Pub. L. No. 87-748, § 1(a), 76 Stat. 744, 744 (codified at 28 U.S.C. § 1361 (1994)).

92. *See* *Kilbourn v. Thompson*, 11 D.C. (MacArth. & M.) 401, 402 (1883).

93. Kilbourn was "imprisoned for 45 days in the common jail of the District of Columbia." *Kilbourn v. Thompson*, 103 U.S. 168, 168 (1880) (mem.).

94. *Kilbourn*, 11 D.C. (MacArth. & M.) at 403 (relying on Act of Jan. 24, 1857, ch. 19, 11 Stat. 155).

95. *Id.*

Kilbourn.⁹⁶ The D.C. Supreme Court dismissed the suit on the ground that the defendants were protected by the Constitution's "Speech or Debate Clause."⁹⁷ The United States Supreme Court affirmed with respect to all the defendants except Thompson, concluding that unelected legislative officials have no "Speech or Debate" immunity.⁹⁸ Many years later, in 1969, this holding proved pivotal to Adam Clayton Powell's successful suit against the clerk, doorkeeper, and sergeant at arms of the House of Representatives, challenging the House's refusal to seat him.⁹⁹

Reminiscent of the disputes over President Jefferson's arrest of Aaron Burr's alleged coconspirators, Bollman and Swartout, and President Lincoln's actions during the Civil War, the crisis created by President Truman's seizure of the steel mills during the Korean conflict similarly challenged the D.C. courts' ability to enforce the rule of law. When the United Steelworkers of America voted to strike in the midst of the war, President Truman, purporting to rely on his "inherent authority" as President and Commander in Chief, issued an executive order directing Secretary of Commerce Sawyer to seize the mills of eighty-five companies and to continue their production of steel.¹⁰⁰ The companies immediately contested the legality of the seizure. District Judge David Pine rejected the President's assertion of "inherent authority," finding it unsupported by any constitutional or statutory provision.¹⁰¹ He ordered the Government to return control to the companies.¹⁰² In Judge Pine's view, "the contemplated strike, if it came, with all its awful results, would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for [the Government's] claim to unlimited and unrestrained executive power."¹⁰³ The Supreme Court affirmed.¹⁰⁴

96. *Id.*

97. *Id.* at 404 (referring to U.S. CONST. art. I, § 6: "For any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").

98. *Kilbourn*, 103 U.S. at 189–90. On the merits, the U.S. Supreme Court held that the investigatory and contempt powers of Congress were limited by the Constitution and could be reviewed by the judiciary. *Id.* at 192. Exercising that power, the Court held that Congress did not possess "the general power of making inquiry into the private affairs of the citizens," but could inquire only into matters over which it had jurisdiction. *Id.* at 190. Because Congress had not contemplated legislation while investigating the real estate deal, Congress had acted outside its authority in compelling Kilbourn's testimony and documents. Sergeant at Arms Thompson was ordered to pay \$20,000 in damages—a judgment Congress subsequently paid. *See MORRIS, supra* note 2, at 54 n.23.

99. *Powell v. McCormack*, 395 U.S. 486, 550 (1969). When Powell alleged that the House of Representatives had unconstitutionally excluded him from taking his seat as a duly elected congressman and named Sergeant at Arms Leake Johnson as one of the defendants, the Supreme Court specifically relied on *Kilbourn* to support the proposition that the fact "that House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision." *Id.* at 504–05.

100. Exec. Order No. 10340, 17 Fed. Reg. 3139 (Apr. 8, 1952).

101. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 573–76 (D.D.C. 1952).

102. *Id.* at 577.

103. *Id.*

104. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952). The case went directly to the Supreme Court. The court of appeals granted a stay pending the Supreme Court's decision whether to grant certiorari, but did not rule on the merits. *Sawyer v. United States Steel Co.*, 197 F.2d 582 (D.C.

The Nixon years gave us Watergate, the Pentagon Papers, and Vietnam War protestors. Constantly, the D.C. courts were called upon to enforce the rule of law. When the *Washington Post* prepared to publish excerpts from the Pentagon Papers, a forty-seven volume classified study of the origins and conduct of the Vietnam War, the Government sought to enjoin the publication, asserting that it would threaten national security.¹⁰⁵ District Judge Gerhard Gesell refused to stop the *Washington Post* publication, observing that the case presented “a raw question of preserving the freedom of the press as it confronts the efforts of the Government to impose a prior restraint on publication of essentially historical data.”¹⁰⁶ The D.C. Circuit, sitting en banc, affirmed; the Government had not proved that publication would irreparably harm the United States, and the equities favored disclosure.¹⁰⁷ The Supreme Court agreed, and the Pentagon Papers rolled off the presses.¹⁰⁸

The Vietnam War presented the courts with other constitutional issues. In the spring of 1971, when thousands of protestors gathered in Washington to engage in “May Day” demonstrations against the war, the police arrested over 14,000 people for disorderly conduct, violation of police lines, unlawful assembly, and illegal entry onto public property.¹⁰⁹ Having suspended normal field arrest procedures, the police had no arrest forms, photos, or other evidence of probable cause to support these charges and had to drop them.¹¹⁰ The protestors then commenced a class action seeking to expunge their arrest records, but District Judge Howard F. Corcoran denied relief.¹¹¹ The D.C. Circuit, in an opinion by

Cir. 1952). For an informative discussion of this case and its history, see MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1977).

105. *United States v. Wash. Post Co.*, No. 71 Civ. 1235 (D.D.C. June 21, 1971) (order denying preliminary injunction), *aff'd per curiam en banc*, 446 F.2d 1327 (D.C. Cir. 1971). The government also sought to enjoin the *New York Times* from publishing the Papers. See *United States v. N.Y. Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971) (mem.). The name of the study was “History of U.S. Decision-Making Process on Vietnam Policy.” See generally *THE NEW YORK TIMES COMPANY v. UNITED STATES: A DOCUMENTARY HISTORY* (James C. Goodale ed., 1971).

106. *Gesell Ruling on Post*, N.Y. TIMES, June 19, 1971, at 10 (providing the text of Gesell’s ruling).

107. *Wash. Post Co.*, 446 F.2d at 1328. Judge Malcolm R. Wilkey dissented, believing that publication “could clearly result in great harm to the nation . . . the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate as honest brokers between would-be belligerents.” *Id.* at 1330 (Wilkey, J., dissenting). Judge George E. MacKinnon also dissented on the ground that “courts are not designed to deal adequately with national defense and foreign policy.” *Id.* at 1329 (MacKinnon, J., dissenting). This approach was notably different from the Second Circuit’s more cautious response when it addressed the United States’s effort to prevent the *New York Times* from publishing these papers. The Second Circuit had remanded the case for further in camera proceedings. *United States v. N.Y. Times Co.*, 444 F.2d 544, 544 (2d Cir. 1971) (en banc) (per curiam).

108. Reviewing the actions of the two circuits, the U.S. Supreme Court agreed with the D.C. courts; both the *Washington Post* and the *New York Times* were allowed to proceed with their publications. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

109. See *Sullivan v. Murphy*, 444 F.2d 840 (D.C. Cir. 1971).

110. *Id.*

111. According to the court of appeals, the district court denied relief because the plaintiffs had failed to demonstrate that the prosecution was rooted in harassment or maintained in bad faith. *Sullivan v. Murphy*, 478 F.2d 938, 943 (D.C. Cir. 1973).

Judge Leventhal, reversed; absent contemporaneous evidence, the appeals court held, the arrests were presumptively invalid under the Fourth Amendment.¹¹² On remand, Judge Corcoran ordered the destruction of all records, reports, photographs, fingerprint cards, copies, and other records resulting from the seizures.¹¹³

Watergate raised thorny issues for the courts, most dramatically the propriety of ordering President Nixon to turn over the tapes of Oval Office conversations regarding an alleged cover-up of the burglary. Rejecting Nixon's claim of executive privilege, District Judge John J. Sirica ordered the President to relinquish the tapes to Special Prosecutor Archibald Cox.¹¹⁴ The D.C. Circuit, sitting en banc, affirmed in a per curiam opinion.¹¹⁵ Finding no constitutional basis for presidential immunity from judicial process, the majority concluded that "[t]hrough the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands."¹¹⁶ Judges MacKinnon and Wilkey concurred in part and dissented in part.¹¹⁷ The Supreme Court agreed with the D.C. Circuit's affirmance. In *United States v. Nixon*,¹¹⁸ the High Court unanimously held that executive privilege, although it has constitutional status, "must yield to the demonstrated, specific need for evidence in a pending criminal trial."¹¹⁹ The Presidency had won, but Nixon had lost. Two weeks later, Nixon resigned.¹²⁰

112. *Id.* at 968-73.

113. *Sullivan v. Murphy*, 380 F. Supp. 867, 869 (D.D.C. 1974).

114. *In re Subpoena to Nixon*, 360 F. Supp. 1, 3 (D.D.C. 1973). Judge Sirica recognized that executive privilege exists but that it is up to the judiciary to decide whether it must yield in a particular case: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers Executive fiat is not the mode of resolution." *Id.* at 5-6.

115. *Nixon v. Sirica*, 487 F.2d 700, 722 (D.C. Cir. 1973) (en banc) (per curiam) (opinion joined by Bazelon, C.J., and Wright, McGowan, Leventhal, and Spottswood Robinson, J.J.).

116. *Id.* at 711. The President may assert executive privilege, but his assertions are judicially reviewable. *Id.* at 715-16.

117. Judge MacKinnon said he would recognize an "absolute privilege for confidential Presidential communications" on the ground that "the preservation of the confidentiality of the Presidential decision-making process is of overwhelming importance to the effective functioning of our three branches of government." *Id.* at 730 (MacKinnon, J., concurring in part and dissenting in part). Judge Wilkey believed that the executive branch, not the judiciary, is the proper arbiter of the scope and applicability of executive privilege. *Id.* at 774 (Wilkey, J., concurring in part and dissenting in part).

118. 418 U.S. 684 (1974).

119. *Id.* at 713. Nixon did not appeal the original D.C. Circuit opinion and instead tried to convince the special prosecutor, Archibald Cox, to accept transcripts of the tape recordings, instead of the tapes themselves. When Cox refused, Nixon ordered him to be fired and triggered a series of resignations known as the Saturday Night Massacre. Solicitor General Bork finally carried out Nixon's order, an action subsequently found unlawful by Judge Gesell in *Nader v. Bork*, 366 F. Supp. 104, 109 (D.D.C. 1973). Popular outrage forced the President to appoint a new special prosecutor, Leon Jaworski, who also sought the tapes. Judge Sirica again issued a subpoena ordering the White House to turn over the tapes. When the White House tried to quash the subpoena, the Supreme Court, on the special prosecutor's request, expedited the case, bypassed the court of appeals, and, in a unanimous opinion, affirmed Judge Sirica's order. *Nixon*, 418 U.S. at 686-87; John P. MacKenzie, *Court Orders Nixon to Yield Tapes; President Promises to Comply Fully*, WASH. POST, July 25, 1974, at A1.

120. Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, at A1. The crucial piece of evidence, the so-called smoking gun, was the recording of June 23, 1972, in which Nixon is heard

The Nixon years also brought to the D.C. courts the question of the criminal accountability of one “following government orders.” Bernard Barker and Eugenio Martinez were convicted in 1974 of unlawfully breaking into the office of the psychiatrist of Daniel Ellsberg, the suspected leaker of the Pentagon Papers. Baker and Martinez appealed, arguing that they reasonably believed their mission had been authorized by the federal government.¹²¹ They alleged that when Howard Hunt, a White House insider, initially solicited them, Hunt told them “he was working for an organization at the White House with greater jurisdiction than the FBI or CIA.”¹²² Hunt invited them to “become ‘operational’” again and “help conduct a surreptitious entry to obtain national security information on ‘a traitor to this country who was passing . . . classified information to the Soviet Embassy.’”¹²³ The D.C. Circuit reversed their conviction. Judge Wilkey said, in his opinion, “I think it plain that a citizen should have a legal defense to a criminal charge arising out of an unlawful arrest or search which he has aided in the reasonable belief that the individual who solicited his assistance was a duly authorized officer of the law.”¹²⁴ Judge Leventhal dissented:

[A]ppellants’ mistake of law, whether or not it is classified as reasonable, does not negative legal responsibility. . . . We should refuse to cut away and weaken the core standards for behavior provided by the criminal law. Softening the standards of conduct rather than ameliorating their application serves only to undermine the behavioral incentives the law was enacted to provide. It opens, and encourages citizens to find, paths of avoidance instead of rewarding the seeking of compliance with the law’s requirements.¹²⁵

In the 1980s, difficult separation of powers issues trooped before the D.C. federal courts, including the validity of the legislative veto, the Balanced Budget Act of 1985, and the independent counsel law. In all three areas, thoughtful opinions of the district court and the court of appeals informed the Supreme Court’s final decision. The constitutionality of the legislative veto first arose in the D.C. Circuit in a challenge to the Natural Gas Policy Act of 1978. Under that Act, changes in pricing policy issued by the Federal Energy Regulatory Commission (FERC) could take effect only if neither house of Congress

ordering Chief of Staff H.R. Haldeman to tell the CIA to block the FBI probe of the Watergate break-in. Lawrence Meyer, *Obstruction of Justice Case Firmed Up by Transcripts*, WASH. POST, Aug. 7, 1974, at A11.

Overall, between January 1972 and January 1975, the D.C. District Court heard more than eighty Watergate-related cases (forty-seven criminal and thirty-six civil). MORRIS, *supra* note 2, at 264. Almost none of these was reversed on appeal. *Id.*

121. *United States v. Barker*, 546 F.2d 940, 943 (D.C. Cir. 1976) (per curiam).

122. *Id.*

123. *Id.* Hunt had been a CIA operative who played a major role in organizing the Bay of Pigs invasion; Barker and Martinez had worked with Hunt during that operation. *Id.*

124. *Id.* at 954. Judge Robert R. Merhige, Jr., District Judge for the Eastern District of Virginia, sitting by designation, also voted to reverse the conviction because the defendants had acted in reliance on a government official’s interpretation of the law. *Id.* at 957 (Merhige, J., concurring in the judgment).

125. *Id.* at 972 (Leventhal, J., dissenting).

adopted a resolution disapproving the agency action within thirty days.¹²⁶ After the House of Representatives voted to reject a pricing program adopted by FERC, the Consumer Energy Council challenged the constitutionality of the veto.¹²⁷ The court of appeals ruled for the Council: A legislative veto, the court declared, “contravenes the constitutional procedures for making law,”¹²⁸ violating the fundamental requirements that legislation be approved by both houses of Congress and presented to the President.¹²⁹ Shortly thereafter, the Supreme Court, in *INS v. Chadha*,¹³⁰ agreed that legislative vetoes are unconstitutional.¹³¹ Relying on *Chadha*, the Court affirmed the D.C. Circuit’s decision in the FERC case.¹³²

Efforts to deal with the budget deficit in the 1980s provoked the next major separation of powers challenge. The Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985 constructed an elaborate mechanism aimed at balancing the budget by 1991.¹³³ Congress set maximum allowable federal deficits for five fiscal years.¹³⁴ It then provided that if the federal budget in any year exceeded the specified ceiling, it would be incumbent upon the Comptroller General, an officer appointed by the President but removable by joint resolution of the Congress, to specify budget reductions designed to ensure compliance with the deficit goals.¹³⁵ The President, in turn, would be required to reduce the budget by the amounts set by the Comptroller General. A three-judge district court—including then-Circuit Judge Antonin Scalia and District Judges Norma Holloway Johnson and Oliver Gasch—held, in a per curiam opinion, that the delegation of executive powers to the Comptroller General, an officer removable by the legislature by a joint resolution, violated the Constitution’s separation of powers.¹³⁶ Again, the Supreme Court agreed,

126. 15 U.S.C. §§ 3301–3342 (1979).

127. *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425 (D.C. Cir. 1982). The opinion, written by Judge Wilkey, was joined by Judges Bazelon and Edwards.

128. *Id.* at 479.

129. *Id.*

130. 462 U.S. 919 (1983), *aff’g* 634 F.2d 408 (9th Cir. 1980).

131. *Id.* at 959.

132. *Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983) (mem.). Before the D.C. Circuit had ruled in the FERC case, Judge John Garrett Penn had certified three questions to the court of appeals concerning the constitutionality of a legislative veto in a different law, the Federal Trade Commission Improvement Act. The challenged provision required the Federal Trade Commission (FTC), after promulgating any final rule, to submit the rule to Congress for review. The rule would become effective after ninety days, unless both houses of Congress adopted a concurrent resolution disapproving the final rule. By the time the D.C. Circuit considered the certified questions, it had decided the FERC case. Relying on its decision in the FERC case, the court of appeals, en banc, also found this form of two-house legislative veto unconstitutional. *Consumers Union of United States v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam). The Supreme Court consolidated this case with the FERC case and affirmed both in *Process Gas Consumers Group*, 463 U.S. at 1216.

133. Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. §§ 900–922 (2000)).

134. *Id.* § 902.

135. *Id.*

136. *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986) (three-judge court) (per curiam). The court held:

affirming the decision in *Bowsher v. Synar*.¹³⁷

In 1988, the D.C. federal courts considered the constitutionality of the independent counsel law, first installed in the Ethics in Government Act of 1978.¹³⁸ In the D.C. District Court, Chief Judge Aubrey E. Robinson concluded that the law was constitutional.¹³⁹ A divided court of appeals reversed. Judge Laurence H. Silberman, joined by Judge Stephen F. Williams, held that the provisions at issue violated the Appointments Clause of Article II, Article III's provision for an independent judiciary, and Article I's requirement that the President "take Care that the laws be faithfully executed."¹⁴⁰ Then-Judge Ruth Bader Ginsburg dissented.¹⁴¹ The Supreme Court agreed with the dissent and upheld the law.¹⁴² After twenty years of mixed experiences with the measure, including the controversial investigation of President Clinton by former D.C. Circuit Judge Kenneth W. Starr, Congress eagerly took advantage of the law's sunset provision and allowed it to expire in June 1999.¹⁴³

The Iran-Contra investigation required the D.C. courts to sort out the complexities created when Congress and prosecutors investigate the same events at the same time. In July 1987, Lieutenant Colonel Oliver North, a former staff member of the National Security Council, testified before a congressional committee under a grant of use immunity.¹⁴⁴ At the same time, Independent Counsel Lawrence Walsh was investigating alleged wrongdoing by government officials and, on March 16, 1988, indicted North.¹⁴⁵ Found guilty on three counts, North maintained that Walsh had improperly used his immunized

We are confident, however, that congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws. . . . Giving such power over executive functions to Congress violates the fundamental principle expressed by Montesquieu upon which the theory of separated powers rests: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."

Id. at 1401-02 (quoting MONTESQUIEU, *THE SPIRIT OF LAWS*, vol. I, bk. XI, ch. 6, at 152 (London 1823)).
137. 478 U.S. 714, 735 (1986).

138. Pub. L. No. 95-521, 92 Stat. 1867 (codified as amended at 28 U.S.C. §§ 591-599 (1994)). The independent counsel law was reenacted several times. Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039; Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293; Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (codified at 28 U.S.C. § 599 (1994)).

139. *In re Sealed Case*, 665 F. Supp. 56, 62 (D.D.C. 1987).

140. *In re Sealed Case*, 838 F.2d 476, 487 (D.C. Cir. 1988).

141. *Id.* at 518 (Ginsburg, J., dissenting).

142. *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988). Justice Scalia dissented. *Id.* at 697 (Scalia, J., dissenting).

143. See 28 U.S.C. § 599; see also Robert Suro, *As Special Counsel Law Expires, Power Will Shift to Reno*, WASH. POST, June 30, 1999, at A6 (discussing new role of the Attorney General in White House investigations).

144. Joe Pichirallo, *Lacking Old Luster, North Returns to Testify*, WASH. POST, July 7, 1987, at A1.

145. Christopher Drew & Janet Cawley, *Grand Jury Indicts Poindexter, North*, CHI. TRIB., Mar. 17, 1988, at 1.

congressional testimony.¹⁴⁶ The circuit court reversed North's convictions because the trial court had failed to conduct a hearing of the kind necessary to ensure that North's immunized testimony would not be used against him.¹⁴⁷ Thereafter, Congress exercised greater care in coordinating its investigations with those pursued by prosecutors.¹⁴⁸

The most recent confrontations between the D.C. federal courts and the executive branch occurred during the proliferation of investigations centered on the Clinton Administration. The federal courts of the District grappled with novel questions of executive privilege,¹⁴⁹ lawyer-client privilege,¹⁵⁰ Secret Service privilege,¹⁵¹ and the interaction between grand jury secrecy and the impeachment power of Congress.¹⁵² While wrestling with these trying questions, the judges also had to make their way daily through the hordes of media folks and their vanloads of equipment that ringed the courthouse for months.¹⁵³

146. George Lardner, Jr., *North Guilty on 3 Counts in Iran-Contra Affair; Ex-Aide Is Acquitted on 9 Charges*, WASH. POST, May 5, 1989, at A1. For a complete report of this investigation, see 2 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS (1993).

147. *United States v. North*, 910 F.2d 843, 872 (D.C. Cir. 1990) (per curiam). The court remanded for the hearing required by *Kastigar v. United States*, 406 U.S. 441 (1972). On remand, Judge Gesell dismissed the charges pursuant to a motion by Walsh. Haynes Johnson & Tracy Thompson, *North Charges Dismissed at Request of Prosecutor*, WASH. POST, Sept. 17, 1991, at A1.

148. See generally Ronald F. Wright, *Congressional Use of Immunity Grants After Iran-Contra*, 80 MINN. L. REV. 407 (1995) (discussing Congress's efforts to coordinate its investigations with prosecutors in response to the reversal of North's convictions).

149. See *In re Lindsey*, 158 F.3d 1263, 1267 (D.C. Cir. 1998) (per curiam) (holding that the independent counsel demonstrated the need and unavailability required to overcome White House Counsel's assertion of executive privilege in the investigation of alleged obstruction of justice in the Paula Jones case); *In re Sealed Case*, 116 F.3d 550 (D.C. Cir.), modified per curiam by 121 F.3d 729 (D.C. Cir. 1997), discussed in Recent Case, *In re Sealed Case*, 116 F.3d 550 (D.C. Cir. 1997), 111 HARV. L. REV. 861 (1998) (dealing with independent counsel's investigation of Agriculture Secretary Espy's alleged improper acceptance of gifts). For interesting discussions, see Symposium, *Executive Privilege and the Clinton Presidency*, 8 WM. & MARY BILL RTS. J. 535 (2000) and Symposium, *The Constitution under Clinton: A Critical Assessment*, 63 Law and Contemp. Probs. 1 (2000).

150. See *Lindsey*, 158 F.3d at 1263 (concerning use of attorney-client privilege by deputy White House counsel to resist answering questions regarding independent counsel investigation of alleged obstruction of justice in *Paula Jones* case); *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997), rev'd, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (holding that attorney-client privilege survives death of client).

151. See *In re Sealed Case*, 148 F.3d 1079, 1079 (D.C. Cir. 1998) (per curiam); see also *When the Secret Service Talks*, N.Y. TIMES, July 19, 1998, § 4, at 15 (comment by Professor Susan Low Bloch regarding the oddity of having the Secret Service, rather than the President, assert the privilege).

152. See *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1059, 1070 (D.C. Cir. 1998) (per curiam) (vacating district court order issuing writ of mandamus compelling independent counsel to testify at a show-cause hearing relating to alleged violation of grand jury secrecy rules while investigating alleged obstruction of justice during Monica Lewinsky probe).

153. Other interesting separation of powers cases in the 1990s included *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996) (affirming district court's refusal to interfere with presidential power to remove a "holdover" member of the National Credit Union Administration); and *Hechinger v. Metropolitan Washington Airports Authority*, 36 F.3d 97, 100 (D.C. Cir. 1994) (holding, on remand from *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), that Congress's statutory amendment "erasing the condition that the Board's membership be limited to Members of Congress," but "requiring the Authority to select members from lists prepared by the Speaker of the House and President *pro tempore* of the Senate" was insufficient to cure constitutional defect).

B. THE ADMINISTRATIVE COURT

In addition to judging acts of the President and Congress, the D.C. federal courts have reviewed countless actions of administrative agencies and have contributed significantly to the development of what we have come to call “administrative law.”¹⁵⁴ The rapid multiplication of regulatory agencies during and after the New Deal transformed the dockets of the D.C. federal courts so that by the end of the twentieth century, the D.C. Circuit was reviewing about one-fourth of all federal agency decisions in the country, far more than any other single circuit.¹⁵⁵ Because of the heavy weight of its agency review cases, the D.C. Circuit is sometimes called the nation’s “administrative law court.”¹⁵⁶

Over the years, D.C. Circuit judgments have increased accountability and transparency in agency decisionmaking. The court of appeals has stood guard against agency “capture” by the industries being regulated. In a 1960 case, for example, the court reviewed and reversed a Federal Maritime Board decision denying a shipping company access to a trade route used by its competitors. Judge Henry W. Edgerton warned the Board that its duty was “not to [p]re-serv[e] [the] monopoly” among current competitors, but to consider “the public interest in ending th[e] monopoly.”¹⁵⁷ Echoing a point made earlier by Judge Bazelon,¹⁵⁸ Judge Edgerton reminded the Board that agencies are charged with protecting the “public,” not the private, interest.¹⁵⁹

D.C. Circuit adjudications have also advanced agency accountability by broadening access to the courts. In 1966, a religious group, the United Church of Christ, sought to oppose the license renewal of a Mississippi television station accused of racial and religious discrimination.¹⁶⁰ The FCC held that the group lacked standing; in the Commission’s view, only persons suffering eco-

154. Depending on Congress’s preference, agency actions may be reviewed first in the district court and then by the court of appeals, or, if Congress so specifies, challenges to administrative actions may skip over the district court and go directly to the court of appeals. Spottswood W. Robinson, *The D.C. Circuit: An Era of Change*, 55 GEO. WASH. L. REV. 715, 716 (1987). For some agencies—such as, the FCC—Congress has made the Court of Appeals for the D.C. Circuit the exclusive forum for judicial review. *See, e.g.*, 47 U.S.C. § 402 (1994).

155. Robinson, *supra* note 154, at 716 (“About one-fourth of all federal agency reviews in the United States reach [the D.C. Circuit], and this far exceeds the number in any other circuit.”).

156. *See* MORRIS, *supra* note 2, at 293 (observing that court of appeals emerged as a “national court of administrative appeals”); Patricia M. Wald, *The Distinctive Contribution of the D.C. Circuit to Administrative Law*, Keynote Address Before the Section of Administrative Law, ABA (Oct. 1987), in 40 Admin. L. Rev. 508, 509 (1988).

157. *Pac. Far E. Line, Inc. v. Fed. Mar. Bd.*, 275 F.2d 184, 186 (D.C. Cir. 1960). Judge Edward A. Tamm, then on the district court, had granted summary judgment for the Board in an unpublished opinion.

158. *See* *Clarksburg Publ’g Co. v. FCC*, 225 F.2d 511, 521–22 (D.C. Cir. 1955) (“The Commission does not stand in the position of a ‘traffic policeman, with power to consider merely the financial and technical qualifications of the applicant.’ . . . [There must be] a considered finding that the grant will serve the public interest.” (quoting *Mansfield Journal Co. v. FCC*, 180 F.2d 28 (D.C. Cir. 1950))).

159. *Pac. Far E. Line*, 275 F.2d at 186.

160. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 997–98 (D.C. Cir. 1996).

nomic injury or electrical interference could challenge a renewal.¹⁶¹ The D.C. Circuit disagreed, holding that standing to challenge license renewals must include “those with such an obvious and acute concern as the listening public.”¹⁶² “This much,” said then-Judge Burger for a unanimous court, “seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist.”¹⁶³

Accountability was also the focus of a key 1971 decision, *Soucie v. David*,¹⁶⁴ a suit brought by citizens seeking government documents under the Freedom of Information Act (FOIA). In a statement later adopted by the Supreme Court, Chief Judge David Bazelon declared, “The policy of [FOIA] requires that the disclosure requirements be construed broadly, the exemptions narrowly.”¹⁶⁵ Decisions such as these spurred the birth and development of public interest groups throughout the nation.¹⁶⁶

Perhaps most prominently, and controversially, the D.C. Circuit—more than any other court of appeals—has influenced the nature of judicial review of agency decisions. In the mid-1970s, Chief Judge Bazelon wrote a series of pathmarking opinions testing agency decisionmaking for procedural adequacy before allowing the agency’s decision to survive “arbitrary and capricious” review.¹⁶⁷ At the same time, Judge Harold Leventhal introduced a brand of

161. *Id.* at 997.

162. *Id.* at 1002.

163. *Id.*

164. 448 F.2d 1067 (D.C. Cir. 1971).

165. *Id.* at 1080 (determining that Office of Science and Technology is an “agency” subject to FOIA and that a report regarding supersonic transport is a “record” within the meaning of the Act; appeals court remanded the case for district court decision whether any of the exemptions to FOIA applied). Judge Bazelon’s statement was first adopted by the Supreme Court in *Department of the Air Force v. Rose*, 425 U.S. 352, 366 (1976).

166. MORRIS, *supra* note 2, at 294; Reuel E. Schiller, *Enlarging the Administrative Polity, Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389, 1438–42 (2000); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 224–25 (1996). See also *Students Challenging Regulatory Agency Procedures (SCRAP) v. United States*, 346 F. Supp. 189, 195–96 (D.D.C. 1972), in which a three-judge district court held that the student organization, SCRAP, had standing to challenge a proposed rule that would discourage the use of recyclable materials because their members camped and hiked in the green spaces threatened by the proposal. The Supreme Court affirmed on the question of standing. *United States v. SCRAP*, 412 U.S. 669, 690 (1973). More recently, however, the Supreme Court has taken a less relaxed view on issues of standing. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (denying standing to wildlife organizations seeking to challenge Secretary of Interior’s interpretation of Endangered Species Act to apply only within United States and on high seas); *Allen v. Wright*, 468 U.S. 737, 749–50 (1984) (parents of black children who attend public schools lack standing to sue the IRS to require it to deny tax exempt status to racially discriminatory private schools).

167. See, e.g., *Aeschliman v. United States Nuclear Regulatory Comm’n*, 547 F.2d 622, 629 (D.C. Cir. 1976) (holding Nuclear Regulatory Commission’s rejection of environmental organization’s comments relating to construction permits “arbitrary and capricious”); *Natural Res. Def. Council, Inc. v. United States Nuclear Regulatory Comm’n*, 547 F.2d 633, 653–54 (D.C. Cir. 1976) (remanding for additional proceedings by the Commission). Bazelon developed an approach earlier initiated by Judge Harold Stephens who, in 1938, reversed an FCC decision denying a license to Saginaw Broadcasting

judicial review that focused on the substance of agency decisions, requiring courts to ensure that the agency has “take[n] a ‘hard look’ at the problems involved in its regulatory task.”¹⁶⁸ As Chief Judge Patricia Wald observed, the Bazelon-Leventhal debate over the proper focus of judicial review “titillated academics and administrative lawyers of the time.”¹⁶⁹

The Supreme Court settled much of this debate in the late 1970s and early 1980s, forbidding courts from requiring procedures beyond those prescribed by statute¹⁷⁰ and warning judges not to substitute their own judgments for those of the agency.¹⁷¹ Thus, while the Supreme Court ultimately did not embrace either the Bazelon or Leventhal approach, the debate between these giants elevated the Court’s comprehension of the diverse considerations at stake. More enduring than the shifting verbalizations of standards of review, the D.C. Circuit’s surveillance improved the quality of agency decisionmaking generally. Former FCC Chairman Richard Wiley specifically credited the D.C. Circuit with upgrading his agency’s performance; the D.C. Circuit, he said, was responsible for encouraging “more careful and thorough Commission consideration of [its] proposed decision[s], . . . increased sensitivity to procedural rights of parties, and, finally, greater responsiveness to our ultimate mandate to serve the public interest.”¹⁷²

Company. In *Saginaw*, Judge Stephens, writing for the court, said the FCC had not provided a “full statement . . . of the facts and grounds for its decision” as required by the Communications Act of 1934. *Saginaw Broad. Co. v. FCC*, 96 F.2d 554, 559 (D.C. Cir. 1938).

168. *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973). Compare *id.* (questioning the data relied upon by the agency in promulgating regulations for cement-plant emissions and ordering the agency to address the petitioner’s contentions about the data), and *Env’tl. Def. Fund, Inc. v. EPA*, 465 F.2d 528, 541 (D.C. Cir. 1972) (remanding the case to the EPA for consideration of scientific evidence that had recently become available), with *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650–51 (D.C. Cir. 1973) (Bazelon, J., concurring) (disagreeing with the majority’s substantive evaluation of the agency’s assumptions and methodology in setting standards for light evaluation emissions, but finding a basis for remand in the agency’s “failure to employ a reasonable decision-making process”).

169. Wald, *supra* note 166, at 226.

170. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the Supreme Court reversed both *Aeschliman* and *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, holding that when an agency has complied with the statutorily required procedures, the courts may not engraft their own notions of acceptable procedures. See *id.* at 558. The Court was notably critical of the circuit court, calling its approach “Monday morning quarterbacking” and “Kafkaesque.” *Id.* at 547, 557; see also Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 371 (describing the D.C. Circuit’s actions, within the realm of administrative law, as “proceeding in a direction not desired by the Supreme Court”).

171. After adopting a variation of the “hard look” doctrine as the way to determine if agency reasoning is “arbitrary and capricious” in *Motor Vehicles Manufacturers Ass’n v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 56 (1983) (court must review for rationality substance of agency decisions, including technical decisions), the Supreme Court instructed courts to show more deference to agencies’ statutory interpretations in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865–66 (1984). According to *Chevron*, courts are to uphold regulations that are based on permissible constructions of an ambiguous statute, even if the interpretation is not the most plausible construction or one the court would choose. *Id.*

172. ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* 62 (3d ed. 1982) (quoting Wiley). Wiley made these remarks in a March 18, 1976 speech in Washington, D.C. to the ABA

The foregoing merely samples the D.C. federal courts' intensive and varied experiences as overseers of government actions. The courts also confronted monumental antitrust cases, including Judge Harold Greene's ordered break-up of AT&T¹⁷³ and Judge Thomas Penfield Jackson's proposed break-up of Microsoft, a disposition reversed unanimously by the court of appeals.¹⁷⁴ In addition, the courts faced landmark broadcasting cases. These include *Red Lion Broadcasting Co. v. FCC*,¹⁷⁵ a court of appeals decision upholding the fairness doctrine, which required broadcasters to afford reasonable opportunity for discussion of conflicting views on issues of public importance,¹⁷⁶ and *Pacific*

Administrative Law Section's 1976 Bicentennial Institute on Oversight and Review of Agency Decision-making.

The court's prominent role in reviewing agency decisions, as well as in important separation of powers cases, has led to assertions that its decisions are often political—that how a judge views agency policy decisions is often dependent on whether the judge was appointed by a Democratic or a Republican President. *See, e.g.,* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155, 2169 (1998); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 *DUKE L.J.* 300, 316–17 (suggesting court should show greater deference to majoritarian institutions and adherence to judicial precedents); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *VA. L. REV.* 1717, 1771 (1997) (suggesting that Congress should no longer vest exclusive venue to review important sets of environmental regulations in the D.C. Circuit). But the judges on the D.C. Circuit strongly disagree with this assessment. *See, e.g.,* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 *VA. L. REV.* 1335, 1364 (1998); Patricia Wald, *A Response to Tiller and Cross*, 99 *COLUM. L. REV.* 235, 258 (1999). The debate continues. *See, e.g.,* Richard J. Pierce, Jr., *The Relationship Between the District of Columbia Circuit and Its Critics*, 67 *GEO. WASH. L. REV.* 797, 802 (1999); Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 *VA. L. REV.* 805, 850 (1999).

173. *United States v. AT&T*, 552 F. Supp. 131, 225 (D.D.C. 1982) (approving, with modifications, proposed settlement decree).

174. *United States v. Microsoft Corp.*, 253 F.3d 34, 46 (D.C. Cir. 2001) (per curiam), *aff'g in part and vacating in part* 97 F. Supp. 2d 59 (D.D.C.), *appeal denied* 530 U.S. 1301 (2000). On June 28, 2001, the court of appeals affirmed the district court's findings that Microsoft had violated the antitrust laws, but vacated the judgment on remedies "because the trial judge engaged in impermissible *ex parte* contacts . . . and made numerous offensive comments about Microsoft officials in public statements outside the courtroom, giving rise to an appearance of partiality." *Id.* Thereafter, the Bush Administration announced it would abandon any effort to break up the company. The D.C. Circuit's ability to act unanimously earned high praise from Linda Greenhouse of the *New York Times*. *See* Linda Greenhouse, *Divided They Stand: The High Court and the Triumph of Discord*, *N.Y. TIMES*, July 15, 2001, § 4, at 1 (contrasting the D.C. Circuit's endeavor to speak with one voice with the current "culture of dissent" in the Supreme Court). On November 2, 2001, Microsoft and the United States announced a settlement that Judge Colleen Kollar-Kotelly will review. Stephen Labaton, *U.S. and Microsoft in Deal, but States Hold Back*, *N.Y. TIMES*, Nov. 3, 2001, at A1. However, eight states and the District of Columbia have opposed the proposed settlement and have asked the judge to impose additional restrictions on Microsoft. Stephen Labaton, *9 States Ask Judge to Put Restrictions on Microsoft*, *N.Y. TIMES*, Dec. 8, 2001, at C1; Steve Lohr, *Microsoft and 9 States Spar in Filings*, *N.Y. TIMES*, Feb. 9, 2002, at C1.

175. 381 F.2d 908 (D.C. Cir. 1967).

176. *Id.* at 930. Writing for the court, Judge Tamm concluded that the "fairness doctrine" did not deprive broadcasters of any First Amendment rights:

The American people own the broadcast frequencies. Speaking through their elected representatives in Congress, they have established a program of licensing the temporary use of allocated frequencies to broadcasters who meet the standards established by Congress as

Foundation v. FCC,¹⁷⁷ in which the D.C. Circuit reversed an FCC ruling banning the broadcasting of seven “filthy” words during hours children were likely to be in the audience.¹⁷⁸ Noteworthy, too, among the First Amendment cases aired in the D.C. federal courts are campaign finance issues in, and in the wake of, *Buckley v. Valeo*¹⁷⁹ and pleas by protestors, who regard the nation’s capital as an ideal venue for all manner of demonstrations.¹⁸⁰ All in all, the

administered thereunder by the Commission. The broadcasters, then, acquire no ownership of assigned channels but are authorized to use them for the service of the public interest, convenience, or necessity.

Id. at 924. The court added: “The broadcasters, as public trustees, have an obligation in a democratic society to inform the beneficiaries of the trusteeship, the public, of the different attitudes and viewpoints which are held by the various groups which make up the community.” *Id.* at 928. The Supreme Court affirmed. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 401 (1969). Ultimately, the court of appeals had to judge the legality of the FCC’s decision to abolish the fairness doctrine. *See generally* Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 *Geo. L.J.* 59 (1987).

177. 556 F.2d 9 (D.C. Cir. 1977).

178. *Id.* at 13–14. Chief Judge Bazelon, concurring in the opinion, believed that the FCC’s ruling violated the First Amendment. *Id.* at 18 (Bazelon, C.J., concurring). Judge Tamm, author of the principal opinion, found the FCC order overbroad and vague, but declined to rule on its constitutionality. *Pacifica Found.*, 556 F.2d at 18. Judge Leventhal dissented, maintaining that the probable presence of children in the audience was critical. *Id.* at 30 (Leventhal, J., dissenting). The Supreme Court agreed with Judge Leventhal and reversed, employing a more relaxed First Amendment test for the electronic media than for the print media. *See FCC v. Pacifica Found.*, 438 U.S. 726, 748–50 (1978).

179. 519 F.2d 821 (D.C. Cir. 1975), *aff’d in part and rev’d in part*, 424 U.S. 1 (1976).

180. Three examples indicate the variety of cases in this category. In *Grace v. Burger*, 665 F.2d 1193 (D.C. Cir. 1981), the court entertained a challenge to a law limiting protests on Supreme Court grounds. Reversing the district court’s dismissal for failure to exhaust administrative remedies, *Grace v. Burger*, 524 F. Supp. 815 (D.D.C. 1980), a divided panel, with Judge Harry Edwards writing and Ruth Bader Ginsburg joining, declared infirm on First Amendment grounds a federal statute banning parades, assemblies, and the display of banners or devices “designed or adapted to bring into notice any party, organization or movement” on the grounds of the Supreme Court. *Grace*, 665 F.2d at 1194. Judge MacKinnon dissented. In his view, “the strong governmental interest in preserving the order and decorum necessary to assure due process of law and the appearance of justice at the Supreme Court [justified] the limits placed . . . on expressive conduct.” *Id.* at 1206 (MacKinnon, J., dissenting in part and concurring in part). The Supreme Court affirmed in part and vacated in part. *See United States v. Grace*, 461 U.S. 171, 184 (1983). The Court held that the sidewalks around the Supreme Court grounds were public fora and that the statute’s total ban on expression in this area was unconstitutional. *See id.* at 183. It declined to decide whether the Court grounds other than the sidewalks are a public forum. *Id.* at 178–79.

In *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983) (en banc) (per curiam), an organization seeking to raise the awareness of homelessness sought permission to have a round-the-clock demonstration in Lafayette Park across from the White House. The National Park Service permitted the demonstration, but prohibited sleeping at the site because sleeping would violate park regulations prohibiting camping. *Id.* at 587. Judge John Pratt granted summary judgment for the government in an unpublished opinion. *Cnty. for Creative Non-Violence v. Watt*, No. 82-2501, 1982 U.S. Dist. LEXIS 17934 (D.D.C. Dec. 9, 1982), but the court of appeals, by a 6-5 vote, ruled for the demonstrators. *See Cnty. for Creative Non-Violence*, 703 F.2d at 599. The Supreme Court agreed with Judge Pratt and upheld the regulation as a reasonable time, place, or manner restriction on communicative conduct. *Clark v. Cnty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984).

In *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), the court of appeals considered the constitutionality of a D.C. statute that prohibited the display, within 500 feet of a foreign embassy, of signs designed to criticize or bring a foreign government “into public odium or public disrepute” without a police permit. *Id.* at 1452 (citing D.C. CODE § 22-1115 (1981) (repealed 1988)). A majority—Judge Robert H.

federal courts at the seat of government have carried out their daunting assignments diligently and honorably in holding government accountable both to the law and to the people government exists to serve.

III. RESPONDING TO THE VULNERABLE

We now turn from the D.C. federal courts' role in holding public officials accountable under the laws that empower and control government actors, to the other dominant part of the courts' jurisprudence: their responses to people striving for fuller recognition of their human dignity. A complete account would encompass diverse people and groups who have experienced outcast or outsider status, including African-Americans, women, the poor, political dissidents, criminal defendants, the mentally ill, gays and lesbians, Native Americans, and aliens. To keep this Essay within tolerable limits, this Part focuses on two of the most populous and historically most disenfranchised groups: African-Americans and women.¹⁸¹ The unifying idea in cases involving people with minimal political clout was well stated by Judge J. Skelly Wright in 1972:

It is claimed that judicial review is anomalously undemocratic, and if by that one means that it is often counter-majoritarian, the point must be conceded. But in another sense, the courts are the most democratic institutions we have.

....

... It is in the nature of courts that they cannot close their doors to individuals seeking justice.

....

... The judiciary is thus the only branch of government which can truly be said to have adopted Dr. Seuss' gentle maxim: "A person's a person, no matter how small."¹⁸²

A. RACE CASES

During the early years of the nation, the most vulnerable people in the District—indeed in the country—were slaves. The Circuit Court of the District of Columbia heard a fair number of slave-related cases, including those brought by slaves seeking freedom and by owners trying to recover fugitive slaves. While the court showed some responsiveness to the plight of the slave,¹⁸³ the

Bork, and Judge Oscar H. Davis of the Federal Circuit—upheld the statute, affirming Judge Oliver Gasch, *id.* at 1477; Chief Judge Wald dissented, *id.* (Wald, C.J., dissenting). Again, the Supreme Court was aided by the divided opinions. The Court adopted the dissent's position with respect to the display clause, but upheld the portions of the statute that, *inter alia*, prohibited groups from congregating within 500 feet of an embassy. *Boos v. Barry*, 485 U.S. 312, 329–32 (1988).

181. The evolution traced here may be indicative of the approach the D.C. federal courts take or will take regarding other vulnerable populations. For a brief discussion of the courts' response to other groups, see *infra* notes 389–92.

182. J. Skelly Wright, *No Matter How Small*, 2 HUM. RTS. 115, 116–18 (1972) (quoting DR. SEUSS, *HORTON HEARS A WHO* 6 (1954)).

183. See, e.g., *Chapman v. Fenwick*, 5 F. Cas. 477, 480–81 (C.C.D.C. 1834) (No. 2604) (stating that burden of proving that "manumission by will" would financially damage decedent's creditors lies on

reality is that the court was effectively constrained by the restrictive laws of the period and, for the most part, it enforced them.¹⁸⁴

Free African-Americans in the District of Columbia, whose numbers were notable,¹⁸⁵ were significantly limited by “black codes,” which required them to register, carry a certificate of freedom, and post a twenty dollar bond to ensure their good behavior.¹⁸⁶ When these restrictions were attacked, the court’s response was hardly visionary; its judgments coincided less with Skelly Wright’s views and more with the law, climate, and habits of thought of the times. In 1821, when William Costin, a longtime, well-respected black resident of Washington, was charged with failing to post the required bond, he attacked the law as unconstitutional, arguing “[t]hat the constitution knows no distinction of color.”¹⁸⁷ Chief Judge Cranch interpreted the bond requirement to apply only prospectively—that is, only to persons who came to the city after enactment of the requirement.¹⁸⁸ Thus, long-standing resident Costin prevailed. But before Cranch ruled for Costin, he rejected Costin’s frontal attack on the law. Costin had argued that the city of Washington lacked authority to prescribe “the terms and conditions upon which free negroes and mulattos may reside in the city,”

those contesting manumission, not on slave to be freed; otherwise executor could indefinitely postpone emancipation); *United States v. Bruce*, 24 F. Cas. 1279, 1280 (C.C.D.C. 1813) (No. 14,676) (holding that an informal paper, as opposed to the formal deed usually required, could suffice for manumission); *Queen v. Neale*, 20 F. Cas. 130, 130 (C.C.D.C. 1810) (No. 11,504) (stating that upon a petition for freedom, declarations of deceased persons that the ancestor was free may be given in evidence to show ancestor was in fact free). See also *United States v. Mullany*, 27 F. Cas. 20 (C.C.D.C. 1808) (No. 15,832), in which the question raised was whether a “free-born negro” could testify in a case “wherein any Christian white person is concerned.” *Id.* at 20. Cranch interpreted the relevant Maryland statute narrowly, holding that the race of the witness should not be disqualifying; the pertinent question was whether or not one was a slave: “[F]ree-born negroes, not in a state of servitude by law, are competent witnesses in any case . . . [C]olor alone does not disqualify a witness. . . .” *Id.* at 22.

184. See, e.g., *Mandeville v. Cookenderfer*, 16 F. Cas. 438 (C.C.D.C. 1827) (No. 9009). In *Mandeville*, a slaveowner sued a stagecoach owner for allowing slaves to use the stagecoach to run away. The court found the stagecoach owner negligent because “[e]very negro is, by a rule of evidence well established in this part of the country, prima facie to be considered as a slave.” *Id.* at 439; see also *Brown v. Wingard*, 4 F. Cas. 438, 439 (C.C.D.C. 1822) (No. 2034) (holding that a slave lacked competency to contract with his owner for his freedom, thus the contract would not be enforced); *Bell v. Hogan*, 3 F. Cas. 107, 107 (C.C.D.C. 1811) (No. 1253) (finding that skin color was prima facie evidence of slavery; therefore defendant was not liable for assault for seizing Bell, a free black man, whom Hogan thought was a slave). For a fuller description of the cases during pre-Civil War period, see CONSTANCE McLAUGHLIN GREEN, *SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION’S CAPITAL* 25–34, 93–94 (1967) [hereinafter GREEN, *SECRET CITY*]; and CONSTANCE McLAUGHLIN GREEN, *WASHINGTON: VILLAGE AND CAPITAL, 1804–1878*, at 141 (1962) [hereinafter GREEN, *WASHINGTON*].

185. In 1820, the African-American population in Washington, D.C. was more than 10,000, with forty percent of those free. The total of 10,000 was slightly less than one-third of the entire population of the District, which then numbered about 33,000 people. GREEN, *WASHINGTON*, *supra* note 184, at 141. By 1860, the District had a population of 14,316 African-Americans, of whom 11,131 were free. MORRIS, *supra* note 2, at 20. The District was one of the very few cities in slave jurisdictions where free blacks outnumbered slaves. *Id.*

186. See *Costin v. Corp. of Wash.*, 6 F. Cas. 612, 613–14 (C.C.D.C. 1821) (No. 3266); MORRIS, *supra* note 2, at 28 (describing the various restrictive laws).

187. *Costin*, 6 F. Cas. at 613–14.

188. *Id.* at 614.

for in Costin's view, Congress could not delegate to the city authority to classify unconstitutionally.¹⁸⁹ Cranch wrote in response to that argument:

Every state has the right to pass laws to preserve the peace and the morals of society; and if there be a class of people more likely than others to disturb the public peace, or corrupt the public morals, and if that class can be clearly designated, it has a right to impose upon that class, such reasonable terms and conditions of residence, as will guard the state from the evils which it has reason to apprehend.¹⁹⁰

Several years later, in 1839, the Circuit Court of the District of Columbia upheld the curfew laws that generally prohibited a "free black or mulatto person" to go out after 10 p.m. without a pass.¹⁹¹

As discussed earlier, the Civil War period posed many challenges to the judicial system in the District.¹⁹² In May 1862, one month after Congress abolished slavery in the District,¹⁹³ and less than four months before President Lincoln's Emancipation Proclamation,¹⁹⁴ the circuit court resolved the question

189. *Id.*

190. *Id.* at 613. See also *Carey v. Corporation of Washington*, 5 F. Cas. 62 (C.C.D.C. 1836) (No. 2404), in which Isaac Carey, a free black man, challenged the constitutionality of a newly enacted law that limited the ability of blacks to hold shop licenses. *Id.* at 65. Carey had previously held a valid license to sell perfume, but under the new law, the city refused to renew his license. Judge Cranch noted that

free colored persons have not the same political rights which are enjoyed by free white persons, yet they have the same civil rights, except so far as they are abridged by the general law of the land. Among those civil rights, is the right to exercise any lawful and harmless trade, or occupation.

Id. at 66. But Cranch avoided the constitutional question by concluding that the law was void because it expanded license requirements beyond the limits of the charter. *Id.* at 63.

191. *Nichols v. Burch*, 18 F. Cas. 187, 188 (C.C.D.C. 1839) (No. 10,240). The law allowed one to travel outside without a pass if going to or from a place of worship or running an errand for his employer. When plaintiff Nichols was arrested by Burch and subsequently sued Burch for assault, battery, and false imprisonment, Burch defended on the ground that he was acting to enforce the curfew law. Finding the curfew and the arrest lawful, the court dismissed Nichols's suit. *Id.* at 188.

192. See *supra* Part I.

193. The District of Columbia Emancipation Act, ch. 54, § 1, 12 Stat. 376, 376 (1862), signed by President Abraham Lincoln on April 16, 1862, freed all slaves in the District of Columbia. The law provided for immediate emancipation, compensation to former slaveholders from the government of up to \$300 for each slave of loyal Unionist masters, voluntary colonization of former slaves to colonies outside the United States, and payment up to \$100 to each person choosing emigration. *Id.* § 3, 12 Stat. at 376-77. Over the next nine months, the federal government paid almost \$1 million for the freedom of approximately 3000 former slaves. Linda Wheeler, *The Bells of Freedom Will Ring Again; Celebration Today Marks the Anniversary of the 1862 D.C. Emancipation Act*, WASH. POST, Apr. 16, 1998, at D3. The District of Columbia Emancipation Act is the only example of compensated emancipation in the United States. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 82-83 (1998); BENJAMIN QUARLES, *LINCOLN AND THE NEGRO* 220 (1962). This act of emancipation preceded by several months President Lincoln's more general Emancipation Proclamation. See *infra* note 194.

194. On September 22, 1862, Lincoln issued a preliminary Emancipation Proclamation, relying on his power as Commander in Chief. 12 Stat. 1267 (1862). On January 1, 1863, Lincoln signed the final Proclamation. See 12 Stat. 1268 (1863); *ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY* 551-52 (Leonard

whether the Fugitive Slave Law remained enforceable in the District. In *United States v. Copeland*,¹⁹⁵ Chief Judge James Dunlop held in no uncertain terms that, notwithstanding the abolition of slavery in the District, fugitive slaves in the District were to be treated like “all the criminals and fugitives from justice of all the states in the Union.”¹⁹⁶ According to the court, it was its duty, even in 1862, to “insist upon the enforcement of a law which has been enforced for sixty years.”¹⁹⁷ The decision was one of the last rendered by the circuit court before its own abolition.¹⁹⁸

Radical changes in the law, both nationally and locally, occurred in the Reconstruction years. In addition to the ratification of the Civil War Amendments, both Congress and the local District of Columbia government enacted progressive measures prohibiting racial discrimination in public accommodations such as restaurants, hotels, and bars.¹⁹⁹ While the U.S. Supreme Court invalidated the federal antidiscrimination law as beyond the authority of Con-

Levy & Louis Fisher eds., 1994). This Proclamation freed those slaves residing in territories in rebellion; it did not free slaves in the border states fighting for the Union, nor did it free slaves in the Southern territories under Union control. The passage of the Thirteenth Amendment to the Constitution on December 18, 1865, finally abolished slavery nationwide. See U.S. CONST. amend. XIII; JOHN HOPE FRANKLIN, *THE EMANCIPATION PROCLAMATION* 104–05, 155 (1963).

195. 25 F. Cas. 646 (C.C.D.C. 1862) (No. 14,865a).

196. *Id.* at 646.

197. *Id.*

198. One year later, the newly created Supreme Court of the District of Columbia considered the same question in the case of an escaped slave named Andrew Hall and divided 2-2. See *In re Hall*, 6 D.C. (1 Mackey) 10, 10 (1863). Chief Justice Cartter and Justice Fisher voted in favor of the slaveowner. In their view, the new court was “essentially . . . a Circuit Court of the United States, subject to all the legislation affecting such courts,” the Fugitive Slave Law remained applicable to the District, and therefore the new court had the power and duty to execute it. *Id.* (opinion of Cartter, C.J.); see *id.* at 24 (opinion of Fisher, J.). Justices Wylie and Olin disagreed. Wylie believed the District had been omitted from the coverage of the Fugitive Slave Law. *Id.* at 12 (Wylie, J., dissenting). Olin maintained that the abolition of the circuit court meant no court in the District had the power to enforce the Fugitive Slave Law. *Id.* at 29 (Olin, J., dissenting). As the justices announced their divergent opinions, Hall’s owner attempted to settle the case by grabbing Andrew and trying to run off with him. Fighting broke out in the courtroom. The police separated the parties and brought Hall to the station house. MCGUIRE, *supra* note 2, at 50–51; MORRIS, *supra* note 2, at 41; Barnard, *supra* note 24, at 32–33. Hall won his freedom by enlisting in the Union Army. MCGUIRE, *supra* note 2, at 51. Congress finally repealed the Fugitive Slave Law in the Act of June 28, 1864, ch. 166, 13 Stat. 200.

199. The Civil Rights Act of 1875, ch. 114, 18 Stat. 335, provided for both civil and criminal remedies, *id.* § 2, 18 Stat. at 336. The local law, enacted in 1872 by the short-lived Legislative Assembly of the District of Columbia, see *supra* note 26, required the owner of any hotel, eating place, barbershop, or bathing house to serve “any respectable well-behaved person, without regard to race, color, or previous condition of servitude.” Act of June 20, 1872, ch. 51, § 3, 1894 D.C. COMPILED STATUTES ch. 16, § 150, at 183. Violations were a misdemeanor, punishable by a \$100 fine and forfeiture of the license to operate the offending facility; a new license could not be reissued until one year after the forfeiture. *Id.* § 3. The following year, the Assembly elaborated on the law, prohibiting owners of restaurants and eating places from refusing to treat “any well-behaved and respectable person or persons as any other well-behaved and respectable person or persons are treated.” Act of June 26, 1873, ch. 46, §§ 3–4, 1894 D.C. COMPILED STATUTES Ch. 16, § 154, at 184–85. See generally Phineas Indritz, *Post Civil War Ordinances Prohibiting Racial Discrimination in the District of Columbia*, 42 GEO. L.J. 179, 181–87 (1954).

gress in the *Civil Rights Cases* of 1883,²⁰⁰ the local laws adopted in 1872 and 1873, albeit enforced only sporadically, remained on the books well into the next century.²⁰¹ Their validity was tested in 1951, when the District of Columbia charged a restaurant owned by John R. Thompson Co. with a misdemeanor for refusing to serve “members of the Negro race.” Stipulating to the facts, the defendant argued that the laws in question, first, were invalid when adopted and, second, even if initially valid, had been implicitly repealed by noninclusion in the 1901 codification of the D.C. Code.²⁰² The D.C. Circuit, in a 5-4 decision, agreed with the defendant on both points. Only Congress, not the D.C. Legislative Assembly, the court ruled, could enact such laws for the District; moreover, the laws had been repealed by their omission from the District of Columbia Code of 1901.²⁰³ The four dissenters—Judges Charles Fahy, Edgerton, Bazelon, and George T. Washington—were of the opinion that Congress could delegate its lawmaking authority, that these laws were valid when enacted and had not been repealed, and that even unenforced laws retained vitality unless and until duly repealed.²⁰⁴ Agreeing with the dissenters, the U.S. Supreme Court held the local law valid and still in force despite the 1901 codification.²⁰⁵

In the first half of the twentieth century, protestors against the city’s prevalent racial segregation appeared before the D.C. federal courts. In the mid-1930s, the

200. 109 U.S. 3 (1883) (holding that neither Thirteenth nor Fourteenth Amendment authorizes Congress to prohibit private discrimination in public accommodations). The Court left open the possibility that the federal law remains applicable in the District of Columbia, but that possibility was ruled out in 1913 in *Butts v. Merchants & Miners Transportation Co.*, 230 U.S. 126, 138 (1913) (holding that the sections of the statute applicable to the District and territories were not severable).

201. GREEN, *SECRET CITY*, *supra* note 184, at 96; MORRIS, *supra* note 2, at 78–79; Phineas Indritz, *Racial Ramparts in the Nation’s Capital*, 41 GEO. L.J. 297, 304 (1953).

202. *District of Columbia v. John R. Thompson Co.*, 81 A.2d 249, 250 (D.C. 1951). The Corporation Counsel brought this case to test the validity of the 1872 and the 1873 laws. See MORRIS, *supra* note 2, at 124; Philip Elman, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960*, 100 HARV. L. REV. 817, 822 (1987).

203. *John R. Thompson Co. v. District of Columbia*, 203 F.2d 579, 592–93 (D.C. Cir. 1953) (en banc) (Stephens, C.J., joined by Bennett Champ Clark, Wilbur K. Miller, James M. Proctor). Judge E. Barrett Prettyman concurred because, in his view, the neglected regulations should be deemed to have lapsed. *Id.* at 593. The court had before it a judgment of the D.C. Municipal Court of Appeals reversing a judgment of the Municipal Court for the District of Columbia. The municipal court had quashed the information filed by the District, believing that the Acts had been repealed by implication; the D.C. Municipal Court of Appeals affirmed as to the first count based on the 1872 Act, but reversed on the counts based on the 1873 Act, concluding that the 1873 Act was valid when adopted and had not been repealed. *John R. Thompson Co.*, 81 A.2d at 256.

204. *John R. Thompson Co.*, 203 F.2d at 598–99 (Fahy, J., dissenting).

205. *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 111 (1953). The Supreme Court concluded that the 1873 Act was valid, but did not decide whether the 1872 Act had been repealed by the 1873 Act. On remand, the circuit court vacated its judgment and affirmed the judgment of the D.C. Municipal Court of Appeals, reinstating the claims based on the 1873 Act and concluding that the 1872 Act had been repealed by the 1873 Act. *John R. Thompson Co. v. District of Columbia*, 214 F.2d 210, 211 (D.C. Cir. 1954) (en banc) (per curiam). But the case was never adjudicated on the merits. On March 17, 1954, the Corporation Counsel dropped the charges because the suit “had been brought by agreement between the colored complainants, the District and the restaurant firm and its attorney to test the validity of the act passed by the now-defunct assembly.” *Restaurant Racial Case Dropped in Court Here*, EVENING STAR (Washington), Mar. 17, 1954, at B1.

New Negro Alliance began a campaign of picketing and boycotting stores that refused to hire blacks. One of the Alliance's targets, the Sanitary Grocery Company, sought an injunction against the picketers.²⁰⁶ The Alliance asserted that the protests were part of a labor dispute and therefore, under the Norris-LaGuardia Act, could not be enjoined.²⁰⁷ Unconvinced, the district court entered the injunction.²⁰⁸ The court of appeals affirmed, agreeing that Norris-LaGuardia did not shield the picketers.²⁰⁹ The picketers were not employees of the store, so their protest was not a labor dispute; it was a racial dispute, the appeals court reasoned. An injunction was warranted, that court concluded, to protect the employer's "free right to choose its employees and to conduct its business in whatever lawful manner it may elect."²¹⁰ The Supreme Court reversed.²¹¹ In the High Court's view, the protestors raised labor issues and qualified as persons within the compass of the Act; therefore injunctive relief stopping the picketing was impermissible.²¹²

Restrictive racial covenants were at issue in a number of cases running from the 1920s through the 1940s. For the most part, the D.C. courts, in line with the national pattern, enforced such covenants.²¹³ Typical of the times was John Buckley's suit to stop the proposed sale of a neighbor's house to a black woman. Buckley urged, successfully, that the sale violated a covenant never to sell the property to "any person or persons of the negro race or blood." Both the D.C. Supreme Court and the Court of Appeals of the District of Columbia rejected the defendants' plea that the covenant violated the Due Process Clause of the Fifth Amendment and the Privileges and Immunities Clause of the Fourteenth.²¹⁴ There was no discrimination, in the courts' view, because black property owners could impose similar restrictions.²¹⁵ The U.S. Supreme Court dismissed for want of a substantial federal question.²¹⁶ The same myopia was evident when several white property owners sought a declaration that the restrictive covenants in their deeds were no longer enforceable because blacks had moved into several adjoining properties not covered by such covenants. Refusing to nullify the restrictions, the Court of Appeals of the District of Columbia wrote, "These

206. *New Negro Alliance v. Sanitary Grocery Co.*, 92 F.2d 510, 510–11 (D.C. Cir. 1937), *rev'd*, 303 U.S. 552 (1938).

207. *Id.* at 511 (discussing the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 113).

208. *Id.* at 510.

209. *Id.* at 511.

210. *Id.* at 512.

211. *New Negro Alliance*, 303 U.S. at 563.

212. *Id.* at 559–62.

213. Shelley Ross Saxer, *Shelley v. Kraemer's Fiftieth Anniversary: "A Time for Keeping; A Time for Throwing Away"?*, 47 U. KAN. L. REV. 61, 80 (1998) (observing that racially restrictive covenants were generally upheld by courts prior to *Shelley v. Kraemer*).

214. *Corrigan v. Buckley*, 299 F. 899, 900–01 (D.C. Cir. 1924), *appeal dismissed*, 271 U.S. 323 (1926). No reported lower court opinion has been located.

215. *Id.* at 901; cf. ANATOLE FRANCE, *THE RED LILY* 75 (Modern Library 1917) (1894) (referring to "the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridge, to beg in the streets, and to steal their bread").

216. *Corrigan*, 271 U.S. at 329–32.

covenants constitute valid and solemn contracts and should not be lightly set aside.”²¹⁷

In two restrictive covenant cases reported in the 1940s, both the trial and appellate courts again upheld the restraints. But, by then, Judge Henry Edgerton was serving on the court of appeals,²¹⁸ following the grand tradition initiated by Chief Judge Cranch, he published thoughtful and ultimately influential dissents. Dissenting in *Mays v. Burgess*,²¹⁹ Judge Edgerton declared it “unsound policy for a court, in the exercise of its equitable discretion, to enforce a privately adopted segregation plan which would be unconstitutional if it were adopted by a legislature.”²²⁰ Two years later in *Hurd v. Hodge*,²²¹ Judge Edgerton, again in dissent, further aired his view that racially restrictive covenants were unreasonable restraints on alienation and contrary to public policy. Judicial enforcement of such restrictions, he insisted, was inequitable and offended both the Due Process Clause of the Fifth Amendment and the Civil Rights Act of 1866.²²² The following year, Judge Edgerton’s position became the law of the land. In *Shelley v. Kraemer*,²²³ the U.S. Supreme Court held that enforcement of a racially restrictive covenant by a state court violates the Fourteenth Amendment.²²⁴ Consolidating *Hurd v. Hodge* with *Shelley v. Kraemer*, the Supreme Court ruled that enforcement of racial covenants in the District of Columbia violated the Civil Rights Act of 1866, which secures the right to own property free from racial restraints.²²⁵

School segregation litigation followed on the heels of the restrictive covenant cases. In 1947, Marguerite Daisy Carr sought to transfer from Brown Junior High, an all-black, overcrowded school, to Eliot Junior High, the all-white school nearer to her home. Her pleas were rejected by the superintendent of

217. *Grady v. Garland*, 89 F.2d 817, 819 (D.C. Cir. 1937) (en banc). Justice Josiah A. Van Orsdal wrote for the court, joined by Chief Justice George E. Martin and Justices Charles H. Robb and Duncan L. Groner. *Id.* at 817. Justice Stephens dissented, maintaining that the burden on the remaining whites was too heavy to justify enforcement. *Id.* at 820 (Stephens, J., dissenting). No reported lower court opinion has been located.

218. Henry Edgerton was nominated by President Franklin Roosevelt and confirmed on December 9, 1937. PRETTYMAN ET AL., *supra* note 2, at vii.

219. 147 F.2d 869 (D.C. Cir. 1945).

220. *Id.* at 875 (Edgerton, J., dissenting). When Mrs. Mays refused to leave her house, the district court held her in contempt and the court of appeals affirmed, *Mays v. Burgess*, 152 F.2d 123, 125 (D.C. Cir. 1945), again over Judge Edgerton’s dissent, *id.* 125–28 (Edgerton J., dissenting).

221. 162 F.2d 233 (D.C. Cir. 1947), *rev’d*, 334 U.S. 24 (1948).

222. *Id.* at 240–43 (Edgerton, J., dissenting). The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1982 (1994)), provided: “[C]itizens, of every race and color, . . . shall have the same right, in every State and Territory . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens”

223. 334 U.S. 1 (1948).

224. *Id.* at 20.

225. *Hurd v. Hodge*, 334 U.S. 24, 33–34 (1948). The Court relied on the federal statute, not the Constitution, in the District of Columbia case because it was not until 1954 that the Court read into the Due Process Clause of the Fifth Amendment, which governs federal actions, an equal protection component equivalent to the Fourteenth Amendment’s explicit check on state action. *See Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954); *infra* notes 232–34 and accompanying text.

schools, the district court, and, in 1950, a divided court of appeals.²²⁶ “Separate but equal” was good law, the majority reasoned.²²⁷ Judge Edgerton, in another pathmarking dissent, presented a raft of statistics indicating that the separate facilities were far from equal.²²⁸ But Judge Edgerton had a more fundamental objection. Laying the groundwork for the Supreme Court’s landmark decision four years later in *Brown v. Board of Education*,²²⁹ Edgerton declared, “‘Separate but equal’ is as much a contradiction in terms as ‘black but white’: facilities which are segregated by law solely on the basis of race or color cannot in any real sense be regarded as equal.”²³⁰ He became the first federal judge in the country to conclude that school segregation imposed by law, even if the facilities could be made equal, nonetheless violates the Constitution:

Independently of objective differences between white and colored schooling, school segregation means discrimination against Negroes for two distinct reasons. (1) By preventing a dominant majority and a depressed minority from learning each other’s ways, school segregation inflicts a greater economic and social handicap on the minority than on the majority. It aggravates the disadvantages of Negroes and helps to preserve their subordinate status. (2) School segregation is humiliating to Negroes. Courts have sometimes denied that segregation implies inferiority One might as well say that the whites who apply insulting epithets to Negroes do not consider them inferior. Not only words but acts mean what they are intended and understood to mean.²³¹

In 1954, in *Bolling v. Sharpe*,²³² a case companion to *Brown*, the Supreme

226. *Carr v. Corning*, 182 F.2d 14, 22 (D.C. Cir. 1950).

227. *Id.* The decision was in line with a much earlier case in which the D.C. Court of Appeals upheld the finding of a trial judge that a child who had “one-eighth or one-sixteenth . . . negro blood” but who had “no physical characteristic which affords ocular evidence suggestive of aught but the Caucasian” was properly excluded from a white public school. *Wall v. Oyster*, 36 App. D.C. 50, 51 (1910). The majority relied on the Supreme Court’s 1896 holding in *Plessy v. Ferguson*, 163 U.S. 539 (1896), that “separate but equal” was constitutional. *Id.* at 548. In the view of the *Plessy* Court:

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.

Id. at 543. Justice Harlan dissented in *Plessy*. *Id.* at 552 (Harlan, J., dissenting).

228. *Carr*, 182 F.2d at 23–30 (Edgerton, J., dissenting) (quoting the Strayer Report, a report made to Congress demonstrating an unequal assignment of school buildings). The majority refused formally to consider the Strayer Report because it postdated the trial, hence had not been presented to the trial court. *Carr*, 182 F.2d at 21. Edgerton maintained that the appeals court could take judicial notice of the report; moreover, in his view, the inequality was clear without reference to the report. *Id.* at 31 (Edgerton, J., dissenting).

229. 347 U.S. 483 (1954).

230. *Carr*, 182 F.2d at 32 (Edgerton, J., dissenting) (quoting Brief for the United States at 12, *Henderson v. United States*, 339 U.S. 816 (1950) (No. 25)) (internal quotation marks omitted).

231. *Carr*, 182 F.2d at 32–33 (Edgerton, J., dissenting).

232. 347 U.S. 497 (1954).

Court effectively affirmed Judge Edgerton's opinion in *Carr*. Twelve-year-old Spottswood Bolling, Jr. and ten other black students sought to transfer from their run-down school, located across the street from a pawn shop, to a brand new, all-white school facing a golf course.²³³ Taking the case immediately after the district court dismissed it and hearing it in tandem with *Brown*, the Supreme Court decided in favor of Spottswood Bolling and his co-plaintiffs.²³⁴ *Brown* and the cases consolidated with it originated in the states and were thus governed by the Fourteenth Amendment's explicit Equal Protection Clause. *Bolling*, the D.C. case, added something more. For the first time, the Court read into the Due Process Clause of the Fifth Amendment an equal protection guarantee, controlling federal action in essentially the same way the Fourteenth Amendment controls state action.

After *Brown*, changes in public attitudes and actions, complemented by personnel changes on the District's federal courts, contributed to a new jurisprudence. According to Professor Morris, the liberal wing of the court of appeals, in particular, began to see itself as "ombudsman to a disenfranchised black municipality."²³⁵

The lingering effects of past racial segregation posed remedial questions in the 1960s unlike any courts had encountered before. In a 1969 opinion, Judge Wright, sitting as the district judge in *Hobson v. Hansen*,²³⁶ faced such a case. The District of Columbia, he found, had adhered to policies that perpetuated segregation.²³⁷ He ordered comprehensive busing.²³⁸ The D.C. Circuit, in a 4-3 decision, upheld Judge Wright's order.²³⁹ Chief Judge Bazelon wrote:

Opinions may differ as to the source and magnitude of the differences between the educational opportunities offered by various District schools. But when the differentiating factor is as clear as overcrowding versus excess capacity, we agree with the trial court that transportation to level out pupil density can fairly be required of the school board.²⁴⁰

Although the D.C. federal courts no longer had local jurisdiction after the Reform Act of 1970,²⁴¹ their Capital City location kept them heavily involved

233. *Id.* at 498.

234. *Id.* at 500.

235. MORRIS, *supra* note 2, at 148.

236. 269 F. Supp. 401 (D.D.C. 1967).

237. *Id.* at 419. The defendants were Carl Hansen, who was the District's Superintendent of Schools, and the District's Board of Education. *Id.* at 401. All of the district judges were conflicted out of the case because they had, by the law existing at the time, appointed the Board of Education. (That law has since been changed.) See ARTHUR SELWYN MILLER, A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT 57 (1984). Accordingly, Chief Judge Bazelon appointed Judge Wright to hear the case in view of the experience Judge Wright had gained as district judge superintending school desegregation in New Orleans. See *supra* note 66.

238. *Id.* at 511.

239. *Smuck v. Hobson*, 408 F.2d 175, 185 (D.C. Cir. 1969) (en banc).

240. *Id.*

241. See *supra* note 61 and accompanying text.

in endeavors to overcome rank race discrimination's legacy. In 1971, a three-judge district court, composed of Judges Harold Leventhal, Joseph Waddy, and John H. Pratt, construed the Internal Revenue Code, in light of the equal protection guarantee, to preclude tax exempt status for racially discriminatory private schools.²⁴² The three-judge court ordered the Internal Revenue Service (IRS) to deny tax exempt status to such schools, and the Supreme Court affirmed.²⁴³ About the same time, a group of black students, citizens, and taxpayers brought a class action to force the Department of Health, Education, and Welfare (HEW) to enforce Title VI of the Civil Rights Act of 1964 and to disallow federal funding for racially segregated systems of higher education in ten states.²⁴⁴ Judge Pratt granted summary judgment for the plaintiffs and ordered the Secretary of HEW to investigate such complaints and commence enforcement proceedings against the noncomplying states.²⁴⁵ The court of appeals, sitting en banc, affirmed.²⁴⁶

The Voting Rights Act of 1965²⁴⁷ entrusted to three-judge panels of the D.C. District Court authority to preclear changes in election procedures in states and subdivisions covered by the Act.²⁴⁸ Designed to thwart racially discriminatory election procedures, the Act requires that "covered states and subdivisions" implement no change in election practices until the Department of Justice or a three-judge D.C. District Court determines that the change is not discrimina-

242. *Green v. Connally*, 330 F. Supp. 1150, 1164 (D.D.C. 1971). The suit was a class action by black parents of school children attending public schools in Mississippi. The year before, the three-judge court had issued a preliminary injunction ordering the IRS to stop according tax exempt status to racially discriminatory private schools in Mississippi. *Green v. Kennedy*, 309 F. Supp. 1127, 1139-40 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970).

243. *Coit v. Green*, 404 U.S. 997 (1971) (mem.).

244. *Adams v. Richardson*, 351 F. Supp. 636, 637 (D.D.C. 1972). Title VI of the 1964 Civil Rights Act prohibits, inter alia, discrimination in federally assisted programs. 42 U.S.C. § 2000d (1970). The ten states at issue were Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia. *Adams*, 351 F. Supp. at 637.

245. The district court first issued Findings of Fact and Conclusions of Law. *Adams*, 351 F. Supp. at 637-42. Thereafter, it issued a declaratory judgment and injunction based on its earlier findings. *Adams v. Richardson*, 356 F. Supp. 92, 93-94 (D.D.C. 1973).

246. *Adams v. Richardson*, 480 F.2d 1159, 1166 (D.C. Cir. 1973) (en banc) (per curiam) (affirming, with minor modifications, the district court's order). The case continued for years. *See, e.g., Adams v. Califano*, 430 F. Supp. 118 (D.D.C. 1977); Laura Hawkins, Note, *The "Adams Criteria": A Threat to Equal Access to Higher Education?*, 10 T. MARSHALL L. REV. 91, 101 (1984).

247. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

248. *Id.* §§ 4-5, 79 Stat. at 438-39. Under the Act, a state or subdivision is "covered" by the preclearance requirement if it maintained a voter eligibility test in the presidential elections of 1964, 1968, or 1972 and if voter registration or turnout was less than fifty percent in the previous presidential election. *Id.*; *see also* Cynthia Grace Lamar, Note, *The Resolution of Post-Election Challenges Under Section 5 of the Voting Rights Act*, 97 YALE L.J. 1765, 1767 n.7 (1988) ("The Act originally covered Alabama, Virginia, Georgia, Louisiana, Mississippi, and South Carolina, as well as one county in Arizona and Hawaii and 39 counties in North Carolina. Coverage was extended in 1975 to include jurisdictions with over five percent language minorities that, as of November 11, 1982, had election materials printed only in English, and in which less than 50% of the eligible population voted in the 1972 election." (citations omitted)). For the list of jurisdictions currently covered by section 5, see 28 C.F.R. § 51 app. (2000).

tory.²⁴⁹ The Act also prohibits “covered states or subdivisions” from using tests or devices, such as literacy tests, as a prerequisite to voting or registering to vote.²⁵⁰ But it allows these entities to seek permission to reinstate such tests if they can convince a three-judge court that the tests had not been used to discriminate against voters on the basis of race or color during the five-year period immediately preceding their suspension.²⁵¹

A key early case from New York challenged Congress’s effort to enfranchise people educated in Puerto Rico who had migrated to New York.²⁵² Congress provided in the 1965 Act that no person who had completed sixth grade in a United States school in which instruction was in a language other than English could be denied the right to vote because of failure to pass an English literacy test.²⁵³ A divided three-judge D.C. District Court held that Congress had exceeded its authority.²⁵⁴ Judge Carl E. McGowan dissented, relying on the special relationship of the United States to its Puerto Rican citizens, the principal beneficiaries of the literacy test suspension.²⁵⁵ The Supreme Court agreed with Judge McGowan; in *Katzenbach v. Morgan*,²⁵⁶ it upheld the Act’s application to secure the franchise for individuals schooled in Puerto Rico.²⁵⁷ In another landmark voting rights case, a three-judge district court, on which Judges Wright, Spottswood Robinson, and Oliver Gasch served, denied a North Carolina county permission to reinstate a literacy test. The court found that the test risked projecting into the future the impact of decades of segregated, inferior education for blacks.²⁵⁸ The Supreme Court affirmed in *Gaston County v. United States*.²⁵⁹

The lingering effects of past discrimination further figured in a trying 1975 D.C. Circuit decision involving public employment. In *Davis v. Washington*,²⁶⁰

249. Preclearance is far more often sought from the Department of Justice than it is from the D.C. District Court. As of 1981, only twenty-three cases had been filed in the District of Columbia courts, from which ten published opinions resulted. By contrast, from 1965 to June 30, 1986, the Justice Department had reviewed 112,184 submissions. See William Colbert Keady & George Colvin Cochran, *Section 5 of the Voting Rights Act: A Time for Revision*, 69 Ky. L.J. 741, 753 (1981); Lamar, *supra* note 248, at 1767 n.10. Similarly, in the 1990s, the Justice Department received about 173,404 requests compared to only 14 cases in the D.C. District Court. See Voting Division, U.S. Dep’t of Justice, *Section 5 Changes by Type and Year*, http://www.usdoj.gov/crt/voting/sec_5/changes.htm (last revised Feb. 11, 2002).

250. 42 U.S.C. § 1971(a)(1)(C).

251. *Id.* § 1971(g).

252. *Morgan v. Katzenbach*, 247 F. Supp. 196 (D.D.C. 1965).

253. Voting Right Act of 1965 § 4(e), 79 Stat. at 437.

254. *Morgan*, 247 F. Supp. at 203 (Holtzoff, J., joined by McGarraghy, J.).

255. *Id.* at 204–05 (McGowan, J., dissenting).

256. 384 U.S. 641 (1966).

257. *Id.* at 658.

258. *Gaston County v. United States*, 288 F. Supp. 678, 687–89 (D.D.C. 1968). Judge Gasch concurred, but on the narrower ground that the county had not proved that municipal registrars had not used the tests in a discriminatory fashion. *Id.* at 690–95 (Gasch, J., concurring in the judgment).

259. 395 U.S. 285 (1969).

260. 512 F.2d 956 (D.C. Cir. 1975).

a divided panel resolved an equal protection challenge to a test for D.C. police applicants that had a disparate impact on African-Americans, keeping their numbers on the police force low.²⁶¹ The disparate racial effect of the test, Judge Spottswood Robinson said, in an opinion joined by Judge McGowan, required the District to justify it in the manner prescribed for Title VII “disparate impact” cases.²⁶² The Supreme Court reversed, holding for the first time that for plaintiffs to prevail on a constitutional, as opposed to statutory, race discrimination claim, discriminatory intent must be shown.²⁶³

The D.C. Circuit’s exclusive jurisdiction to review most actions of the FCC also figured in the circuit’s encounters with race discrimination. Most notably, the D.C. Circuit played a pivotal role in encouraging the FCC to consider racial diversity in its licensing decisions. In 1973, for example, the court reversed a license grant and ordered the FCC to provide a comparative “plus” for a black applicant expected to participate actively in the station’s management.²⁶⁴ The ordered “plus,” the court said, was needed to advance the “public interest” in access to diverse ideas and expression.²⁶⁵ A few years later, the D.C. Circuit, sitting en banc, held that, when confronted with a well-pleaded claim of discrimination, the FCC must hear and resolve the allegation before renewing a license.²⁶⁶ Thereafter, the FCC adopted a multifactor licensing system that gave a “plus” for minority ownership so long as the minority owner would participate fully in station management. In a 1984 opinion, the D.C. Circuit upheld the constitutionality of the policy,²⁶⁷ stating that “[p]romoting minority ownership, if linked to minority management, is desirable as a way of increasing the overall diversity of perspectives represented in the broadcast mass media.”²⁶⁸ Five years later, in a 1989 opinion, *Winter Park Communications, Inc. v FCC*,²⁶⁹ a divided court of appeals upheld the constitutionality of the FCC’s use of

261. *Id.* at 958–59.

262. *Id.* at 959. Until 1972, government employers were not subject to Title VII of the Civil Rights Act of 1964. *Id.* at 958 n.2.

263. *Washington v. Davis*, 426 U.S. 229, 239–40 (1976).

264. *TV9, Inc. v. FCC*, 495 F.2d 929, 942 n.34 (D.C. Cir. 1973).

265. *Id.* at 938. The court denied a petition for rehearing en banc, *id.* at 942 (supplemental opinion denying petition for rehearing en banc), but Judges MacKinnon, Robb, Tamm, and Wilkey disagreed. In their view, the consideration of race as a “merit” or “preference” was impermissibly discriminatory. *Id.* at 942 (MacKinnon, J., joined by Robb, and Tamm, JJ., dissenting from the denial of petition for rehearing en banc); *id.* (Wilkey, J., dissenting from the denial of petition for rehearing en banc).

266. *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 629–30 (D.C. Cir. 1978) (en banc). The court reversed the renewal of a licensee accused of discrimination and ordered the Commission to investigate further the complainant’s charge. *Id.* at 633. However, in this consolidated case, the court affirmed the renewal of another contested license. *Id.* at 635. Judge Spottswood Robinson dissented from this aspect of the case; in his view, the Commission should have investigated the charges of discrimination more thoroughly in both cases. *Id.* at 654 (Robinson, J., dissenting in part).

267. *W. Mich. Broad. Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984).

268. *Id.* at 609.

269. 873 F.2d 347 (D.C. Cir. 1989).

“qualitative enhancement” for minority ownership,²⁷⁰ a divided Supreme Court affirmed in *Metro Broadcasting, Inc. v. FCC*.²⁷¹

As the divided panels suggest, affirmative action controversies have not been calmly or evenly adjudicated in the D.C. Circuit. The judges, like the public, have not been of one mind on the use of race not to subordinate, but to make up for past discrimination or to promote diversity. The pendulum on the D.C. Circuit changed direction in *Hammon v. Barry*.²⁷² In that case, in April 1985, District Judge Charles Richey upheld the District of Columbia Fire Department’s affirmative action hiring plan,²⁷³ but a divided court of appeals panel reversed.²⁷⁴ Judge Starr, joined by Judge Silberman, pointed to three flaws in the District’s case: The District had not shown “present day impediments to black hiring,”²⁷⁵ it had not considered nonrace-based alternatives, and it relied on a constitutionally impermissible goal of achieving racial parity.²⁷⁶ Judge Mikva dissented, chastising the majority for ignoring the long history of discrimination by the Fire Department; that history included separate black and white companies until 1962 and continued widespread segregation within D.C. fire houses through the early 1970s.²⁷⁷

Shortly after the divided D.C. Circuit decision in *Hammon*, the Supreme Court, in *Johnson v. Santa Clara Transportation Agency*,²⁷⁸ upheld a local government’s affirmative action hiring plan. Denying a petition to rehear *Hammon*, the D.C. Circuit panel found that *Johnson* would not alter the panel’s judgment.²⁷⁹ Judge Mikva again dissented.²⁸⁰ The en banc court then granted rehearing,²⁸¹ but later, without explanation, revoked its decision.²⁸² This prompted another sharp dissent by Judge Mikva, this time joined by Chief Judge Wald and Judges Spottswood Robinson, Ruth Bader Ginsburg, and Edwards.²⁸³ The

270. *Id.* at 353. Winter Park Communications and Metro Broadcasting were unsuccessful applicants who challenged the FCC’s decision to award a license to Rainbow Broadcasting Company, in part, because of its minority ownership. Judge Edwards, joined by Judge Daniel M. Friedman of the U.S. Court of Appeals for the Federal Circuit, sitting by designation, relied on *West Michigan Broadcasting* and denied review. *Id.* at 355. Judge Williams concurred in part and dissented in part. *Id.* at 356 (Williams, J., concurring in part and dissenting in part).

271. 497 U.S. 547, 566 (1990).

272. 606 F. Supp. 1082 (D.D.C. 1985), *rev’d*, 813 F.2d 412 (D.C. Cir. 1987).

273. *Id.* at 1095. Judge Richey found that the part of the plan dealing with promotion violated Title VII. *Id.* at 1099. That aspect of the opinion was not appealed. Both the hiring and the promotion plans had been developed by the Fire Department pursuant to a consent decree. *Id.* at 1086.

274. *Hammon*, 813 F.2d at 431–32.

275. *Id.* at 428.

276. *Id.* at 431–32.

277. *Id.* at 433–35 (Mikva, J., dissenting).

278. 480 U.S. 616 (1987).

279. *Hammon v. Barry*, 826 F.2d 73, 81 (D.C. Cir. 1987).

280. *Id.* at 88 (Mikva, J., dissenting from the denial of petition for rehearing).

281. *Hammon v. Barry*, 833 F.2d 367, 367 (D.C. Cir. 1987) (en banc) (per curiam).

282. *Hammon v. Barry*, 841 F.2d 426, 427 (D.C. Cir. 1988) (en banc) (per curiam).

283. *Id.* (Mikva, J., dissenting from the unexplained vacation of order granting rehearing en banc). The dissenting judges said, “The question presented in this case is too important to leave in its present unsatisfactory state in this circuit . . .” *Id.* *Hammon* was the case that allegedly provoked a heated

court's internal division became even more apparent the next year when a different divided panel, in *Shurberg Broadcasting of Hartford, Inc. v. FCC*,²⁸⁴ held unconstitutional the FCC's policy of favoring minorities in its distress sale programs.²⁸⁵ The Supreme Court agreed with the dissent; consolidating *Shurberg* with *Metro Broadcasting*, the Court, in a 5-4 decision, upheld these affirmative action plans.²⁸⁶

The life of *Winter Park* and *Metro Broadcasting* proved short. In 1995, in *Adarand Constructors, Inc. v. Peña*,²⁸⁷ the Supreme Court, again by a 5-4 vote, overruled *Metro Broadcasting's* holding that intermediate scrutiny applied to affirmative action programs adopted by the federal government.²⁸⁸ Instead, the Supreme Court held that strict scrutiny is the appropriate standard of review for all racial classifications, whether adopted by the local, state, or federal government.²⁸⁹ The majorities in *Shurberg* and *Hammon* had prevailed, at least for now.²⁹⁰ Whatever side one takes in the affirmative action debate, all would agree that irrational prejudice, even rank discrimination based on race, have not vanished in the United States and are infectious in our world. In this reality, as well as the determination to counter it at home and abroad, we all share.²⁹¹

B. GENDER CASES

In the nineteenth century, a variety of complaints concerning the status of women were litigated in the D.C. federal courts. Initially, the common-law tradition held sway. In 1869, Congress enacted a Married Woman's Act for the District; the Act allowed women to hold property separate and apart

dispute between Judges Silberman and Mikva. See CHRISTOPHER P. BANKS, *JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT* 6 (1999); Ann Pelham, *Silberman, Dogged by Story, Provides Details of Outburst*, *LEGAL TIMES*, Mar. 11, 1991, at 7.

284. 876 F.2d 902 (D.C. Cir. 1989) (per curiam).

285. *Id.* at 902-03. Under the FCC's policies, a licensee whose license renewal had been called into question could bypass comparative hearing procedures by assigning or transferring the license to a minority-owned recipient. *Shurberg Broadcasting* urged that the policy denied it equal protection. Judges Silberman, *id.* at 903 (opinion of Silberman, J.), and MacKinnon agreed, *id.* at 926 (opinion of MacKinnon, J.). Judge Wald dissented. *Id.* at 934 (Wald, J., dissenting).

286. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 566 (1990). While citing *Metro Broadcasting*, the court of appeals, in an opinion by then-Judge Thomas, held unconstitutional the FCC's policy of giving "extra credit" to female applicants in the licensing decisions. *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (holding preference for women owners not substantially related to achieving diversity on air waves). Chief Judge Mikva dissented. *Id.* at 404 (Mikva, C.J., dissenting).

287. 515 U.S. 200 (1995).

288. *Id.* at 227.

289. *Id.* at 236 ("We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications . . . detailed examination, both as to ends and as to means.").

290. For a recent application of *Adarand* to the FCC's equal employment opportunity regulations, see *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 351-55 (D.C. Cir. 1998) (holding FCC's regulations unconstitutional). To date, the Supreme Court has not had the opportunity to apply the *Adarand* test.

291. For a helpful overview of the Supreme Court's approach to affirmative action, see generally Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 *CARDOZO L. REV.* 253 (1999).

from their husbands.²⁹² In its early interpretations, the D.C. Supreme Court read the Act narrowly.²⁹³ When the creditors of George Seitz, in the early 1870s, sought satisfaction of George's debt by reaching a house held in the name of his wife, Mary Seitz, the Seitzes resisted, maintaining that Mary had paid for the house entirely out of her own earnings. George's creditors nevertheless prevailed. The legislation let Mary hold the property, the D.C. Supreme Court said, but left untouched the common-law rule that a wife's earnings belong to her husband.²⁹⁴ The U.S. Supreme Court affirmed.²⁹⁵

The D.C. Supreme Court continued to interpret the Act narrowly²⁹⁶ until Congress amended it in 1896 to describe more precisely the classes of property qualifying for placement in the wife's separate estate.²⁹⁷ In one of the first cases after the 1896 amendment, the newly created D.C. Court of Appeals held that a married woman running a business may maintain a libel suit in her own name without joining her husband.²⁹⁸ The amended Act did not abandon completely the common-law disabilities imposed on married women, the court cautioned, but it did enlarge the scope of the separate estate women may hold and it gave them control of their earnings.²⁹⁹ Three years later, the D.C. Court of Appeals spoke more expansively:

[I]t was the purpose of Congress in the act of June 1, 1896, to restore to married women, or rather to continue in them, the power, which they had before marriage and would have in the absence of the marital relation, freely to control their own persons and their own actions; to remove and destroy the common law authority of their husbands, so far as that authority rested upon mere force; and to leave the marital relation to be supported by the power of affection alone.³⁰⁰

292. Act of Apr. 10, 1869, ch. 23, 16 Stat. 45. The Act provided: "The right of any married woman to any property, personal or real, acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were femme sole, and shall not be subject to the disposal of the husband, nor be liable for his debts." *Id.* § 1, 16 Stat. at 45. The Act further provided that "any married woman may contract, and sue and be sued, in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried." *Id.*

293. See, e.g., *Mitchell v. Seitz*, 8 D.C. (1 MacArth.) 480 (1874).

294. *Id.* at 483.

295. *Seitz v. Mitchell*, 94 U.S. 580, 582–83 (1876) (stating that while statute had modified a husband's common-law right to absolute ownership of his wife's property, nonetheless, purchases of "property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate In a contest between the creditors of the husband and the wife, there is, and there should be, a presumption against her which she must overcome by affirmative proof").

296. See, e.g., *John C. Schneider & Son v. Garland*, 12 D.C. (1 Mackey) 350 (1882) (holding that married woman could not contract for supplies for support of her family so as to bind herself individually or her separate estate); *McDermott Bros. v. Garland*, 12 D.C. (1 Mackey) 496 (1882) (holding that married woman could not bind herself or her estate to pay for a carriage to be used by woman in attending to her property).

297. Act of June 1, 1896, ch. 303, 29 Stat. 193.

298. *Wills v. Jones*, 13 App. D.C. 482, 493 (1898). On the creation of the D.C. Court of Appeals, see *supra* text accompanying notes 47–48.

299. *Wills*, 13 App. D.C. at 496–97.

300. *Capital Traction Co. v. Rockwell*, 17 App. D.C. 369, 379 (1901) (recognizing the right of married woman to sue for negligence in her own name, without requiring that her husband join suit).

In the drive to gain the vote for women nationally, particularly from the start of 1917 running into 1918, suffragists picketed outside the White House almost daily.³⁰¹ Though their picketing was peaceful, they attracted crowds that often turned hostile. Arrests were common; charges against the picketers included “unlawful assembly,” “obstructing traffic,” “disorderly conduct,” “assembling in a public park without a permit,” and, when suffragists burned President Wilson’s books in Lafayette Park, “starting bonfires between sunset and sunrise.”³⁰² When six suffragists appealed their convictions for unlawful assembly to the D.C. Court of Appeals, Justice Charles Robb asked this testing question:

Suppose some [followers] of Billy Sunday should go out on the streets with banners on which were painted some of Billy’s catch phrases, and should stand with their backs to the fence. A curious crowd gathered, some of whom created disorder and threw stones at the carriers of the banners. Who should get arrested, those who created the disorder, or the banner carriers?³⁰³

Government counsel was uncertain, but the court was not. On March 4, 1918, Chief Justice Constantine J. Smyth, joined by Justices Robb and Van Orsdel, declared the arrest of the women illegal and reversed their convictions.³⁰⁴

One indomitable suffragist, who years later ascended to the District’s federal judiciary, had a technique for avoiding the attention of police officers. Burnita Shelton Matthews, a gentle young woman from Mississippi, was a weekend picketer.³⁰⁵ During the week, she attended law school classes at night and worked at the Veterans Administration by day.³⁰⁶ In a 1985 interview, years after her retirement from long service as a U.S. district judge in the District of Columbia, she said of her protest activity, “You could go to the front of the White House, and you could carry a banner, but if you spoke you were arrested for speaking without a permit So, if the press or anyone else asked me why I was there, I didn’t answer.”³⁰⁷ The suffrage banner she carried declared her purpose. And no arrest record impeded either her admission to the bar or her

301. These protests were not the first by the suffragists, but they were the most intense and most effective. See INEZ HAYNES IRWIN, *THE STORY OF ALICE PAUL AND THE NATIONAL WOMAN’S PARTY* 203 (1964). The suffragists also marched in front of Congress on occasion. The first picket line outside the White House appeared on January 10, 1917; the last, a year and one-half later. Between those dates, more than a thousand women held lettered banners, accompanied by the purple, white, and gold tri-colors of the Suffragist movement, at the White House gates or in front of the Capitol. *Id.*

302. At first, picketers were jailed for a few days, but as the demonstrations continued, sentences rose to as much as sixty days in the District workhouse in Occoquan, Virginia. INEZ HAYNES IRWIN, *UPHILL WITH BANNERS FLYING* 267–68 (1964); MORRIS, *supra* note 2, at 73.

303. IRWIN, *supra* note 302, at 267. Charles Robb was the father of Roger Robb, a judge from 1969 until 1985 on the successor court, the U.S. Court of Appeals for the District of Columbia Circuit.

304. *Hunter v. District of Columbia*, 47 App. D.C. 406, 409–10 (1918) (holding that the indictment failed to allege an unlawful purpose for the gathering).

305. *Judge Burnita Shelton Matthews: Leader of Women’s Rights Movement Recalls Suffrage Fight and Appointment to Bench*, THIRD BRANCH, Mar. 1985, at 3, 6 (1985) (interview with Judge Matthews).

306. *Id.*

307. *Id.*

appointment to the D.C. District Court in 1949 as the first female Article III trial court judge in the nation.³⁰⁸

Also noteworthy among early twentieth-century cases were challenges to legislation intended to improve working conditions. The Supreme Court's now infamous 1905 "liberty of contract" decision, *Lochner v. New York*,³⁰⁹ precluded protection for all workers.³¹⁰ Reformers thereafter rallied around a half-a-loaf strategy—a "women and children first" approach. If a minimum wage law for women could survive, reformers thought, extension of the law to men would eventually take hold. In line with that strategy, Congress, in 1918, passed a minimum wage law for the District covering women and minors only.³¹¹ The D.C. Children's Hospital and Willie Lyons, a woman who had worked as an elevator operator at the Congress Hotel but lost her job to a man who could lawfully be paid less, brought separate suits to declare the law unconstitutional.³¹² Unsuccessful in the trial court, the complainants prevailed in their consolidated appeal. Writing for the majority, in typical *Lochner* style, Justice Van Orsdel held that the law interfered with the plaintiffs' freedom to contract:

No greater calamity could befall the wage-earners of this country than to have the legislative power to fix wages upheld. It would deprive them of the most sacred safeguard which the Constitution affords. Take from the citizen the right to freely contract and sell his labor for the highest wage which his individual skill and efficiency will command, and the laborer would be reduced to an automaton—a mere creature of the state. It is paternalism in the highest degree, and the struggle of the centuries to establish the principle that the state exists for the citizen, and not the citizen for the state, would be lost.

If, in the exercise of the police power for the general welfare, power lies in the Legislature to fix the wage which the citizen must accept, or choose idleness, . . . it is but a step to a legal requirement that the industrious, frugal, economical citizen must divide his earnings with his indolent, worthless neighbor. The modern tendency toward indiscriminate legislative and judicial jugglery with great fundamental principles of free government, whereby property rights are being curtailed and destroyed, logically will, if persisted in, end in social disorder and revolution. Let no one imagine for a moment that our civilization is such that property rights can thus be socialized without

308. Ginsburg & Brill, *supra* note 67, at 284.

309. 198 U.S. 45 (1905).

310. *Id.* at 61, 64 (holding unconstitutional on substantive due process grounds a state law regulating working hours).

311. Act of Sept. 19, 1918, ch. 174, 40 Stat. 960.

312. After implementation of the law, minimum pay for female hotel and hospital workers was set at 34.5¢ per hour. Before passage of the so-called protective measure, Ms. Lyons had been earning \$35 per month and two meals per day. The new minimum wage law set her pay at \$71.50 per month. Instead of doubling Ms. Lyons's compensation, the hotel protected its purse by replacing her with a man who would and lawfully could work for a lower wage. *Children's Hosp. v. Adkins*, 284 F. 613, 618 (D.C. Cir. 1922).

the grossest abuse of the privileges granted, or that the restraint of the abuses can be left with safety to legislative or judicial discretion.³¹³

The case elicited an equally passionate dissent from Chief Justice Smyth. The right of employer and worker to contract, in his view, did not trump official action taken to promote public health, safety, morals, and welfare:

[I]t is urged that the act is invalid because it interferes with freedom of contract. That it does so must be conceded, but that is not fatal. Every statute exerting the police power interferes with freedom of contract. . . . If it be correct that the statute is void on that ground, there would be no room for the play of the police power. But, obviously, it cannot be correct. “. . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.” The right to make contracts “is subject also . . . to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction.”³¹⁴

Applying that test, Smyth concluded:

It appears to me conclusively that a minimum wage has a real and substantial relation to the health and morals of women and minor girls who work, and that Congress, by providing for the establishment of such a wage in the manner outlined in the statute, has not acted arbitrarily . . . , but clearly within the limits of the police power with which it is intrusted.³¹⁵

Both sides had a point. Wages below the prescribed minimum kept workers impoverished. As Willie Lyons’s case indicated, however, protective labor laws applicable only to women could end up protecting men’s jobs from women’s competition. The Supreme Court spoke next, agreed with the majority, and affirmed in *Adkins v. Children’s Hospital*.³¹⁶ Ultimately, however, Chief Justice Smyth’s dissenting view prevailed. In 1937, the Supreme Court turned away from “liberty to contract” reasoning and overruled *Adkins* in *West Coast Hotel Co. v. Parrish*,³¹⁷ a decision presaging the demise of *Lochner*.

On the contentious issue of abortion, the D.C. District Court was one of the

313. *Id.* at 623.

314. *Id.* at 632 (Smyth, C.J., dissenting) (quoting *Chicago, Burlington & Quincy Railroad v. McGuire*, 219 U.S. 549, 567, 568 (1911)).

315. *Id.* at 638.

316. 261 U.S. 525, 552–53 (1923) (invalidating minimum wage legislation for women on substantive due process grounds and distinguishing *Muller v. Oregon*, 208 U.S. 412 (1908), which upheld a statute establishing maximum working hours for women).

317. 300 U.S. 379, 400 (1937) (upholding Washington State statute establishing minimum wage for women); see also *Olsen v. Nebraska*, 313 U.S. 236 (1941) (upholding unanimously state statute fixing minimum fee that employment agency could collect from employees and explicitly embracing Justice Holmes’s dissenting views in *Lochner*); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949) (upholding a right-to-work law that prohibited closed shops and explaining that the Court had abandoned the “*Lochner* . . . constitutional doctrine”).

first courts in the country to find an antiabortion statute unconstitutional.³¹⁸ In 1969, a D.C. physician, Dr. Milan Vuitch, challenged his indictment under a 1901 provision of the D.C. Code that made it a felony to perform an abortion, except when necessary to preserve the woman's life or health.³¹⁹ Judge Gerhard Gesell held the law unconstitutionally vague because it failed to define the term "health"; specifically, the provision did not indicate whether the exception to the abortion ban encompassed mental as well as physical health.³²⁰ Judge Gesell dismissed the indictment,³²¹ and the United States appealed directly to the Supreme Court.

By the time the Supreme Court considered the appeal in *United States v. Vuitch*,³²² Judge Joseph C. Waddy, in an intervening case, had interpreted the health exception to include both mental and physical health.³²³ Relying on that opinion and its affirmance by the D.C. Circuit,³²⁴ the Supreme Court reversed *Vuitch*: "[Since the courts below have] construed the [D.C.] statute to permit abortions 'for mental health reasons whether or not the patient had a previous history of mental defects' . . . [, w]e see no reason why this interpretation of the statute should not be followed."³²⁵ The statute was no longer vague; abortions to protect a woman's mental and physical health were lawful, but nontherapeutic abortions remained unlawful.³²⁶ Mental health as a reason for abortion, however, was a major development. Given that escape hatch, any woman of means or sophistication could get an abortion. In other words, post-*Vuitch*, the situation became essentially what it is today—effectively only poor women are denied free choice.³²⁷

318. *United States v. Vuitch*, 305 F. Supp. 1032, 1033 (D.D.C. 1969). In an earlier ruling also in 1969, the California Supreme Court struck down an 1850 California statute that prohibited abortions unless performed to preserve the physical or mental health of the woman. *People v. Belous*, 71 Cal. 2d 954, 973–74 (1969). In declaring the statute unconstitutional, the California court relied on U.S. Supreme Court precedent recognizing a "right of privacy" in matters relating to marriage, family, and reproduction. *Id.* at 963.

319. *Vuitch*, 305 F. Supp. at 1033. Violators faced up to ten years in prison. *Id.*

320. *Id.* at 1034. Dr. Vuitch had moved to dismiss the indictment on the grounds that the statute was unconstitutionally vague and that women have a due process constitutional right to an abortion with which the statute interfered. Judge Gesell did not rule on the due process plea, but noted that "[t]he asserted constitutional right of privacy, here the unqualified right to refuse to bear children, has limitations. Congress can undoubtedly regulate abortion practice in many ways, perhaps even establishing different standards at various phases of pregnancy." *Id.* at 1035.

321. *Id.* at 1036.

322. 402 U.S. 62 (1971). The United States appealed under the Criminal Appeals Act, 18 U.S.C. § 3731 (1970), which allowed direct appeals to the Supreme Court from district court judgments "in all criminal cases . . . dismissing any indictment . . . where such decision . . . is based upon the invalidity . . . of the statute upon which the indictment . . . is founded." *Vuitch*, 402 U.S. at 64 (omissions in original) (quoting § 3731) (internal quotation marks omitted).

323. *Doe v. Gen. Hosp.*, 313 F. Supp. 1170, 1174–75 (D.D.C.), *aff'd*, 434 F.2d 427 (D.C. Cir. 1970).

324. *Gen. Hosp.*, 434 F.2d at 427.

325. *Vuitch*, 402 U.S. at 71–72 (quoting *Gen. Hosp.*, 313 F. Supp. at 1174–75).

326. *Id.* at 72–73. Noting that the lower court had ruled only on the vagueness ground, the Supreme Court did not address Dr. Vuitch's privacy arguments.

327. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 377, 383–86 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1201 & n.149 (1992).

Years after *Roe v. Wade*,³²⁸ the District's federal courts considered the issue of abortion in the context of restrictions on the use of federal funds by foreign grantees of U.S. family aid, a matter generating conflict to this day. In *DKT Memorial Fund, Ltd. v. Agency for International Development*,³²⁹ District Judge June L. Green declared unconstitutional a provision that prohibited foreign grantees from expending federal funds on abortion-related services or providing such services even if funded by private sources.³³⁰ But the D.C. Circuit, in an opinion by Judge David Sentelle, found no First Amendment violation and reversed.³³¹ Judge Ruth Bader Ginsburg dissented, reasoning that the federal agency distributing U.S. funds had unconstitutionally used the power of its purse to restrain privately funded speech and association rights of domestic organizations engaged in family-planning work overseas.³³²

The D.C. courts contributed importantly to the sound interpretation of the Equal Pay Act of 1963³³³ and Title VII of the Civil Rights Act of 1964.³³⁴ In one of the longest running employment discrimination cases in this or any other circuit, *Laffey v. Northwest Airlines, Inc.*,³³⁵ female flight attendants sued Northwest Airlines under both the Equal Pay Act and Title VII.³³⁶ Women were assigned to an all-female category designated "stewardess"; men who signed on for cabin duty worked in a better-paying job classification called "purser."³³⁷ Men, but not women, were given an allowance for cleaning their uniforms, were allowed to wear eyeglasses, and could carry luggage of their own choice aboard flights.³³⁸ Male attendants, without regard to length of service, ranked higher than female attendants aboard a plane.³³⁹ Women of a certain height were excluded; men of the same height were not. Women, but not men, had to weigh in and could be grounded if their weight became too great.³⁴⁰ Stewardesses, but not pursers, had to double up in hotel rooms on layovers.³⁴¹ District Judge Aubrey E. Robinson, Jr. held that Northwest Airlines had violated both Acts; he ordered both injunctive relief and back pay.³⁴² On appeal, Judge Spottswood Robinson, joined by Judges Bazelon and Tamm, affirmed the district court's

328. 410 U.S. 113 (1973).

329. 691 F. Supp. 394 (D.D.C. 1998).

330. *Id.* at 405.

331. *DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 287-90 (D.C. Cir. 1989).

332. *Id.* at 299 (Ginsburg, J., dissenting). The Supreme Court later agreed with the majority. *See Rust v. Sullivan*, 500 U.S. 173, 196-202 (1991) (upholding as compatible with First Amendment a ban on any involvement by Title X projects in abortion-related activities).

333. 29 U.S.C. § 206(d)(1) (1994).

334. 42 U.S.C. § 2000(e)(1) (1994).

335. 567 F.2d 429 (D.C. Cir. 1976).

336. *Id.* at 430. Commenced in the summer of 1970, the case did not end until certiorari was denied in 1985. *See infra* note 347.

337. *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763, 765 (D.D.C. 1973).

338. *Id.* at 774-75.

339. *Id.* at 775.

340. *Id.* at 773-74.

341. *Id.* at 774.

342. *Id.* at 789-90.

judgment in principal part.³⁴³ But Northwest Airlines fought on, appealing each district court loss.³⁴⁴ The third appeal prompted a strong per curiam opinion by Judges Ruth Bader Ginsburg, Bork, and Starr, in which the appeals court solidly reaffirmed the prior determinations that Northwest Airlines had violated both the Equal Pay Act and Title VII.³⁴⁵ The authors of the comprehensive per curiam expressed the hope that their opinion would be “the court’s closing chapter in this nearly fourteen-year-old controversy.”³⁴⁶ It was. In 1985, the Supreme Court denied certiorari and the long saga finally ended.³⁴⁷ The class action plaintiffs had prevailed, gaining monetary and injunctive relief, large in dollars, sweep, and precedential value.³⁴⁸

While the *Laffey* litigation was underway, female “bindery workers” sued the Government Printing Office (GPO) for paying them less than it paid male “bookbinders” for similar work.³⁴⁹ Judge Charles R. Richey held that the GPO had violated both the Equal Pay Act and Title VII.³⁵⁰ The court of appeals affirmed.³⁵¹ Its opinion, by Judge Mikva, advanced the *Laffey* holding that, to trigger the Equal Pay Act, jobs need not be identical.³⁵² The appeals court further held that Title VII prohibits treating comparable gender-segregated positions differently for training and promotion purposes.³⁵³ Together, the decisions in *Laffey* and the GPO case delineated a middle way to construe the 1963 Act’s equal-pay-for-equal-work requirement: Equal pay is commanded when jobs are “substantially equal”—a standard less stringent than “nearly the same” but more demanding than “comparable” broadly viewed.³⁵⁴

Employment discrimination cases pursued by women in the District’s federal courts span a wide range, both factually and legally. In *Walker v. Jones*,³⁵⁵ for example, Anne Walker complained that, in 1982, she was terminated from her post as manager of the House of Representatives’ restaurants because the Chairman of the Subcommittee on Services of the Committee on House Admin-

343. The court of appeals stated that “the [stewardess/purser] contrast in pay is a consequence of the historical willingness of women to accept inferior financial rewards for equivalent work[—]precisely the outmoded practice which the Equal Pay Act sought to eradicate.” *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 436, 451 (D.C. Cir. 1978). Because the appeals court disagreed with certain remedial aspects of the district court’s judgment, it remanded for reconsideration. *Id.* at 473–78.

344. *See Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578 (D.C. Cir. 1980); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984) (per curiam).

345. *Laffey*, 740 F.2d at 1075.

346. *Id.*

347. *Laffey v. Northwest Airlines, Inc.*, 472 U.S. 1021 (1985).

348. *Laffey*, 740 F.2d at 1103.

349. *Thompson v. Boyle*, 499 F. Supp. 1147, 1150 (D.D.C. 1979).

350. *Id.* at 1167.

351. *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982).

352. *Id.* at 271–72.

353. *Id.* at 292. Judge Roger Robb dissented in part; he objected to the retroactive imposition of remedies for offenses predating the laws’ application to the federal government. *Id.* at 296 (Robb, J., dissenting in part).

354. *Thompson*, 678 F.2d at 270.

355. 733 F.2d 923 (D.C. Cir. 1984).

istration thought her salary, \$45,000 annually, was “ridiculous for a woman.”³⁵⁶ Ms. Walker’s due process and equal protection claims were met by a defense of blanket immunity under the Constitution’s Speech or Debate Clause.³⁵⁷ The defendants’ pleas succeeded in the district court,³⁵⁸ but the court of appeals reversed.³⁵⁹ In an opinion by Judge Ruth Bader Ginsburg, joined by Judge Wilkey, the court acknowledged that the Speech or Debate Clause comprehensively shields activity relating to lawmaking.³⁶⁰ But auxiliary services, such as parking, haircut shops, and food facilities, can and should be cordoned off from the legislative milieu:

The Speech or Debate Clause . . . does not impregably shield from court consideration allegedly unconstitutional personnel actions taken in the course of managing congressional food service facilities.

....

. . . Selecting, supervising, and discharging a food facilities manager, we believe, is not reasonably described as work that significantly informs or influences the shaping of our nation’s laws.³⁶¹

Another long-held defense failed in *Owens v. Brown*,³⁶² a class action suit in which Navy women challenged the constitutionality of Congress’s ban on the assignment of female personnel to sea duty aboard Navy vessels.³⁶³ It is a military matter, the United States urged, so the judgment of Congress should not be second guessed by the judiciary. Judge Sirica found that response inadequate.³⁶⁴ His final judgment ordered no radical changes. He simply directed the Navy to “move forward in measured steps” toward the integration of shipboard crews; if problems arose in integrating crews, they could be handled

356. *Id.* at 926 (internal quotation marks omitted).

357. U.S. CONST. art. I, § 6, cl. 1 (“They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.”).

358. *Walker v. Jones*, 557 F. Supp. 366, 367–68 (D.D.C. 1983). Ms. Walker sued Ed Jones, Chairman of the Subcommittee on Services of the Committee on House Administration, and Tom Marshall, Staff Director of the Subcommittee on Services, claiming that her firing violated her Fifth Amendment rights to due process and equal protection. *See Walker*, 733 F.2d at 925. At the time of the *Walker* litigation, the federal laws against employment discrimination did not apply to Congress. They were extended to the national legislature some years later in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 117, 105 Stat. 1071, 1080–81 (codified at 2 U.S.C. § 601 (2000)).

359. *Walker*, 733 F.2d at 933–34.

360. *Id.* at 928–29.

361. *Id.* at 925, 931. Judge MacKinnon dissented in part and concurred in part, adopting a more expansive reading of the immunity secured by the Speech or Debate Clause. *Id.* at 934–35 (MacKinnon, J., dissenting in part and concurring in part). The Supreme Court denied certiorari. *Jones v. Walker*, 469 U.S. 1036 (1984).

362. 455 F. Supp. 291 (D.D.C. 1978). The defendants were Harold Brown, the Secretary of Defense, and W. Graham Claytor, the Secretary of the Navy.

363. *Id.* at 294. Women were allowed on hospital ships and transports.

364. *Id.* at 299.

through appropriate training and planning.³⁶⁵ The Navy did not fight on; it took the measured steps and did not appeal the district court's decision.

The D.C. federal courts were leaders in recognizing that sexual harassment was gender discrimination remediable under Title VII. Paulette Barnes brought the first case.³⁶⁶ She sued her employer, the Environmental Protection Agency, for sex discrimination alleging that her job was terminated when she refused to comply with the sexual demands of her supervisor.³⁶⁷ District Judge John Lewis Smith dismissed the suit, concluding that sexual harassment did not constitute sex discrimination in violation of Title VII.³⁶⁸ In his view, Ms. Barnes's ill fortune was attributable to "the subtleties of an inharmonious relationship," not to discrimination based on her sex.³⁶⁹ In a landmark opinion, *Barnes v. Costle*,³⁷⁰ Judge Spottswood Robinson, joined by Judge Bazelon, held that if Barnes's job was abolished because she repulsed her male supervisor's sexual advances, the superior's conduct did indeed constitute sex discrimination proscribed by Title VII.³⁷¹ The appeals court explained that if the plaintiff's allegations proved true, the supervisor had harassed Ms. Barnes because she was a woman, thus imposing on her a condition of employment "he would not have fastened on a male employee."³⁷² Judge MacKinnon agreed that sexual harassment may be a violation of Title VII, but wrote separately to state his narrower view of employer liability for coworker violations.³⁷³

In a noteworthy post-*Barnes* case, Sandra Bundy objected to what District Judge George L. Hart, Jr. described as a work environment in which "making . . . sexual advances to female employees [was] standard operating procedure, a fact of life, a normal condition of employment."³⁷⁴ Judge Hart nonetheless denied relief. Sexual harassment, without more, does not constitute discrimination within the meaning of Title VII.³⁷⁵ The court of appeals reversed.³⁷⁶ In an opinion by Judge Wright, joined by Judges Spottswood Robinson and Luther M. Swygert, the D.C. Circuit concluded that an employer violates Title VII by subjecting female employees to sexual harassment, even when the resisting employee lost no tangible job benefits.³⁷⁷

365. *Id.* at 310.

366. *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. Aug. 9, 1974).

367. *Barnes* sued under Title VII, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-16(c) (1994)), which extended the statute's prohibition of discrimination to state, local, and federal government employers.

368. *Barnes*, 13 Fair Empl. Prac. Cas. at 124.

369. *Id.*

370. 561 F.2d 983 (D.C. Cir. 1977).

371. *Id.* at 995.

372. *Id.* at 990 n.49.

373. *Id.* at 995, 999 (MacKinnon, J., concurring). Perhaps Judge MacKinnon was beginning to be influenced by his daughter's views. See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

374. *Bundy v. Jackson*, No. 77-1359, 1979 WL 197, at *4 (D.D.C. Apr. 25, 1979).

375. *Id.* at *6.

376. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

377. *Id.* at 945-46, 953 (remanding for further evidentiary proceedings). Judge Swygert, from the Seventh Circuit, was sitting by designation. For discussion of the *Barnes* and *Bundy* cases, see Steven

Mechelle Vinson's case came up while Sandra Bundy's was in progress. Vinson, then employed at Meritor Bank, accused her supervisor and the bank of violating Title VII based on the supervisor's alleged coercion of a sexual relationship, which Vinson had endured for several years.³⁷⁸ District Judge John G. Penn, ruling before the court of appeals decided *Bundy*, found no violation; the plaintiff had not lost her job or suffered any other economic loss.³⁷⁹ Moreover, any sexual encounter, if it occurred, Judge Penn suggested, was "voluntary."³⁸⁰ Again, the court of appeals reversed, in an opinion by Judge Spottswood Robinson, joined by Judges Wright and Northrop.³⁸¹ The allowance of an intimidating, hostile, or offensive working environment, the court said, suffices to establish a Title VII violation; physical coercion or economic loss is not a necessary ingredient.³⁸² A violation of Title VII may be predicated on either of two types of harassment: (1) the conditioning of employment benefits on sexual favors, so-called quid pro quo harassment; and (2) the creation of a hostile or offensive working environment, even when not attended by adverse economic consequences.³⁸³ Because Ms. Vinson's grievance was of the second type and the district court had not considered whether a violation of that genre had occurred, a remand was necessary.³⁸⁴ The Supreme Court agreed. In its first sexual harassment decision, captioned *Meritor Savings Bank v. Vinson*,³⁸⁵ the Supreme Court affirmed the essence of Judge Robinson's opinion.³⁸⁶ A hostile work environment, if sufficiently severe or pervasive to affect "a term, condition, or privilege of employment," is discrimination based on sex within Title VII's compass; detrimental economic effects are not essential.³⁸⁷ Regarding Judge Penn's conclusion that no claim lay because Vinson's response was "voluntary," the Supreme Court agreed with the court of appeals: The correct inquiry is whether the sexual advances were unwelcome, not whether the

S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII*, 27 RUTGERS L.J. 383 (1996).

378. *Vinson v. Taylor*, No. 78-1793, 1980 U.S. Dist. LEXIS 10676, at *20 (D.D.C. Feb. 26, 1980).

379. *Id.* at *20-23.

380. *Id.* at *20.

381. *Vinson v. Taylor*, 753 F.2d 141, 152 (D.C. Cir. 1985). Judge Edward S. Northrop, from the District Court of Maryland, was sitting by designation. For evaluation of the D.C. Circuit's work in the area of sexual harassment, see Locke, *supra* note 377, at 390.

382. *Vinson*, 753 F.2d at 144, 146, 150 n.68.

383. *Id.* at 144, 146, 150.

384. The court denied a motion for rehearing en banc, *Vinson v. Taylor*, 760 F.2d 1330 (D.C. Cir. 1985) (en banc) (per curiam), with a dissenting opinion by Judge Bork, joined by Judges Scalia and Starr. *Id.* at 1331 (Bork, J., dissenting from denial of rehearing en banc).

385. 477 U.S. 57 (1986).

386. *Id.* at 73.

387. *Id.* at 63-64. The Supreme Court did not agree with the court of appeals regarding the admissibility of the testimony concerning the provocative nature of the plaintiff's attire or the absolute liability of an employer for harassment by a supervisor. *Id.* at 58. But the Supreme Court did agree that the existence of a grievance procedure and a policy against discrimination, coupled with the plaintiff's failure to invoke the grievance procedure, did not necessarily insulate the employer from liability. *Id.* at 67, 73.

employee's participation was, in some sense, voluntary.³⁸⁸

In sum, for much of their history, the D.C. federal courts were not pathbreakers, but the cases they adjudicated occasionally yielded powerful dissents that eventually became prevailing law.³⁸⁹ During some periods, perhaps most notably in the 1960s and 1970s, the D.C. Circuit played a conspicuously active part in endeavors to secure genuinely equal rights and opportunities for the vulnerable populations that came before it. Complementing the cases discussed above involving African-Americans and women, the court of appeals responded to pleas on behalf of the poor and the infirm. For example, the D.C. Circuit invoked the unconscionability clause of the Uniform Commercial Code (UCC) to stop the Walker-Thomas furniture store from repossessing all the purchases of Mrs. Williams when she defaulted on one of her very last payments.³⁹⁰ The D.C. Circuit was one of the first courts to so employ the UCC. The court reacted similarly to the plight of impecunious tenants captive to overbearing landlords³⁹¹ and held that persons involuntarily committed to a mental institution in the District have a statutory right to "adequate treatment."³⁹² While these courts have

388. *Id.* at 69. In two subsequent cases, coming from the Seventh and Eleventh Circuits, the Supreme Court decided that employers can be vicariously liable for a supervisor's sexual harassment of employees in both quid pro quo and hostile work environment cases. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) *rev'g* 76 F. 3d 1155 (11th Cir. 1996); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) *aff'g* *Jansen v. Packaging Corp. of Am.*, 123 F. 3d 490 (7th Cir. 1997).

389. In addition to the cases already described, judges of the D.C. Circuit authored some prescient dissents when the Red Scare produced a variety of governmental efforts to test the loyalty of Americans. *See, e.g., Watkins v. United States*, 233 F.2d 681, 688 (D.C. Cir. 1956) (Edgerton, J., dissenting), *rev'd*, 354 U.S. 178, 216 (1957); *Bailey v. Richardson*, 182 F.2d 46, 66-74 (D.C. Cir. 1950) (Edgerton, J., dissenting), *aff'd by an equally divided Court*, 341 U.S. 918 (1951); *Barsky v. United States*, 167 F.2d 241, 252-63 (D.C. Cir. 1948) (Edgerton, J., dissenting).

390. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (invoking U.C.C. § 2-302 (1962)).

391. *See, e.g., Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). In *Javins*, tenants, threatened with eviction for failure to pay rent, claimed they were entitled to withhold rent in light of numerous violations of the D.C. housing code. *Id.* at 1073. Reversing the lower court's rejection of the defense, the D.C. Circuit, in an opinion by Judge Wright, discarded the common-law rule that a lease primarily conveys an interest in land and contains no implied warranty that the premises are fit for occupancy. Such a rule, according to the court, though reasonable in a rural, agrarian society, is no longer appropriate for the modern apartment dweller. Contract law, not property law, should govern leases for urban dwelling units. *Id.* at 1074-75. The court held that a warranty of habitability, measured by the standard established in the D.C. housing regulations, is implied in all leases of urban dwellings covered by those regulations. Breach of such a warranty gives rise to the usual remedies for breach of contract, including suspension of a tenant's obligation to pay rent. *Id.* at 1080-82. In *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), a tenant protested her eviction, claiming it was in retaliation for her complaining to the District of more than forty violations of the D.C. Code. The D.C. Circuit, in an opinion by Judge Wright, reversed the lower court's rejection of her defense:

In light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated.

Id. at 701 (footnotes omitted).

392. *Rouse v. Cameron*, 373 F.2d 451, 459 (D.C. Cir. 1966). Rouse, an eighteen-year-old tried for carrying a dangerous weapon, a misdemeanor for which maximum imprisonment was one year, was found not guilty by reason of insanity, confined in St. Elizabeth's Hospital, and held under maximum

become less pathbreaking in recent years, they remain mindful of Judge Wright's exhortation of Dr. Seuss's gentle maxim: "A person's a person, no matter how small."³⁹³

CONCLUSION

The federal courts of the District of Columbia are unique because of their location in the Capital City and their special competence to review actions of officialdom. For two centuries, they have adjudicated cases of great and grave consequence to the nation's well-being. They have also participated prominently in the evolution of the concept "We, the People" to encompass all who dwell in this land, including those once excluded, ignored, or undervalued. The judges of these courts, in many pathmarking cases, have been willing to stand up for the weak and to stare down the powerful, even, when necessary, the President of the United States. The mission of these courts remains as Chief Judge Cranch described it in 1837. Of the circuit court that once comprised the District's main trial and appellate tribunals, Cranch wrote:

This Court has the power to call before it every person found in the district, from the highest to the lowest; and it is upon this power that [the president, vice-president, heads of departments, other officers of government, foreign ministers, local inhabitants, visitors to the seat of government, as well as the citizens and inhabitants of the district] depend for that protection which the law extends over them.³⁹⁴

On this two-hundredth anniversary, we applaud these courts for their part in carrying out the responsibility defined by Chief Justice John Marshall: To say what the law is and to enforce it.³⁹⁵

security for three years. Rouse petitioned the district court for a writ of habeas corpus, claiming he had received no treatment. The district judge denied relief, saying he did not have jurisdiction to consider whether petitioner was getting sufficient treatment. *Id.* at 452. A divided court of appeals, in an opinion by Chief Judge Bazelon, reversed and remanded for a hearing on whether Rouse was receiving adequate treatment, finding that a person involuntarily committed to a mental hospital has a statutory right to treatment, cognizable in habeas corpus, under the newly enacted D.C. Hospitalization and Mentally Ill Act. *Id.* at 451, 458–59 (citing D.C. CODE ANN. § 21-562 (Supp. V 1966)). In *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966) (en banc), the petitioner, a woman in her sixties who was "somewhat senile, . . . ha[d] a poor memory, ha[d] wandered on a few occasions, and [was] unable to care for herself at all times," *id.* at 662 (Wright, J., concurring), had been confined in St. Elizabeth's Hospital as an insane person. *Lake*, 364 F.2d at 658. Invoking the D.C. Hospitalization and Mentally Ill Act, the court found that Ms. Lake had a statutory right, cognizable through habeas corpus, not to be deprived of her liberty beyond what is necessary for her own protection; it therefore ordered the district court to explore "alternative courses of treatment." *Id.* at 661.

Turbulent issues of criminal justice also figured importantly in the D.C. federal courts' decisionmaking. *See, e.g., Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (defining insanity); *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc) (adopting Model Penal Code standard for insanity).

393. Wright, *supra* note 182, at 118 (quoting SEUSS, *supra* note 182, at 6).

394. *United States ex rel. Stokes v. Kendall*, 5 D.C. (5 Cranch) 163, 188 (1837).

395. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

