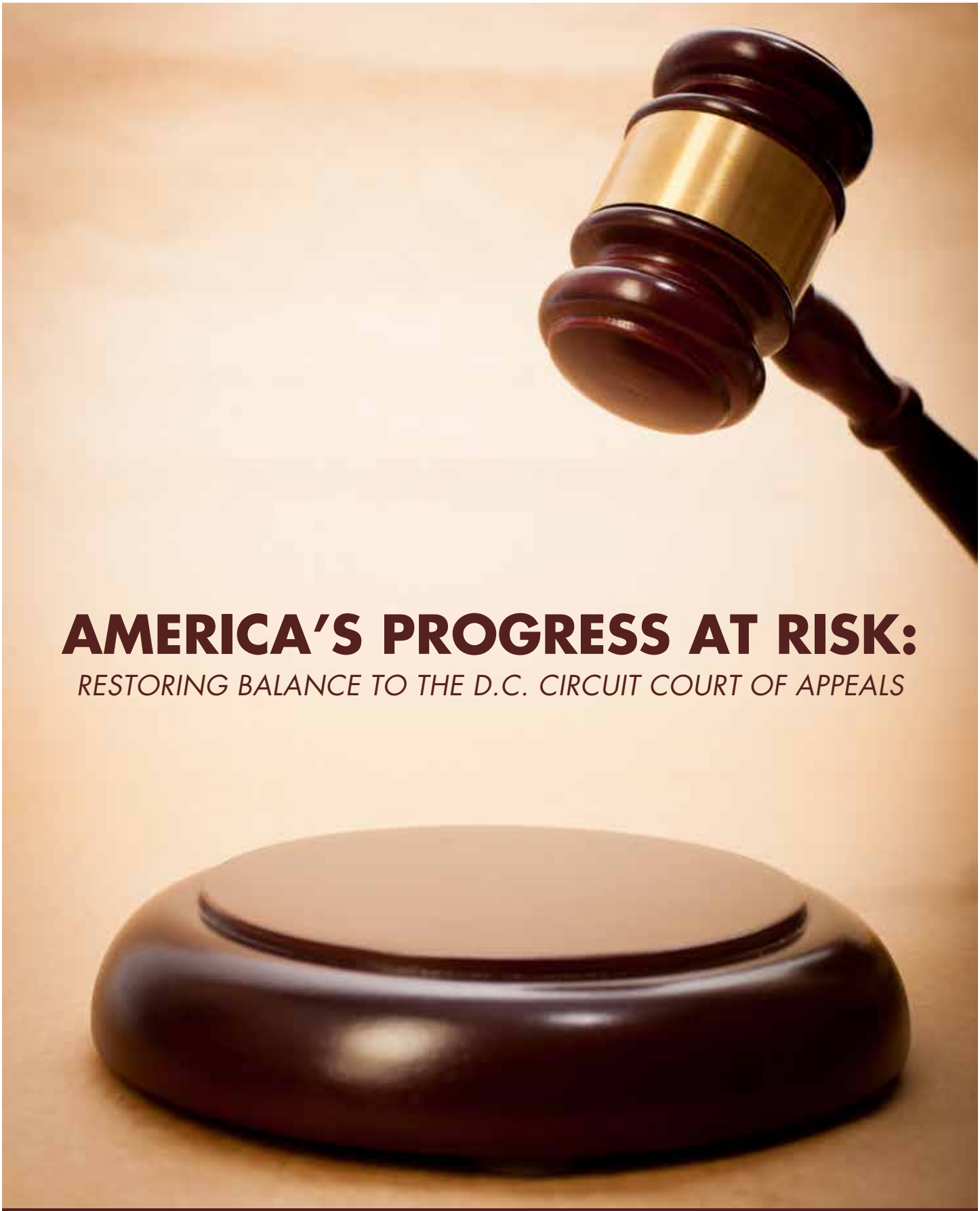


AMERICA'S PROGRESS AT RISK:

RESTORING BALANCE TO THE D.C. CIRCUIT COURT OF APPEALS

People For the American Way

Introduction

For more than 30 years, the political dialogue in our country was shaped by Ronald Reagan's famous claim that "government is not the solution to our problem; government *is* the problem." Too many bought into – or failed to adequately push back against – the paradigm that less government is always better than more government, or as President Obama said in his recent State of the Union address, "smart government." As a result, the past generation has seen rollbacks in protections for ordinary people and a dangerously high level of income disparity.

The 2012 elections saw the rise of another paradigm. Across the nation, millions of Americans who saw the impact of "government is the problem" policies voted for a different agenda: one where the people utilize the tools available uniquely through government to address major problems that cannot effectively be addressed otherwise. President Obama spoke clearly of his vision of a robust government that plays a positive role in people's lives, and Americans elected him to make that agenda happen.

But even in electoral defeat, the far right retains the power to undermine progressive laws and thwart the agenda that Americans elected President Obama to pursue. One measure of that power is the outsized influence far-right ideologues have on the United States Court of Appeals for the District of Columbia Circuit. This appeals court has a unique influence over the shape of our nation's laws, determining the meaning and even the constitutionality of federal legislation and regulation across a broad spectrum of issues: national security, campaign finance, voting rights, workers' rights, consumer rights, environment and energy policy, telecommunications, and more. Now dominated by right wing ideologues who are deeply hostile to government power – who think that "government is the problem" – the D.C. Circuit as currently constituted stands as a major obstacle to progressive advances.

The D.C. Circuit's Unique Influence

While the Supreme Court attracts the lion's share of attention from the press and the public, it hears only a tiny fraction of the appeals filed each year. The nine Justices, who generally get to pick which appeals they will consider, heard only 79 cases during the 2011-2012 term. Only a tiny number of those cases were appealed from the D.C. Circuit. In contrast, the D.C. Circuit cannot simply choose not to hear an appeal. In the year that ended in September 2012, nearly 1,200 appeals were filed before the court.

This means that when the D.C. Circuit makes a ruling, it is almost guaranteed to have the last word.

And because of the D.C. Circuit's jurisdiction it has the last word on a wide range of federal laws, including congressional enactments and regulations adopted by federal agencies and departments. By virtue of the types of cases it hears, the court has a unique ability to put its stamp on an enormous array of the nation's laws in a way that other circuits simply do not.

Congress requires the D.C. Circuit to be the immediate and exclusive court to consider appeals of a breathtaking array of agency regulations and decisions. Moreover, even when parties appealing agency decisions have a choice of venues, they often choose to have their cases heard by the D.C. Circuit, sometimes due to its expertise in complex administrative matters and sometimes to take advantage of the court's ideological imbalance. For the same reason, the D.C. Circuit is also a prime choice for those challenging congressionally passed statutes or presidential actions.

Much of the machinery of United States administrative law (the rules adopted by federal agencies that affect so many aspects of our society) runs through the D.C. Circuit. According to a September 2012 report by the Administrative Office of U.S. Courts, 43 percent of the appeals filed at the D.C. Circuit in the past year were related to administrative actions. For circuit courts overall, that number is only 15 percent.

Every facet of our lives is affected by some aspect of federal law. Clean air rules, gun safety measures, telecom regulations, investor protection rules, securities fraud laws, labor law, banking regulations, food safety requirements, credit card regulations and election laws can be appealed to a federal court, and that court is often the D.C. Circuit.

While many Americans haven't heard of the D.C. Circuit, we've all lived with the results of its rulings. For instance, anyone who was swamped in campaign commercials paid for by super PACs last year can

thank the D.C. Circuit. In the 2010 *SpeechNow v. Federal Election Commission* case, the D.C. Circuit ruled that since, under *Citizens United*, independent expenditures do not cause real or perceived corruption, an individual's giving contributions to groups that make only independent expenditures also cannot create real or perceived corruption and so cannot be limited. The result was the creation of "super PACs," which gave the super wealthy, including moguls like Sheldon Adelson and Foster Friess, an outsized influence on the 2012 elections.

For those who seek to block a progressive, smart-government agenda, the D.C. Circuit is an important vehicle.

The Right Knows How Important the D.C. Circuit Is

When George W. Bush was president, he made a concerted effort to stack the nation's circuit courts with far-right ideologues – and no court got more attention from him than the D.C. Circuit. Over significant progressive opposition, Bush succeeded in placing Janice Rogers Brown, Brett Kavanaugh, and Thomas Griffith on the D.C. Circuit. All three remain on the court, and continue to steer the court's agenda far to the right.

Bush also had his eye on a particular movement conservative for the Supreme Court, and he recognized that the best way to set him up for the high court would be to first get him onto the nation's second most important court. John Roberts was confirmed to the D.C. Circuit in 2003. Two years later, Bush chose him to become our Chief Justice.

By the time President Obama took office, the eleven-member D.C. Circuit had six Republican-nominated judges, three Bill Clinton nominees, and two vacancies. Since then, two of the Republican nominees have taken senior status, leaving four vacancies on the court.

The semi-retirement of these two Reagan nominees has opened up new seats on the court, but it hasn't reduced the court's rightward ideological tilt. Senior judges cannot participate in *en banc* appeals of panel decisions, but they can serve on three-judge panels. And with one-third of the court's active judgeships vacant, they are often called to do so. This means that the court remains heavily dominated by George W. Bush and Ronald Reagan's judges. Including senior judges, the court holds nine Republican-nominated judges and only four Democratic-nominated judges.

Mission Accomplished: Consequences of the Right's Takeover of the D.C. Circuit

Unfortunately, the far right has gotten exactly what they wanted from their efforts to stack the D.C. Circuit. As George W. Bush and his movement conservative supporters planned, the D.C. Circuit can now be counted on to make sweeping rulings that favor the powerful at the expense of workers and consumers, and limit the role government can play to address national problems. A sampling of those decisions are discussed below.

Workers' Rights

In January, the D.C. Circuit issued a ruling on presidential recess appointments – *Noel Canning v. NLRB* – that not only reversed one ruling of the National Labor Relations Board, it undermined every action the Board has taken for over a year and threatened to prevent it from functioning at all going forward.

President Obama had been driven to make key appointments to the NLRB in January 2012, when the Senate was in recess but having *pro forma* sessions every three days to make it look like they were still in session. (A *pro forma* session is held to keep the form but not the substance of being in session: During vacation, one senator who lives near Washington enters the chamber, declares it in session, then closes it after a couple of minutes without any substantive activity.) In early 2011, the president had nominated two people to fill vacancies at the NRLB. But Senate Republicans prevented the Senate from holding yes-or-no confirmation votes on those nominees, which meant that beginning in January of 2012, the NLRB would no longer have a quorum and would no longer be able to function and protect the rights of millions of working people. Although Senate Republicans could not pass legislation closing the NLRB's doors, they sought to accomplish essentially the same results through another route, by refusing to confirm new members of the Board.

In early 2013, the D.C. Circuit issued a sweeping ruling declaring the president's recess appointments unconstitutional. This meant that a decision the Board had made against the Noel Canning company was made unlawfully without a quorum – and so was every other decision since early January 2012. Instead of deciding the case on the narrow grounds of whether or not the Senate was actually in recess during these *pro forma* sessions, the court came to the astounding conclusion that recess appointments going back to the nineteenth century had been invalid.

Judge David Sentelle and two other Republican-nominated judges decided that the only recess that counts for the Recess Appointments Clause is the one that occurs once a year between two sessions of Congress. So even if Congress leaves town and is unavailable, say, for the entire summer, it isn't really in recess. The fact that hundreds of recess appointments have been made during "intra-session recesses" for most of the nation's history without any constitutional controversy seemed not to matter. Two of the three judges went even further to decide a constitutional issue not needed to resolve the case, ruling that the president can only make a recess appointment for a vacancy that was created during the same recess in which he is making the appointment.

This was a breathtaking attack on the ability of government to protect the rights of working people and an unprecedented gift to Senate Republicans, who, if the ruling stands, can now wield the filibuster to keep NLRB vacancies open indefinitely and keep it from functioning at all – or at least until a Republican president is the one making nominations. Yet working people are not the only ones harmed by this decision. In fact, *Noel Canning's* reasoning gives Republican senators the green light to decimate any federal agency through attrition of its leadership, knowing that their right-wing counterparts on the D.C. Circuit have severely limited the president's corrective power to make recess appointments in the face of persistent and overwhelming obstruction.

The *Noel Canning* decision has been widely condemned as "a remarkable exercise of judicial overreach and arrogance" (Norm Ornstein of the American Enterprise Institute), "a judicial atrocity" (Jeffrey Toobin), "insanely hubristic" (Timothy Noah), and "an extraordinary display of judicial activism [and] a strained reading of the law" (Jeffrey Rosen). Those are the kinds of criticisms reserved for opinions like *Bush v. Gore* or *Citizens United*, which are now joined by a new member in the pantheon of notorious court decisions.

Environmental Protection

Last summer, two Bush-nominated judges on the D.C. Circuit issued a much-criticized ruling in *EME Homer City Generation*, striking down important new EPA rules on air pollution that crosses state lines. In 2011, the EPA issued new regulations to limit the levels of sulfur dioxide and nitrous oxide emitted by coal-fired power plants and crossing state lines. Based on the administrative record and its expertise on environmental health, the agency concluded that the new rules would prevent 34,000 premature deaths, 15,000 heart attacks, and 400,000 cases of asthma. As if that weren't important enough, the rules would also save $280 billion a year in healthcare costs.

Utility companies appealed the regulations to a three-judge panel of the D.C. Circuit. The companies' arguments were accepted by Brett Kavanaugh and Thomas Griffith, two George W. Bush judges who outvoted the dissenting Clinton nominee, Judge Judith Rogers. Judge Rogers eviscerated the majority opinion:

> To vacate the Transport Rule, the court disregards limits Congress placed on its jurisdiction, the plain text of the Clean Air Act ... and this court's settled precedent interpreting the same statutory provisions at issue today. Any one of these obstacles should have given the court pause; none did.

Washington Post columnist Steven Pearlstein harshly criticized the decision in an op-ed titled "The Judicial Jihad Against the Regulatory State," calling the ruling:

> ... 60 pages of legal sophistry, procedural hair-splitting and scientific conjecture.
>
> You find a judge without a shred of technical training formulating his own policy solution to an incredibly complex problem and substituting it for the solution proposed by experienced experts.
>
> You find an appeals court judge so dismissive of the most fundamental rules of judicial restraint that he dares to throw out regulations on the

> basis of concerns never raised during the rule-making process or in the initial court appeal.

In other words, you find the D.C. Circuit working exactly as intended by the Bush administration.

Protecting Main Street From Wall Street Abuse

After the stock market collapse and Great Recession of 2008-2009, more and more Americans began to recognize the parallel world in which the 1% on Wall Street live – a world in which the needs of shareholders and consumers are too often ignored. For instance, when a corporation's shareholders elect board members, their proxy material often contains the names only of the candidates put forward by the corporation's management. The Securities and Exchange Commission attempted to remedy this problem with a proposal to expand board accountability by requiring companies to also include qualifying shareholders' nominees and information about them in proxy material.

The Dodd-Frank reform law authorized the SEC to expand proxy access "under such terms and conditions as the Commission believes are in the interests of shareholders and for the protections of shareholders." That is exactly what the SEC did by a partisan 3-2 vote in September of 2010, based on a voluminous record and an exhaustive cost-benefit analysis.

But in 2011, a unanimous three-judge panel of the D.C. Circuit struck down the SEC's rule, claiming that the SEC had not engaged in an adequate cost-benefit analysis. Judge David Sentelle wrote the opinion in *Business Roundtable v. SEC*, joined by Judge Janice Rogers Brown and Judge Douglas Ginsburg (a Reagan nominee). Essentially, the judges usurped the role of SEC commissioners, taking it upon themselves to weigh the evidence in the ruling and make their own judgments.

Normally, courts reviewing agency action defer to an agency's expertise when making policy decisions. This should especially be the case in an area as complex and filled with policy-based judgments as securities law. But in this case, the judges took it upon themselves to sift through the record, examine complex economic arguments, and make independent determinations as to which assertions in the record were reliable and which weren't. If this were the standard in every case, an agency would be hard pressed to defend its policy decisions from judges with different political ideologies.

As described in the Harvard Law Review:

> In *Business Roundtable*, the D.C. Circuit waded into a political fight under the guise of dispassionate scientific oversight to vacate a proxy access rule produced after years of open, contentious debate. While statutes require the SEC to consider the consequences of its regulations, courts should recognize the limitations of economics and of their own expertise by acknowledging thorough, competent analyses. Perpetuating *Business Roundtable's* exacting review could impose a judicial blockade on complex financial rulemaking, which would impede regulators' ability to police the marketplace in accordance with congressional intent.
>
> Courts hardly outperform the SEC at evaluating the imperfect science of economics. Judges can struggle with expert testimony in their own decisions, and traditional training leaves most jurists ill-prepared to engage with sophisticated econometrics. And the validity of economic analysis is cloudier than that of many other scientific methods because economic models rely on complex, interrelated assumptions. Even practiced analysts struggle to isolate the impact of factors like proxy access, and good-faith differences abound.

Another key blow to our ability to use government to protect ourselves from the abuses of the financial industry came in the *Noel Canning* case discussed above. At the same time that he made recess appointments to the NLRB, President Obama also made a recess appointment of Richard Cordray to be director of a powerful new Consumer Financial Protection Bureau. But under the Dodd-Frank reform law which created the Bureau, it was not fully empowered to do many of its most important tasks without a director. So Senate Republicans filibustered Cordray, openly acknowledging that their objection was not to Cordray but to the strong Board whose creation they had failed to torpedo.

As with the NLRB, Senate Republicans were preventing a vital government agency from functioning by preventing the Senate from holding a confirmation vote. Although the *Noel Canning* case involved only the NLRB, its logic would apply to the Consumer Financial Protection Bureau as well, meaning that some of the most important work the Bureau has done over the past year would be considered unconstitutional. Even worse, because the vacancy is now an existing one, the D.C. Circuit's decision would prevent the president from ever using a recess appointment to fill it – allowing Republicans to keep the position empty and the Board ineffective for perpetuity.

Consumer Health and Safety

A notorious ruling against consumer health and safety came last summer when the D.C. Circuit struck down FDA rules requiring graphic warning images on cigarette packages. Congress had directed the FDA to adopt these regulations in 2009. In addition to text warnings, cigarette packages would also have pictures depicting the factual, negative health consequences of smoking cigarettes. In other words, consumers would see the results of using this particular product in the manner intended by the manufacturer.

The majority opinion was written by one of George W. Bush's most strongly ideological nominees, Janice Rogers Brown, who argued that requiring a factual health warning on a demonstrably dangerous product violates the First Amendment rights of cigarette manufacturers. She concluded that many of the images "do not convey any warning information at all." Among the images she criticized were an image of a baby enveloped in smoke with the explanatory text, "Tobacco smoke can harm your children" and an image of a woman crying with the explanatory text, "Tobacco smoke causes fatal lung disease in nonsmokers." Brown decided that these images "do not offer any information about the health effects of smoking" and "cannot rationally be viewed as pure attempts to convey information to consumers."

The dissenting judge in the case, Clinton nominee Judith Rogers, pointed out that these images clearly convey the factual message that cigarette smoking harms both smokers and their family members. And while there was a substantial record in the FDA's administrative rulemaking to support that conclusion, the far-right judges replaced it with their own. The dissent also pointed out that these images did not just come out of the blue, but were instead disclosures designed to counter generations of misleading commercial speech by the tobacco companies.

Judge Rogers also pointed out that the far-right majority turned the rationale for protecting commercial speech on its head. The Supreme Court has noted that commercial speech has First Amendment protection principally because of the value to consumers of the information such speech provides. The FDA's regulations required cigarette makers to provide valuable information to consumers, stating and showing the factually accurate health consequences of their product. Precisely because imagery is so effective, the industry that relied on its own imagery to peddle the idea that smoking is healthy and glamorous fought against the regulations. They lost in Congress, and they lost at the FDA, but the D.C. Circuit was there to limit the government's ability to protect consumers and their families.

Echoes of Mitt Romney's "47%"

In a bizarre concurrence to the otherwise unexceptional case of *Hein Hettinga v. USA* last year, Judge Janice Rogers Brown laid out her opposition to the principle of a robust federal government with a vital constitutional role to play in improving our lives.

The decision, on its surface, had to do with milk. For many decades, Congressional authority under the Commerce Clause to regulate the milk market has been settled law, and the D.C. Circuit recognized that precedent.

But Judge Brown decided to use this innocuous case as an opportunity to affirm her allegiance to the long-discredited ideology of the Lochner era, a period in the early part of the last century when a far-right Supreme Court routinely struck down laws needed to protect Americans' lives and well-being. This was an era when unbridled capitalism was devastating the lives of ordinary Americans and the people sought to use their elected government to tackle that era's substantial problems.

Echoing the strains of the Supreme Court's discredited cases during this era, Brown said about the milk market regulation case:

> The [case] reveals an ugly truth: America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s.
>
> First the Supreme Court allowed state and local jurisdictions to regulate property, pursuant to their police powers, in the public interest, and to adopt whatever economic policy may reasonably be deemed to promote public welfare. Then the Court relegated economic liberty to a lower echelon of constitutional protection than personal or political liberty, according restrictions on property rights only minimal review. Finally, the Court abdicated its constitutional duty to protect economic rights completely, acknowledging that the only recourse for aggrieved property owners lies in the "democratic process."
>
> ...
>
> Civil society, once it grows addicted to redistribution, changes its character and comes to require the state to feed its habit. The difficulty of assessing net benefits and burdens makes the idea of public choice oxymoronic. Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect - a lot more. [internal quotations and citations removed]

Americans recognize that the Constitution empowers them to use government as a force for good. But those efforts are endangered by judges who see the people as "pillagers" or, to use a word familiar from the 2012 campaign, as "takers." While the American people decisively rejected Mitt Romney and again gave the presidency to Barack Obama, until balance is restored to the D.C. Circuit it will remain in the grip of judges set on opposing Obama's agenda.

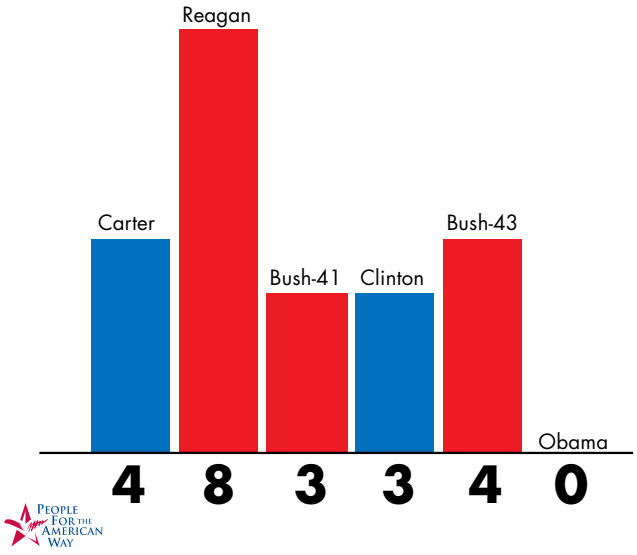
What's Next?

As noted above, there are now four vacancies on the eleven-member D.C. Circuit. In 2011 and again in 2013, Senate Republicans – determined to keep Obama from restoring the court's balance – filibustered the indisputably qualified nominee Caitlin Halligan. Republicans who said the Constitution prohibited filibusters of George W. Bush's judicial nominees nevertheless filibustered Halligan. Republicans who condemned opposing Bush's judicial nominees because of arguments they had once made as lawyers representing their clients filibustered Halligan because of legal arguments she had once made on behalf of her clients.

President Obama has also renominated Principal Deputy Solicitor General Sri Srinivasan to the D.C. Circuit. The president first put forward Srinivasan's nomination last year, but the Senate Judiciary Committee's ranking Republican has so far denied him a hearing. We expect that hearing will soon be scheduled and that the nomination will move speedily through the committee.

Moving forward, the White House needs to nominate high quality candidates from diverse professional backgrounds for the remaining vacancies. In all cases, the Senate must be allowed to hold timely confirmation votes on these nominees once they are vetted by the Judiciary Committee. Balance must be restored to the nation's second most important court, so it will again issue decisions reflecting the wisdom of judges who understand the impact of the law and the Constitution on everyday Americans.

CONFIRMED DC CIRCUIT NOMINEES BY PRESIDENT



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