The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.¹

That is what the Supreme Court said, in an earlier century, about the idea that courts might review agency decisions. In this century, the second part of this observation no longer holds. Power to review Federal Communications Commission decisions, for example, has been given to the courts, especially to the U.S. Court of Appeals for the District of Columbia Circuit. This change, many an FCC Chairman has no doubt concluded, proves the first part of the Supreme Court's observation to be all too true.

There is indeed a fine tension between the FCC and the D.C. Circuit. The FCC is institutionally interested in expanding to the greatest possible extent the scope of its discretion. The D.C. Circuit maximizes its utility precisely to the extent it holds the FCC's expansion of discretion in check. This tension is aggravated by the unusual intimacy the court shares with the FCC. An overwhelming majority of appeals from FCC decisions are taken to the D.C. Circuit, and perhaps half of these cases are required by the Communications Act to be there. Thus, the court is closely familiar with the FCC's work, a familiarity which often tempts it to believe that it can produce better results. In this article we will explore this unusual relationship; how it came to exist, how it has developed over the years, especially in response to Supreme Court mandates, and where it stands today.

I. ORIGINS OF THE RELATIONSHIP

How did D.C. Circuit review of FCC decisions come to be? There is nothing intuitively obvious about court review of agency decisions. The Supreme Court's early decisions like Decatur, quoted at the outset, attest to this. Even in the great case of Marbury v. Madison,² where the Court compelled the Secretary of State to issue justice of the peace commissions to persons who had been nominated and confirmed, the Court stressed that this ministerial duty was already imposed on the Secretary by statute. The Court denied that it had power to review discretionary actions of executive officers. The reason for the Court's reticence is easy to understand. Agency actions are necessarily political.³ Agencies apply policy at least partly determined by the political process. Courts, in contrast, are not and cannot be in the policy business.

Perhaps even less obvious is the structure of agency review. In most of its important cases, the FCC decides among the competing interests of private parties. The process very much resembles private party litigation in trial court. But when a party is disappointed by the FCC's decision, it sues on appeal not the litigation's winner, but the FCC itself. Winners are relegated to intervenor status. On the surface, this procedure makes little sense. Losers in civil cases do not sue on appeal the trial court judge, who then defends his decision while the winner stands by. Yet, this procedure is so firmly entrenched in agency cases that in one oral argument I witnessed before the D.C. Circuit, when FCC counsel permitted intervenor's counsel to argue first on appellee's side, the judges objected and required intervenor's counsel to sit down.

The answers to these mysteries lie in the origins of the modern administrative state. As Marbury made clear, federal courts have always held power in equity to enjoin or set aside executive action that violates the constitution or federal statute. This power did not, however, comprise a direct power to review agency decisions. A somewhat more direct system of

¹ Mr. Hirrel is a member of the District of Columbia and Florida bars. Mr. Hirrel was in private practice, concentrating in appellate matters, at the time this article was submitted. He is co-chair of the Judicial Practice Committee of the Federal Communications Bar.
⁴ Id. at 170.
review emerged with the passage of the original Inter-
state Commerce Act in 1887. The Interstate
Commerce Commission was authorized to seek en-
forcement of its orders in U.S. District Courts.
These enforcement proceedings in practice often
turned upon a review of the record compiled by the
ICC. The ICC's inability to enforce its orders except
through this cumbersome process left the agency
rather impotent. Congress set out to correct this
problem in 1906 in the Hepburn Act. The
Hepburn Act gave the ICC substantial enforcement
powers. To counterbalance the possibility that the
ICC might act arbitrarily, however, the Hepburn
Act also specifically authorized affected parties to
bring actions in equity against the ICC "to enjoin,
set aside, annul, or suspend in whole or in part any"
ICC order. The decedent of this provision survives
today as section 402(a) of the Communications Act.

In cases brought under this provision of the
Hepburn Act, the courts soon modified the tradi-
tional action in equity to include direct review of
ICC decisions. At first this modification proceeded
upon a legal fiction; even when ICC decisions were
authorized by the literal terms of the Commerce Act,
they were held to be unauthorized by the statute if
they were "unreasonable" or "arbitrary." "[I]n
truth," the Supreme Court explained, arbitrary or
unreasonable actions fall "within the elementary
rule that the substance, and not the shadow, deter-
mines the validity of the exercise of the power." The
courts gradually dropped this fiction. Agency
decisions could be set aside, the Supreme Court held,
simply because they were "arbitrary or capricious"
or not supported by "substantial evidence." The
Hepburn Act authorized actions in equity against the
ICC to be taken in the U.S. Courts of Appeals. Four
years later, in 1910, Congress changed this venue. The change was to foreshadow
much of the future interaction between the FCC and
the D.C. Circuit. In the Mann-Elkins Act, Congress
changed this venue. The change was to foreshadow
the Supreme Court for failure to show proper defer-
ence to the agency. Of the Commerce Court's twelve
decisions reviewed by the Supreme Court, ten were
reversed. Faced with this sorry record, Congress abolished
the Commerce Court in 1913. Congress transferred
authority to review ICC orders to the U.S. District
Courts. The District Courts were for this purpose
constituted as three-judge courts, with a presiding
judge from the relevant circuit court. Appeals from
the District Court decisions were taken directly to
the Supreme Court. This structure remained in exis-
tence for review of ICC orders until 1975, when ju-
risdiction was transferred to the Courts of Appeals.
The 1913 statute creating the structure was known as the Urgent Deficiencies Act.
The Urgent Deficiencies Act was explicitly incor-
porated into the Communications Act in 1934 as the
means for review of all FCC orders other than those
that concerned radio licenses. Before 1934, the ICC
held some regulatory power over interstate communica-
tions common carriers under the 1910 Mann-El-
kins Act. This power was exercised by the ICC only
sporadically, a fact which influenced Congress to
create a unified communications commission. But the
FCC's heritage in the ICC led Congress to adopt for
the FCC the same method by which ICC orders were reviewed. As a result, FCC orders other than
those concerning radio licenses were, until 1950, re-
viewed by special three-judge district courts.

In 1950, Congress returned the FCC to the venue
originally set out by the Hepburn Act for review of
ICC orders. Review of FCC orders other than those
for radio licenses was transferred to the U.S. Courts
of Appeals. This method of review still stands to-
day in section 402(a) of the Communications Act.

7 See J. Chamberlain, et al., The Judicial Function
in Federal Administrative Agencies, 166 (1942).
8 The Hepburn Amendment to an Act to Regulate Com-
merce, Ch. 3591, 34 Stat. 584 (1906).
9 Id.
10 ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910); See
also ICC v. Union Pac. R.R., 222 U.S. 541, 547 (1912).
Mortgage Co., 289 U.S. 266, 277 (1933); Silberschein v. U.S.,
266 U.S. 221, 225 (1924).
Petitioners for review under section 402(a) may of course seek review in their own circuit as well as the D.C. Circuit. But for reasons to be suggested below, a good majority of these petitions are taken to the D.C. Circuit. But for reasons to be suggested below, a good majority of these petitions are taken to the D.C. Circuit.

The D.C. Circuit has exclusive authority to review FCC orders that concern radio licenses. This authority is set out in detail in section 402(b) of the Communications Act.18 Appeals under section 402(b) comprise probably half of the FCC's appellate docket. They include the vast majority of appeals related to broadcasting and private radio, and many appeals from common carrier decisions, such as those concerning cellular, mobile radio, and satellite authorizations. This exclusive jurisdiction over radio licensing cases goes to the heart of the special relationship between the FCC and the D.C. Circuit. The nature of this special relationship was clearly anticipated by Congress when it passed the Radio Act ("Radio Act") in 1927.19

The Radio Act created the system of construction permits, licenses, modifications and renewal of radio licenses that still prevails today under Title III of the Communications Act. Responsibilities held today by the FCC were assigned by the Radio Act to the Federal Radio Commission ("FRC"). If the FRC denied an application, section 16 of the Radio Act granted the applicant a right of appeal. Exclusive jurisdiction over these appeals was given to the Court of Appeals of the District of Columbia, predecessor to the D.C. Circuit. The Court of Appeals not only was given exclusive jurisdiction but also was granted authority to take additional evidence, and, perhaps most strikingly, to "alter or revise the decision appealed from and enter such judgment as to it may seem just."20

The debate in Congress over this provision shows that this striking grant of power to the Court of Appeals was more or less intentional. Congress feared that the FRC would act arbitrarily in making licensing decisions. Congress wanted to curb the agency's power. Speaking for the minority, Senator Albert Cummins argued that no appeal should be permitted from FRC licensing decisions because applicants have no inherent rights in the radio spectrum. Licensing decisions, he reasoned, were thus necessarily committed to the Commission's discretion. Appeals from them would only impede the Commission's work.21

A majority of the Senate disagreed, however. Senator Joseph Robinson, who introduced the amendment, argued that a right of appeal is necessary because "it frequently happens the commissions act arbitrarily." A citizen needs to know, he continued, that when he "is being deprived of his rights by the arbitrary action of a governmental agency, he may have his case heard and his right determined finally by a court..."22 Senator William King pronounced himself "astounded" by Senator Cummins' position. "I cannot conceive of a measure of this character," he explained, "with a board having such arbitrary power, not affording an opportunity for a judicial review of the proceedings..."23

Senator Cummins also contended that the statute's right to appeal to a court the decisions of an administrative agency violated the federal constitution. In this contentment, Cummins was proved partially correct. In its first FRC case, the Supreme Court held that it lacked jurisdiction to review decisions of the D.C. Court of Appeals in FRC cases. The Court cited in particular the Court of Appeals' authority to take additional evidence and to revise FRC decisions.24 This authority, the Court held, is an administrative function, and makes the Court of Appeals "no more than... a superior and revising agency in the same field."25 Such authority may be exercised by the courts of the District of Columbia, because they are legislative creations, but it may not be exercised by Article III courts.26 Thus, the Supreme Court could not review decisions rendered pursuant to such a grant of authority.27

Congress had not intended to disable the Supreme Court from performing its traditional role. Congress quickly revised the Radio Act's appeal section to strike the provisions that had caused this result. The Court of Appeals could no longer take evidence or revise the FRC's decisions. It was now confined to "questions of law." The FRC's findings of fact, "if supported by substantial evidence," were deemed to be "conclusive unless it shall clearly appear that the findings... are arbitrary or capricious."28 In its next FRC case, the Supreme Court declared itself

20 Id.
21 67 CONG. REC. 12,354 (1926).
22 Id. at 12,355.
23 Id. at 12,508.
25 Id. at 467.
26 Id. at 468-69.
27 Id. at 469.
satisfied with these changes. The Court of Appeals' authority, as revised, concerns only "the legal question whether the commission has acted within the limits of its authority."^{29} An appeal on this question is "a case or controversy which is the appropriate subject of the exercise of judicial power."^{30}

In 1934, the Radio Act's appeal section was incorporated with only minor revision into the 1934 Act as Section 402(b). Over the subsequent years, some changes have been made in the types of licensing actions covered by the provision, but review of these actions by the D.C. Court of Appeals, and later the D.C. Circuit, has remained a stable feature of section 402(b).

This brief history provides a surprisingly clear answer to the questions we asked at the outset. Judicial review of FCC decisions, and particularly review by the D.C. Circuit, came about as a reaction to the growing power of administrative agencies. As agencies' power expanded in the early years of the 20th century, the courts gradually assumed authority to restrain arbitrary agency action. This authority was first applied to decisions of the ICC, an application which was carried forward in the Communications Act under Section 402(a). When Congress created the FRC, it worried specifically about the FRC's power to make decisions arbitrarily. Congress intentionally created in the D.C. Court of Appeals a strong counterbalance to the FRC's, and later the FCC's, power.

Agencies defend their own decisions on appeal because of the way court review came about. The agencies themselves were hauled into court, initially as defendants in actions for injunctions. They had no choice but to defend themselves. This practice was sufficiently well established by 1927 that Congress apparently did not even consider any other possibility with respect to appeals of FRC decisions. In addition, a practical consideration underlay this approach. Today we think of the FCC largely as an arbiter of competing private interests. In their early days, however, the ICC, the FRC, and the FCC itself were expected to, and did, balance private interests solely against the public interest. When the commissions made decisions on this basis, private parties often did not exist to defend the decisions.

II. DEVELOPMENT OF THE RELATIONSHIP

The above history highlights a tension in the relationship between the D.C. Court of Appeals and the FRC that has persisted as the relationship has unfolded over the years. At the very outset, Congress was of two minds about what it wanted from the relationship. It wanted a strong court to check arbitrary action by the FRC. But when the Supreme Court shunned a similar role for itself, Congress removed the provisions in the Radio Act that made the Court of Appeals "a superior and revising agency." Instead, the statute explicitly confined the Court of Appeals to "questions of law." Thus, Congress wants the Court to be a strong court, but one confined to questions of law. Delineating the area of permissible overlap between these contradictory goals is a problem that has vexed the Court ever since.

The Court of Appeals has always been fairly consistent in aggressively intervening in FCC matters, but the objects of its intervention have varied. From 1927 until the 1960s, the Court regularly interceded against the FRC or FCC on behalf of incumbent broadcast licensees. The Court was, however, frequently reversed by the Supreme Court. By the 1940s, in particular, the Supreme Court was controlled by New Deal appointees. They firmly believed in the wisdom of government by administrative experts. They had little tolerance for lower courts who insisted on meddling in the business of expert agencies.

The Court of Appeals' troubles with the Supreme Court began at the beginning in *FRC v. Nelson Bros. Bond & Mortgage Co.*^{31} The FRC had granted an application for a new radio station in Gary, Indiana. To accommodate the new station, the FRC ordered two Chicago stations off the air, refusing to renew their temporary licenses. The Court of Appeals reversed, finding that the FRC had arbitrarily failed to consider various equities held by the Chicago stations. The Supreme Court demurred. "[T]he weight of . . . these equities," it held, "is for the determination of the commission. . . ."^{32} The FRC was entitled to consider the factors it did in

---


^{30} Id.

^{31} Several of the Supreme Court's most important opinions concerning the relationship of the courts and the executive branch, such as *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 136 (1940), were, for example, written by Associate Justice Felix Frankfurter. Frankfurter had long passionately embraced the idea of government by administrative experts, both as a bureaucrat himself and as a law professor. See MICHAEL E. PARISH, FELIX FRANKFURTER AND HIS TIMES, 36, 43-46, 200-02 (1982).

^{32} 289 U.S. 266 (1933).

^{33} Id.
making its decision.\textsuperscript{34}

In succeeding years, efforts by the Court of Appeals to substitute its conclusions for those of the Commission met similar fates. In FCC v. WOKO, Inc.\textsuperscript{38} for example, the FCC denied a license renewal to a station where owners had misrepresented facts to the FCC. The Court of Appeals reversed, holding that the FCC failed to consider the quality of the station’s service and the immateriality of the falsehoods. Again, the Supreme Court disagreed: “[I]t is the Commission, not the courts which must be satisfied that the public interest will be served by renewing the license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion.”\textsuperscript{38}

Sometimes when the Court of Appeals was unhappy with the FCC’s results, it imposed upon the Commission, not different outcomes, but additional procedural requirements. The Supreme Court was equally hostile here. It canceled the following procedures ordered by the Court of Appeals: A hearing on whether a station would be harmed by grant of a permit for another station to move to the same community;\textsuperscript{37} an oral argument on whether a clear channel station would suffer interference from a new co-channel station;\textsuperscript{38} and a right to hearings for multiple station owners who applied for additional stations beyond the number permitted by the FCC’s rules.\textsuperscript{39}

Perhaps the defining early case concerning the relationship between the Court of Appeals and the FCC is FCC v. Pottsville Broadcasting Co.\textsuperscript{40} In Pottsville, the FCC had found an applicant financially unqualified, a decision which the Court of Appeals had reversed.\textsuperscript{41} On remand, the FCC combined the disputed application with two others for comparative consideration.\textsuperscript{42} The Court issued a writ of mandamus, holding that its prior mandate reversing the denial required the FCC to grant the application.\textsuperscript{43} Once again, however, the Supreme Court intervened. In sweeping language, it stressed the limited role of courts in reviewing agency actions. The Court of Appeals merely corrects legal error; once it does that, it has “exhausted the only power which Congress gave it.”\textsuperscript{44} It may not interfere with the FCC’s public interest judgments.\textsuperscript{48}

In the modern era, beginning in the 1960s, the scope of the D.C. Circuit’s cases has expanded considerably. The Court is still called upon to review cases brought by incumbent licensees unhappy with FCC regulatory actions. But just as often it must also consider cases brought by other industry parties or members of the public who argue that the FCC has not been active enough. And of course the Court’s case load has expanded far beyond its earlier concentration in broadcast cases. The Court considers licensing cases in many radio services in addition to broadcast, and, through section 402(a) petitions for review, a wide variety of appeals in cases that do not even concern radio licensing.

The Court continues to play an active role in FCC cases, although the nature of its intervention has changed. Even when the Court is unhappy with the FCC’s results, it almost never simply substitutes its judgment for that of the FCC in the bold fashion it did in the 1930s. And, with the passage of the Administrative Procedure Act in 1946, the Court no longer may require the FCC to follow additional procedures devised by the Court. The Supreme Court made this clear in Vermont Yankee Nuclear Power Corp. v. NRDC.\textsuperscript{46} Nevertheless, the Court has continued to make its presence felt, reversing FCC decisions on narrower and more technical grounds.

Occasionally, the D.C. Circuit still reaches beyond the restricted role assigned to it by the Supreme Court. This tendency manifested itself in paradigmatic fashion in a series of decisions in the 1970s concerning changes of radio station program formats.\textsuperscript{47} In each case, a prospective purchaser proposed to change the station’s format. Existing for-

\textsuperscript{34} Id. at 285-86.
\textsuperscript{35} 329 U.S. 223 (1946).
\textsuperscript{36} Id. at 229.
\textsuperscript{37} FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).
\textsuperscript{40} 309 U.S. 134 (1940).
\textsuperscript{41} Id. at 139.
\textsuperscript{42} Id. at 140.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} The sweep of Pottsville was substantially cut back twelve years later when Congress passed Section 402(h), which directs the FCC to carry out a reviewing court’s mandate, unless otherwise authorized by the court, based on the prior record and proceedings. 47 U.S.C. § 402(h).
\textsuperscript{46} 435 U.S. 519, 549 (1978).
\textsuperscript{47} Joseph v. FCC, 404 F.2d 207 (D.C. Cir. 1968); Citizens Committee to Preserve the Present Programming of the “Voice of the Arts in Atlanta on WGNA-AM & FM” v. FCC, 436 F.2d 263 (D.C. Cir. 1970); Hartford Communications Committee v. FCC, 467 F.2d 408 (D.C. Cir. 1972); Citizens Committee to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C. Cir.}
networks often were unique in the markets—classical music and jazz were typical—and the new proposed formats were arguably already offered by other stations. Devotees of the existing formats stoutly resisted these petitions. Initially, the FCC refused to consider the issue, reasoning that the format is committed to licensee discretion. After the Court reversed these decisions, the FCC found that proposed format changes met the criteria specified by the Court.

The D.C. Circuit was almost equally tenacious in reversing the FCC. It held that the FCC must consider the availability of formats to the listening public when it decides whether proposed transfers serve the public interest. When a viable format will be lost in a market, the Court held, the FCC must weigh that loss in a hearing. Frustrated by the Court’s tenacity, the FCC finally threw down the gauntlet. Using rulemaking procedures, the Commission issued a notice of inquiry. Then, the Commission adopted a blanket policy statement holding that it would no longer involve itself in program format decisions. The Commission found that format decisions are made most efficiently in the marketplace, and stressed the many practical difficulties of inserting itself into these decisions.

Again, the D.C. Circuit reversed. This time, however, the Supreme Court granted certiorari; it reversed the Court of Appeals and fully acquitted the FCC. The Supreme Court observed that the FCC’s “judgment regarding how the public interest is best served is entitled to substantial judicial deference. . . . The Commission’s implementation of the public interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals. . . .”

Another area in which the D.C. Circuit may have too exuberantly imposed its own preferences upon the FCC involves policies favoring minorities, women, and the disabled. Ironically, the Court and the FCC have over the years switched policy preferences in this area. The Court in the 1970s reversed the FCC for failing to adopt rules favoring these groups. The Court’s last such decision required the FCC to consider in license renewal proceedings the allegedly inadequate efforts of noncommercial television stations to accommodate the needs of the hearing impaired. This decision was reversed by the Supreme Court. In the 1980s, the D.C. Circuit took the opposite tack. Although it did affirm a minority preference policy in comparative broadcast hearings, it reversed the FCC for adopting a similar preference for women, and for authorizing licensees in renewal trouble to sell their stations at a discount to minorities. The latter decision was again reversed by the Supreme Court.

The D.C. Circuit’s tendency to impose its policy preferences upon the FCC has abated noticeably since 1980. The Court now generally takes a more cautious, more deferential, approach when FCC appeals are based on policy-oriented arguments. Even so, a reversion to the Court’s old habits arguments. Even so, a reversion to the Court’s old habits may be seen in a series of recent decisions striking down the FCC’s “integration” preference in comparative broadcast hearings. That preference favors applicants who propose to work in management level positions at the stations for which they are applying. The FCC has essentially made a predictive judgment that stations operated by owner-managers will better serve their communities. The Court is unwilling to accept the FCC’s predictive judgment. It seems to in-
sist upon hard evidence. Such evidence may be, however, for purely practical reasons, impossible to secure.

Apart from policy-oriented cases, the D.C. Circuit's active supervision of the FCC in the modern era has often proved to be fully necessary. The Court plays a vital role in correcting the FCC's frequent and persistent procedural lapses. It has, for example, repeatedly interceded on behalf of applicants whose applications were dismissed for failing to comply with standards of which the FCC had provided no notice. In addition, the Court has often needed to remind the FCC that a hearing is required in licensing proceedings when a substantial and material question of fact arises.

The Court similarly serves a necessary function in requiring the FCC to stay within the limits of its statutory authority. Typical of this role is the Court's decade long conflict with the agency over the filing of tariffs. The Communications Act specifies that "[e]very common carrier. . . shall. . . file. . . schedules showing all charges"; "No carrier," the Act continues, "shall engage in communications service unless these tariffs have been filed." Notwithstanding these seemingly unambiguous commands, the FCC began in 1982 to excuse many carriers from the tariff filing requirement. It relied upon its statutory authority to "modify" the tariffing sections requirements, "either in particular instances or. . . special circumstances." Those decisions were not immediately appealed.

In 1985, the FCC went a step further and required almost all carriers to withdraw their tariffs. This decision was appealed, and the D.C. Circuit reversed. The Court found that the FCC's modification authority does not sanction "wholesale abandonment or elimination of a requirement." Several years later, AT&T used several procedural mechanisms to challenge the FCC's decisions excusing rival carriers from filing tariffs. The FCC rebuffed these challenges. When the cases reached the D.C. Circuit, the Court, relying on its earlier decision, reversed again. The Supreme Court granted certiorari, and, perhaps for the first time, affirmed the Court of Appeals' reversal of the FCC. The FCC's modification authority, the Supreme Court confirmed, "does not contemplate fundamental changes."

In response to AT&T's success in the Court of Appeals, the FCC began a new rulemaking proceeding. It adopted rules allowing most carriers to file tariffs specifying rate ranges rather than particular rates. The FCC insisted that customers could discern from looking at these tariffs "the reasonable zone of rates within which [they] would be charged." Again, AT&T protested. The statute, AT&T pointed out, requires tariffs to "show[] all charges." Again, the Court of Appeals agreed and reversed the FCC. This presumably will be the end of the matter. As both the D.C. Circuit and Supreme Courts observed, the FCC must address its concerns to Congress if it believes that the statute represents an outmoded policy.

III. THE STATUS OF THE RELATIONSHIP TODAY

For the most part, Congress seems to have achieved what it wanted in 1927 from the relationship between the FCC and the D.C. Circuit. The Court serves as a vigorous counterbalance to the enormous administrative power wielded by the Commission. The Court's special zeal in FCC cases is nurtured by two unusual factors. First, the Court possesses a striking familiarity with FCC matters. Observers see this familiarity in action at almost any oral argument in an FCC case. The Court gains this knowledge because of the great number of FCC

---

61 Citizens for Jazz on WRVR v. FCC, 775 F.2d 392, 395 (D.C. Cir. 1985); Astroline Communications Co. v. FCC, 857 F.2d 1556, 1561 (D.C. Cir. 1988); David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1257 (D.C. Cir. 1990).
62 47 U.S.C. § 203 (a) and (c) (1988).
64 MCI Telecommunications v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).
65 Id. at 1192, 1195-96
66 There were two of these cases. The first was reported. AT&T v. FCC, 978 F.2d 727, 737 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 3020 (1993). The second was not reported. AT&T v. FCC, No. 92-1628 (June 4, 1993). The Supreme Court granted certiorari in the second case.
68 Id. at 2230.
70 Id. para.
71 Southwestern Bell Corp. v. FCC, 43 F.3d 1515, 1517-26 (D.C. Cir. 1995).
cases it hears and because of the longevity of its judges. Most D.C. Circuit judges serve far longer than do FCC Commissioners. Thus, by the time they retire, many D.C. Circuit judges have spent more time on FCC matters than many Commissioners.

The Court’s familiarity with FCC matters clearly affects the way it perceives FCC actions. From the Supreme Court’s vantage point, FCC actions may well be grounded in the agency expertise which that Court so often invokes as a reason for deference. From where the D.C. Circuit sits, the FCC’s expertise is very much exaggerated. Every week, the D.C. Circuit reviews FCC decisions drafted by staff personnel who may have graduated only recently from professional school, and approved by Commissioners who, historically at least, have often had little prior experience in communications matters. Year in and year out, the Court sees the FCC repeat the same mistakes of policy and law. Judges on the Court would not be human if they did not believe that they could improve upon the FCC’s results.

A second factor that fosters special zeal by the Court in FCC cases is the Court’s heavy administrative case load. In fiscal year 1993, for example, 1,791 appeals were filed with the D.C. Circuit. Fully 838, or forty-seven percent, of these were appeals from administrative decisions. In all circuit courts combined, in contrast, only 3,938 of 50,224, or eight percent, of all appeals were from administrative decisions. Administrative appeals are by far the dominant category of appeals in the D.C. Circuit.

This predominance of administrative cases gives the D.C. Circuit an institutional interest in reversing some proportion of agency decisions. Suppose instead that the Court began regularly to affirm a high proportion of agency decisions. It would soon gain a reputation among potential appellants as hostile territory. Many of those appellants would either forego their appeals altogether or file them in other circuits, reducing significantly the D.C. Circuit’s case load. Perhaps even more importantly, because administrative cases are a primary source of its unique importance, the Court would suffer a corresponding loss of prestige. FCC cases are among the most prominent administrative appeals, so the Court’s institutional interest is unusually strong in those cases.

The Court’s own attitude is not, however, the only factor that affects the rate at which it reverses the FCC. On the other side of the equation is the FCC itself. The quality of its decisions—their consistency internally and with prior decisions, their adherence to statutory requirements, the strength of reasoning in their opinions—determines whether those decisions will, in particular cases, be affirmed. This side of the equation, I believe, accounts primarily for the interesting cycles over time in the proportion of FCC decisions reversed by the Court of Appeals. Those cycles are shown on Table I at the appendix. Table I concerns decisions published with opinions by the D.C. Circuit in FCC cases from 1960 to 1993.

As the table shows, there have been two distinctive large-scale cycles in the rate at which the D.C. Circuit has reversed the FCC. The first cycle began in 1960 and ended in 1979. The second began in 1980 and appears now to be winding down. Each cycle in turn breaks down into three periods. It begins with a period in which the FCC is consistently affirmed each year in a high proportion of its cases. Thus, the FCC was reversed in fewer than 35% of appeals from 1960 to 1964 and again from 1980 to 1984. Next, the FCC is reversed in a high (above 35%) percentage of its cases in every third or second year. This pattern prevailed from 1965 to 1975 and again, more or less, from 1985 to 1989. Finally, the FCC is consistently reversed in a high proportion of its cases each year. This pattern prevailed from 1976 through 1979 and again from 1990 through 1993.

What accounts for these cycles? I believe that they result largely from learned behavioral responses by the FCC. At the beginning of the cycle, the FCC is consistently affirmed. After several years of this, the FCC starts to believe that it can do no wrong. It tests the limits of its discretion and becomes sloppy in the way it approaches legal prerequisites. A period follows in which the agency is reversed frequently, but intermittently. In these periods, the FCC hesitantly apprehends that discretion has limits. It vacillates between fixing the problems and ignoring them. When the Court rewards it only intermittently for its tentative efforts, the FCC comes to believe that the Court affirms only randomly, conveying no fixed reward for good behavior. A period follows in which the FCC, perceiving no reward, pays little attention to legal prerequisites, basing decisions primarily on policy alone. This produces a period of consistent reversal by the Court of Appeals. In turn, the FCC reforms its behavior, and the cycle begins again.

Table I appears to show that the rate at which the


Director, AI-3 (1993) (Table B-1).
D.C. Circuit has reversed the FCC has gradually increased over time. This appearance is deceptive. The table is, of necessity, compiled from decisions accompanied by published opinions. Information about unpublished decisions over this period is too unreliable to be compiled in a similar format. The Court has, however, increasingly relied upon unpublished dispositions. The overwhelming majority of these dispositions are affirmances. Thus, after accounting for cyclical variations, the overall rate at which the FCC has been affirmed has remained relatively constant from 1960 to the present.

Indeed, I believe, on an absolute scale that the Court today grants the FCC substantially more discretion than it did in earlier decades. The Court routinely affirms FCC decisions now that it would likely have reversed in the 1960s and 1970s. Compare, for example, Russian River Vintage Broadcasting v. FCC,\textsuperscript{76} with Natick Broadcast Associates, Inc. v. FCC,\textsuperscript{77} and National Cable Television Association, Inc. v. FCC and USA,\textsuperscript{78} with Hawaiian Telephone Co. v. FCC and USA.\textsuperscript{79} In Russian River, a recent case, the Court affirmed the FCC’s dismissal of a broadcast application because the information on a map in the application was not set out in the prescribed manner. In Natick, a 1967 case, the Court reversed after the FCC dismissed a broadcast application because the applicant originally submitted erroneous information, later corrected, showing a prohibited overlap. The Court huffed: “We think the Commission’s action was hypertechnical and arbitrary.” No similar sentiment would likely be uttered today.

In Hawaiian Telephone, in 1974, the Court reversed the FCC’s grant of a certificate of convenience and necessity to provide a new private line service between Hawaii and the mainland. The FCC failed, the Court explained, to justify its assumption that competition was necessarily in the public interest. In NCTA, in 1994, the FCC made the same assumption in adopting a policy to authorize certificates of public convenience and necessity to telephone companies so that they could provide video dial tone service in competition with cable television companies. The lawfulness of this assumption was not even challenged on appeal, the Court cited the FCC’s competition rationale with approval, and it affirmed.

The greater liberty given by the Court to the FCC today has not been reflected, however, in declining rates of reversal. Why not? The FCC has taken full advantage of its greater discretion, and has continued to press at the margins of its allowed discretion. Thus, even as the court has expanded the boundaries of what it considers acceptable, the total proportion of FCC decisions outside these boundaries has remained about the same.

One factor that has relatively little impact—popular belief notwithstanding—on the rate of reversal is the political philosophies of the individual judges. A judge’s political philosophy may affect the kinds of cases in which she or he votes to reverse, but it does not, for the most part, affect the overall proportion of such cases. Table II at the appendix shows votes by individual D.C. Circuit judges to reverse or affirm the FCC, covering decisions with published opinions in the two year period from October 1, 1992, through September 30, 1994. The table shows that judges nominated by Democratic Presidents (R.B. Ginsburg, Mikva, Wald, Edwards, and Rogers) voted to reverse about half the time. The same is true of most judges (Silberman, Buckley, Williams, Sentelle and Randolph) nominated by Republican Presidents. Only two Republican nominated judges (D.H. Ginsburg and Henderson) were fairly consistent in voting to affirm the FCC.

For judges nominated by Presidents of both parties, then, Table II shows a relatively high proportion of votes to reverse. These proportions reflect the last stage of the large scale cycle, discussed above, through which the Court and the FCC are now going. This last stage is also reflected on Table III, showing all contested dispositions from October 1, 1992, through September 30, 1994. In this period, the D.C. Circuit has decided forty two FCC cases showing all contested dispositions from October 1, 1992, through September 30, 1994. In this period, the D.C. Circuit has decided forty two FCC cases with opinions, twenty three times affirming and nineteen times reversing. Thus, in these cases, the Court has reversed forty-five percent of the time. That percentage is substantially higher than the average reversal rate shown on Table I, i.e. thirty-four percent.

This phenomenon is tempered, however, when decisions without opinions are considered. The Court affirmed without opinion in nineteen cases in the period reflected on Table III. Overall, then, the Court has reversed the FCC in this period in only thirty one percent of its cases. That percentage is probably still higher than the comparable rate for the thirty three year period. The disparity is probably not as great, however, as when only decisions with opinions are considered. That is so because, as noted above,

\textsuperscript{76} 5 F.3d 1518 (D.C. Cir. 1993).
\textsuperscript{77} 385 F.2d 985 (D.C. Cir. 1967).
\textsuperscript{78} 33 F.3d. 66 (D.C. Cir. 1994).
\textsuperscript{79} 498 F.2d 771 (D.C. Cir. 1974).
the Court has made its decisions without opinion more frequently in recent years. In these comparisons, reversals without opinion are not counted because they actually reflect the precedential impact of only one or two recent decisions with opinions. Affirmances without opinion, in contrast, generally involve consideration of the merits of the individual cases.

One final trend is also clear from Table III. The overwhelming majority of appeals today are taken to the D.C. Circuit. In the recent period reflected in the table, the D.C. Circuit disposed of 101 appeals from FCC decisions. All other circuits combined disposed of only fourteen such appeals. Perhaps half of FCC appeals must be taken to the D.C. Circuit, of course, because they involve radio licensing. But these numbers show that even in other types of cases, where appellants do have a choice, the vast majority choose the D.C. Circuit. This trend is certainly abetted by the assessments prospective appellants make as to where their appeals are most likely to succeed. While the D.C. Circuit reversed in forty five percent of its FCC cases decided with opinions, all other circuits reversed in only twenty nine percent of such cases.

Prospective appellants do not, however, base these assessments only on their perceptions about the courts' relative propensities to reverse. The D.C. Circuit's far greater knowledge of FCC matters, and its vast body of administrative law precedent, enable appellants to focus their briefs much more precisely on critical arguments. Appellants sometimes prevail for this reason in the D.C. Circuit, when they would not elsewhere. When they do, the Court's special role in FCC matters serves a profound public interest; justice is achieved that would otherwise be lost. And that result is very much what Congress had in mind when it laid the groundwork for the special relationship.

CONCLUSION

The relationship between the FCC and the D.C. Circuit is, as we have seen, an evolving one. Its continuing evolution in the last years of the millennium will be interesting to watch. One factor especially worth watching will be the role of the Supreme Court. Three former D.C. Circuit judges now sit there. They have thus far tended to employ traditional D.C. Circuit responses in FCC matters. In both major communications cases last term, for example, all three favored positions identical to those long taken by the D.C. Circuit. In *MCI Telecommunications Corp. v. AT&T*,[76] they joined the majority; in *Turner Broadcasting System, Inc. v. FCC*,[77] they dissented. If this pattern holds, the Supreme Court's traditional role as FCC champion may be weakened. And future FCC Chairman will ruefully conclude that the D.C. Circuit's power of review is productive of even more mischief.

76 114 S.Ct. 2223 (1994).

77 114 S.Ct. 2445 (1994).
TABLE I
D.C. CIRCUIT DECISIONS AFFIRMING OR REVERSING FCC
(Including only reported decisions with opinions)
(Based on U.S. App. D.C.)
1960 THROUGH 1993

<table>
<thead>
<tr>
<th>Year</th>
<th>Affirmed</th>
<th>Reversed</th>
<th>Mixed</th>
<th>Percent Reversed*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>10</td>
<td>3</td>
<td></td>
<td>23</td>
</tr>
<tr>
<td>1961</td>
<td>13</td>
<td>6</td>
<td></td>
<td>32</td>
</tr>
<tr>
<td>1962</td>
<td>10</td>
<td>1</td>
<td></td>
<td>9</td>
</tr>
<tr>
<td>1963</td>
<td>11</td>
<td>3</td>
<td>2</td>
<td>25</td>
</tr>
<tr>
<td>1964</td>
<td>9</td>
<td>3</td>
<td></td>
<td>25</td>
</tr>
<tr>
<td>1965</td>
<td>11</td>
<td>9</td>
<td>1</td>
<td>45</td>
</tr>
<tr>
<td>1966</td>
<td>9</td>
<td>1</td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>1967</td>
<td>11</td>
<td>3</td>
<td></td>
<td>21</td>
</tr>
<tr>
<td>1968</td>
<td>9</td>
<td>7</td>
<td></td>
<td>44</td>
</tr>
<tr>
<td>1969</td>
<td>11</td>
<td>4</td>
<td></td>
<td>27</td>
</tr>
<tr>
<td>1970</td>
<td>10</td>
<td>3</td>
<td></td>
<td>23</td>
</tr>
<tr>
<td>1971</td>
<td>8</td>
<td>6</td>
<td>1</td>
<td>43</td>
</tr>
<tr>
<td>1972</td>
<td>15</td>
<td>2</td>
<td></td>
<td>12</td>
</tr>
<tr>
<td>1973</td>
<td>3</td>
<td>3</td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>1974</td>
<td>9</td>
<td>4</td>
<td></td>
<td>31</td>
</tr>
<tr>
<td>1975</td>
<td>8</td>
<td>1</td>
<td>1</td>
<td>15</td>
</tr>
<tr>
<td>1976</td>
<td>8</td>
<td>10</td>
<td></td>
<td>56</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Affirmed</th>
<th>Reversed</th>
<th>Mixed</th>
<th>Percent Reversed*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>7</td>
<td>7</td>
<td>4</td>
<td>50</td>
</tr>
<tr>
<td>1978</td>
<td>8</td>
<td>9</td>
<td>2</td>
<td>53</td>
</tr>
<tr>
<td>1979</td>
<td>3</td>
<td>3</td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>1980</td>
<td>16</td>
<td>3</td>
<td>1</td>
<td>18</td>
</tr>
<tr>
<td>1981</td>
<td>9</td>
<td>4</td>
<td>3</td>
<td>34</td>
</tr>
<tr>
<td>1982</td>
<td>13</td>
<td>2</td>
<td>1</td>
<td>16</td>
</tr>
<tr>
<td>1983</td>
<td>14</td>
<td>2</td>
<td>2</td>
<td>17</td>
</tr>
<tr>
<td>1984</td>
<td>15</td>
<td>4</td>
<td>1</td>
<td>23</td>
</tr>
<tr>
<td>1985</td>
<td>9</td>
<td>9</td>
<td>5</td>
<td>50</td>
</tr>
<tr>
<td>1986</td>
<td>13</td>
<td>4</td>
<td>1</td>
<td>25</td>
</tr>
<tr>
<td>1987</td>
<td>15</td>
<td>9</td>
<td>4</td>
<td>39</td>
</tr>
<tr>
<td>1988</td>
<td>9</td>
<td>12</td>
<td>1</td>
<td>57</td>
</tr>
<tr>
<td>1989</td>
<td>9</td>
<td>2</td>
<td>2</td>
<td>23</td>
</tr>
<tr>
<td>1990</td>
<td>9</td>
<td>6</td>
<td>1</td>
<td>41</td>
</tr>
<tr>
<td>1991</td>
<td>5</td>
<td>5</td>
<td>2</td>
<td>50</td>
</tr>
<tr>
<td>1992</td>
<td>5</td>
<td>9</td>
<td></td>
<td>64</td>
</tr>
<tr>
<td>1993</td>
<td>12</td>
<td>7</td>
<td>1</td>
<td>38</td>
</tr>
</tbody>
</table>

| TOTAL | 336 | 166 | 36 | 34 |

* Percentages in this table reflect "mixed" decisions in .5 values for both reversals and affirmances. In the following tables, a full value is assigned to a mixed decision according to the decision's predominant impact. That is, a decision whose predominant impact is reversal is counted as a reversal.
### TABLE II
BREAKDOWN BY JUDGES
ALL D.C. CIRCUIT PUBLISHED OPINIONS AFFIRMING OR REVERSING FCC ORDERS
October 1, 1992 through September 30, 1994

<table>
<thead>
<tr>
<th>Judge</th>
<th>Total</th>
<th>Votes to Affirm</th>
<th>Votes to Reverse</th>
<th>Wrote Majority Opinion Affirming</th>
<th>Wrote Majority Opinion Reversing</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Join in majority</td>
<td>Dissent to reversal</td>
<td>Join in majority</td>
<td>Dissent to affirmation</td>
</tr>
<tr>
<td>RB Ginsburg</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Mikva</td>
<td>16</td>
<td>8</td>
<td>1</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Wald</td>
<td>15</td>
<td>7</td>
<td>8</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Edwards</td>
<td>13</td>
<td>5</td>
<td>8</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Silberman</td>
<td>7</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Buckley</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Williams</td>
<td>13</td>
<td>8</td>
<td>3</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>DH Ginsburg</td>
<td>12</td>
<td>9</td>
<td>3</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Sentelle</td>
<td>19</td>
<td>10</td>
<td>9</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Henderson</td>
<td>10</td>
<td>8</td>
<td>2</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Randolph</td>
<td>10</td>
<td>4</td>
<td>1</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>Rogers</td>
<td>1</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Per Curiam</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>MacKinnon*</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Campbell**</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Will**</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
</tbody>
</table>

* Senior Circuit Judge  
** Sitting by Designation
TABLE III  
CONTESTED DISPOSITIONS OF APPEALS OF FCC ORDERS  
ALL U.S. COURTS OF APPEALS  
October 1, 1992 through September 30, 1994

<table>
<thead>
<tr>
<th>Court</th>
<th>Affirmed</th>
<th></th>
<th>Reversed</th>
<th></th>
<th>Dismissed</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>with opinion</td>
<td>without opinion</td>
<td>with opinion</td>
<td>without opinion</td>
<td>with opinion</td>
<td>without opinion</td>
</tr>
<tr>
<td>D.C.</td>
<td>23</td>
<td>19</td>
<td>19</td>
<td>18*</td>
<td>5</td>
<td>17</td>
</tr>
<tr>
<td>Other Circuits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1st</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2nd</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6th</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>7th</td>
<td>1</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8th</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9th</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>11th</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Other</td>
<td>5</td>
<td>1</td>
<td>2</td>
<td></td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>All Circuits</td>
<td>28</td>
<td>20</td>
<td>21</td>
<td>18*</td>
<td>6</td>
<td>22</td>
</tr>
</tbody>
</table>

Petitions for Writs of Mandamus: Fourteen were denied by the D.C. Circuit, one by the 9th Circuit; none were granted.

* All of the reversals without opinion appear to be new cases that were controlled by preceding decisions of the Court, especially the Rechtel decision concerning the FCC's integration criterion in broadcast comparative hearings.