

D.C. CIRCUIT

A court where policy takes center stage

A year of duck hunting, pardons and privileges in our nation's capital.

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THE U.S. CIRCUIT Court for the District of Columbia is by far the smallest of the regional U.S. circuit courts of appeals in terms of its caseload—the next smallest caseload belongs to the 1st Circuit, which still has about 60% more cases than the D.C. Circuit. The huge 9th Circuit decides the same number of cases on the merits in five weeks that the D.C. Circuit decides in an entire year. While most circuits have surging caseloads, filings in the D.C. Circuit have dropped by almost a third over the past five years.

Despite its small caseload, the D.C. Circuit exercises more control over public policy than any court except the U.S. Supreme Court, for the simple reason that the circuit is home to the 800-pound gorilla that is the federal government. Many of the most important cases involving the structure and functions of the federal government are litigated in the D.C. Circuit.

The District of Columbia has no senator, and thus the president is free to nominate judges for the D.C. Circuit without the traditional deference to the wishes of senators from the cir-

cuit (which, of course, is not to say that the Senate necessarily defers to the president's choice in the confirmation process). One result has been that the D.C. Circuit is a stepping stone to the Supreme Court: Three sitting justices (Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg) were on the D.C. Circuit when they were nominated for the Supreme Court.

Two judges now on the D.C. Circuit—David Tatel, who is brilliant and liberal in equal measures, and John Roberts, also brilliant, who clerked for then-Justice William Rehnquist and served as counsel to President Reagan—would be on the short list for the Supreme Court in a Kerry or second Bush administration, respectively.

Prime examples of the D.C. Circuit's influence on public affairs are its decisions in the continuing litigation over Vice President Dick Cheney's formulation of energy policy, *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003), vacated and remanded, 124 S. Ct. 2576 (2004), and on whether to release to the public the U.S. Department of Justice's (DOJ's) internal documents relating to President Clinton's midnight pardons of Marc Rich and others. *Judicial Watch Inc. v. Department of Justice*, 365 F.3d

1108 (D.C. Cir. 2004).

In *Cheney*, the group Judicial Watch claims that the Bush administration's energy policy task force included de facto members from the private sector, such as Ken Lay, the former chief executive officer of Enron. Consequently, according to Judicial Watch, the task force was subject to the Federal Advisory Committee Act (FACA), which it allegedly violated by meeting in private and failing to disclose minutes of its meetings.

Judge Gladys Kessler of the U.S. District Court for the District of Columbia granted Judicial Watch "tightly reined discovery" on whether Lay and other private sector bigwigs had been, as alleged, de facto members of the task force, plus other issues. 334 F.3d at 1107. The government, rather than assert executive privilege, took the position that discovery was inappropriate at all, absent some compelling need. And, in the face of the discovery order, the government sought mandamus in the D.C. Circuit.

'Cheney' at D.C. Circuit

In an opinion by Tatel, the D.C. Circuit held that mandamus was unwarranted because the government had not asserted any privilege in the

district court. Tatel noted, though, that, “were the district court to reject a claim of executive privilege, thus creating an imminent risk of disclosure of...presidential communications, then mandamus might well be appropriate to avoid ‘letting the cat...out of the bag.’ ” 334 F.3d at 1104-05 (quoting *In re Executive Office of the President*, 215 F.3d 20, 23-24 (D.C. Cir. 2000)).

The Supreme Court, though, had a different view: It granted the government’s petition for certiorari, and, following the controversy over Scalia’s duck-hunting trip with Cheney, *Cheney v. U.S. District Court*, 124 S. Ct. 1391 (March 18, 2004) (Scalia, J.) (denying motion to recuse), vacated and remanded. Justice Anthony M. Kennedy, writing for the majority, held that the district court had “other avenues, short of forcing the Executive to invoke privilege” in the face of broad discovery requests, and he noted that the D.C. Circuit “labored under the mistaken assertion that the assertion of executive privilege is a necessary precondition to the government’s separation-of-powers objections.” 124 S. Ct. at 2592-93.

Ginsburg, in her interesting dissent, suggested that the difference between the majority on the one hand, and the D.C. Circuit’s decision below on the other, boiled down to who had the burden of seeking to narrow the scope of discovery—the government, or the district court itself. 124 S. Ct. at 2601. (On remand, the circuit recently set the *Cheney* case for re-argument en banc—rare in the D.C. Circuit—in

January 2005.)

Judicial Watch, the plaintiff in the *Cheney* litigation, is also the plaintiff in the litigation over the DOJ’s advice to President Clinton on the midnight pardons. While the pardon litigation arises under the Freedom of Information Act rather than FACA, a core issue is the same: the proper scope of the president’s executive privilege.

Pardon us, that’s privileged

At issue in the pardons case was the distinction between papers provided to the president or his staff by DOJ, and the preliminary drafts prepared by DOJ but not actually routed to 1600 Pennsylvania Avenue. Judge Judith W. Rogers, a Clinton appointee, held that the drafts were not “solicited and received” by the White House and therefore were not within the protection of the executive privilege.

Judge A. Raymond Randolph, who was appointed during the previous Bush’s administration, dissented (he also dissented in *Cheney*). He argued that any document prepared in connection with the pardon power was, by definition, prepared for the president, since the U.S. Constitution gives the power of granting pardons solely to the president. 365 F.3d at 1137-38; U.S. Const. art. II, § 2, cl. 1.

Cheney and the midnight pardons case, taken together, illustrate a judicial split between those who think executive privilege should be treated basically like any other evidentiary privilege, and those who feel that, within limits, presidential decision-making is out of bounds for civil discovery.

In addition, the D.C. Circuit in the

past year has decided four other appeals that are significant: two in the telecommunications field, and two that involved the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA), respectively.

Telecommunications cases have traditionally been a major slice of the D.C. Circuit’s administrative law docket and an area where its influence is keenly felt, dating back even before the breakup of AT&T. This year, its decision in *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir.) (*USTA II*), cert. denied, 73 U.S.L.W. 3234 (U.S. Oct. 12, 2004), led to a result roughly comparable to a sudden decision by Ford Motor Co. to stop making passenger cars: AT&T is exiting the home telephone market.

USTA II is proof of the legal adage that the more arcane the administrative law issue, the more seriously someone’s ox is going to be gored. In the Telecommunications Act of 1996, Congress set the ground rules for competition in the market for local telephone services; in short, the Baby Bell companies (e.g., Verizon, BellSouth) would be forced to sell the right to use their local networks with competitors in exchange for being allowed themselves to sell long-distance telephone service.

In *USTA II*, the D.C. Circuit held that the Federal Communications Commission had failed to consider the proper factors in determining which network elements the Baby Bells must make available to their competitors—a decision that throws into doubt the ability of those competitors, including AT&T, to survive in the market.

In another telecommunications case, the D.C. Circuit held that the Digital Millennium Copyright Act

‘USTA II’ throws into doubt the survival of some competitors.

(DMCA) does not require an Internet service provider to disclose the names of its subscribers who share copyrighted music by means of so-called peer-to-peer or P2P programs such as KaZaA. *Recording Indus. Ass'n of America Inc. v. Verizon Internet Servs. Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), cert. denied, 73 U.S.L.W. 3230 (U.S. Oct. 12, 2004). Interestingly, P2P technology did not exist in 1998 when Congress enacted the DMCA, 351 F.3d at 1238, and so Congress, not surprisingly, failed to sweep P2P into the disclosure provisions of the statute.

While *Verizon* is a major setback for the recording industry in its attempt to identify P2P copyright infringers, it is reassuring to any parent whose attempt to explain “copyright” to an iPod-equipped teenager may have been less than a complete success.

The Food and Drug Administration (FDA) scored a major victory in *Whitaker v. Thompson*, 353 F.3d 947 (D.C. Cir.), cert. denied, 73 U.S.L.W. 3232 (U.S. Oct. 12, 2004). Plaintiff Julian Whitaker sought to market an extract of saw palmetto with a label that included the claim that saw palmetto “may” reduce the symptoms of an enlarged prostate. The FDA considered this to be a “drug” claim and insisted that Whitaker seek approval of saw palmetto as a drug (a process requiring patience and deep pockets). Whitaker, determined to bring the benefits of saw palmetto to middle-aged men, sued the FDA, alleging that the prostate claim on the label was accurate and not misleading—an allegation taken as true at this stage—and that by prohibiting this claim from appearing on the saw palmetto label, the FDA violated “the First

Amendment’s limits on restriction of commercial speech.” 353 F.3d at 952.

The D.C. Circuit, in an opinion by Senior Judge Stephen F. Williams, quickly rejected Whitaker’s commercial speech argument on the ground that marketing saw palmetto as an unapproved drug would be unlawful. Since commercial speech is protected only if it relates to lawful conduct, Williams reasoned, Whitaker’s saw palmetto-prostate claim was not protected by the First Amendment.

Here the D.C. Circuit has endorsed one of the FDA’s most cherished notions—that, consistent with the First Amendment, the FDA may prohibit the use of many entirely truthful statements on the labels of everything from cancer drugs to tongue depressors. Interestingly, though, both the Supreme Court and the D.C. Circuit itself previously have been, at best, cautious about the FDA’s position on this point. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002) (O’Connor, J.) (rejecting restrictions on advertising of compounded drugs as inconsistent with First Amendment); *Washington Legal Found. v. Henney*, 202 F.3d 331, 335 (D.C. Cir. 2000) (declining to reach First Amendment issue in challenge to the FDA’s off-label promotion rules but describing it as “a difficult constitutional question of considerable practical importance”).

The EPA’s Superfund program may have hit a snag when the D.C. Circuit held that General Electric Co. could maintain a pre-enforcement, facial challenge to the constitutionality of the statutory provisions that allow the EPA to order a potentially responsible party, to clean up a Superfund site without any right to challenge the legality of the order until after the

cleanup is completed. *General Electric Co. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004) (per curiam). The district court dismissed General Electric’s complaint on the ground that the statute prohibited “any challenges” to EPA’s actions under the relevant statutory provisions until and unless EPA brought an enforcement action. On appeal, General Electric Co.—represented by Laurence Tribe—argued that “the combination of the absence of pre-enforcement review and massive penalties for noncompliance with [an EPA order]” imposed an unconstitutional Hobson’s choice. *Id.* at 190.

The D.C. Circuit reinstated the complaint on the ground that General Electric’s facial challenge to the statutory scheme was not a challenge to EPA’s specific actions under the statute, “but rather it is a challenge to the...statute itself.” *Id.* at 191. Thus, the court held, the statute’s prohibition of pre-enforcement challenges to EPA’s actions did not bar General Electric’s facial challenge.

On remand, the EPA moved to stay discovery and has also moved for summary judgment. (General Electric opposed the stay of discovery, and the district court has yet to rule whether discovery should proceed.) An eventual decision by the district court, or the D.C. Circuit, in General Electric’s favor that relevant provisions of the Superfund statute are unconstitutional would be a legal earthquake, requiring substantial changes to the Superfund scheme. **NLJ**

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