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# THE REAGAN JUDICIARY AND ENVIRONMENTAL POLICY: THE IMPACT OF APPOINTMENTS TO THE FEDERAL COURTS OF APPEALS

*William E. Kovacic\**

## I. INTRODUCTION

Modern economic regulation in the United States recently passed the twentieth anniversary of one of its most important formative events. On January 1, 1970, President Nixon signed the National Environmental Policy Act (NEPA)<sup>1</sup> and launched a revolution in environmental policy.<sup>2</sup> Since NEPA's enactment, Congress has passed an unparalleled collection of statutes designed to protect the environment. The subjects of these statutes are familiar topics of academic discourse and popular debate: clean air,<sup>3</sup> clean

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\* Associate Professor, George Mason University School of Law. This Article is based in part on a working paper entitled "The Reagan Judiciary Examined: A Comparison of Environmental Law Voting Records of Carter and Reagan Appointees to the Federal Courts of Appeals" (Washington Legal Foundation, Working Paper No. 36 (Oct. 1989)). The author thanks the Smith Richardson Foundation and the Sarah Scaife Foundation for support in preparing this article. The author is grateful to Michael Greve, Michael McDonald, Shannon O'Chester, and Alan Slobodin for many useful comments and suggestions, and to Sean Coleman and Steven Taylor for their research assistance.

<sup>1</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4370a (1988)). See also *Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act*, 20 ENVTL. L. 447 (1990) (collection of articles discussing NEPA's significance).

<sup>2</sup> See R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 28 (1983) ("[t]he year 1970 was a watershed for pollution control"). Among other initiatives in 1970, President Nixon issued a reorganization plan that created the Environmental Protection Agency (EPA) by consolidating environmental protection units located in other federal agencies. See Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970). In January 1990, President Bush endorsed proposals that the EPA be raised to cabinet-level status. See The President's News Conference, 26 WEEKLY COMP. PRES. DOC. 88, 89 (Jan. 24, 1990).

<sup>3</sup> The principal pieces of clean air legislation have been the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990); the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685; and the Clean Air Amendments of 1970, Pub. L. No. 91-604,

water,<sup>4</sup> ocean dumping,<sup>5</sup> toxic waste,<sup>6</sup> noise,<sup>7</sup> pesticides,<sup>8</sup> land use,<sup>9</sup> and endangered species.<sup>10</sup> These environmental statutes and their implementing regulations constitute the most sweeping and significant program of American economic regulation in the post-World War II era.<sup>11</sup>

Most scholarly commentary has endorsed a basic goal underpinning federal environmental statutes: economic actors should be induced to internalize the negative spillovers associated with pollution.<sup>12</sup> The form of federal intervention since 1970 to achieve this

84 Stat. 1676. These measures are codified or in the case of the 1990 amendments will be codified at 42 U.S.C. §§ 7401-7642 (1988).

<sup>4</sup> The principal clean water statutes since 1970 have been the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7; the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642; the Federal Water Pollution Control Act Amendments of 1977, Pub. L. No. 95-217, 91 Stat. 1566; the Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660; and the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-498, 86 Stat. 816. The Federal Water Pollution Control Act Amendments and the 1987 Water Quality Act are codified at 33 U.S.C. §§ 1251-1387 (1988). The Safe Drinking Water Act, as amended, is codified at 42 U.S.C. §§ 300f-300j (1988).

<sup>5</sup> See Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-531, 86 Stat. 1052 (codified at 33 U.S.C. §§ 1401-1445 (1988)).

<sup>6</sup> The major statutes have included the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767; the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795; and the Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976). These measures are codified at scattered sections of title 42 of the United States Code.

<sup>7</sup> See Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (codified as amended at 42 U.S.C. §§ 4901-4918 (1988)).

<sup>8</sup> See Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (codified as amended at 7 U.S.C. §§ 136-136y (1988)).

<sup>9</sup> See Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. §§ 1451-1464 (1988)).

<sup>10</sup> See Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1988)).

<sup>11</sup> In a speech in 1980, Gus Speth, Chairman of the President's Council on Environmental Quality, described the environmental statutes of the 1970s as "a single sustained burst of legislation, almost without precedent in our history." Speth, *Environmental Regulation and the ImMOBILization of Truth*, 8 B.C. ENVTL. AFF. L. REV. 413, 414 (1980). Speth referred to the 1970s as the "decade of environmental renaissance" and likened congressional activism in this period to "creative bursts of legislation during the 1930's for the New Deal, and the 1960's civil rights." *Id.*; see also Reilly, *The Future of Environmental Law*, 6 YALE J. ON REG. 351, 351 (1989) (written by EPA Administrator William K. Reilly). "During the 1970s, we passed close to a dozen major environmental laws meant to protect us in a relatively comprehensive way. For the first time in history, an industrialized, technologically advanced nation enacted sweeping federal legislation to protect human health, natural systems, and the environment nationwide." Reilly, *supra*, at 351.

<sup>12</sup> The failure of markets in dealing with negative environmental spillovers is treated in R. CRANDALL, *CONTROLLING INDUSTRIAL POLLUTION: THE ECONOMICS AND POLITICS OF CLEAN AIR* 58-80 (1983). See also R. LITAN & W. NORDHAUS, *REFORMING FEDERAL REGULATION*

end, however, has drawn extensive criticism. In particular, many observers have criticized the federal regulatory regime for its frequent use of "command and control" abatement strategies and for its failure to take appropriate account of the costs associated with achieving additional incremental cuts in emissions.<sup>13</sup> Critics frequently focus on statutory and regulatory requirements that impose especially stringent abatement ceilings upon new sources of emissions, or on "technology-forcing"<sup>14</sup> standards that deny firms the flexibility to choose the lowest cost reduction approach.<sup>15</sup> In the last fifteen years, a large body of legal and economic literature has suggested alternative methods and incentives for achieving important pollution control objectives at costs much lower than those imposed by existing regulatory requirements.<sup>16</sup>

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36-37 (1983); D. SPULBER, *REGULATION AND MARKETS* 46-53, 331-84 (1989); R. STEWART & J. KRIER, *ENVIRONMENTAL LAW AND POLICY* 97-117 (1978). This is not to suggest that the desire to internalize external costs of pollution is necessarily the only concern, or even the dominant objective, animating adoption of environmental protection statutes and regulations. See, e.g., B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* (1981) (discussing efforts to use Clean Air Act to protect eastern coal producers from low-sulphur coal suppliers located in western United States); Bartel & Thomas, *Predation Through Regulation: The Wage and Profit Effects of the Occupational Health and Safety Administration and the Environmental Protection Agency*, 30 J.L. & ECON. 239 (1987) (discussing use of environmental regulations to enable incumbent suppliers to deter entry and expansion by rival firms); Brady, Maloney & Abbott, *Political Limits of the Market for "BAT Medallions,"* *REGULATION*, Winter 1990, at 61 (identifying political obstacles to attaining an economically efficient market for pollution permits).

<sup>13</sup> In a representative assessment in 1983, Robert Crandall said that "[t]here is overwhelming evidence that the current approach to setting environmental standards for air quality is extremely inefficient." See R. CRANDALL, *supra* note 12, at 57. For similar evaluations, see S. BREYER, *REGULATION AND ITS REFORM* 261-84 (1982); A. KNEESE, *ECONOMICS AND THE ENVIRONMENT* 108-11 (1977); B. YANDLE, *THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION: TRACKING THE UNICORN* (1989); Ackerman & Stewart, *Reforming Environmental Law*, 37 *STAN. L. REV.* 1333 (1985); Crandall, *Air Pollution, Environmentalists, and the Coal Lobby*, in *THE POLITICAL ECONOMY OF DEREGULATION* 84 (R. Noll & B. Owen eds. 1983); Stewart, *Economics, Environment, and the Limits of Legal Control*, 9 *HARV. ENVTL. L. REV.* 1 (1985); Weiss, *Introduction: The Regulatory Reform Movement*, in *REGULATORY REFORM: WHAT ACTUALLY HAPPENED* 9 (L. Weiss & M. Klass eds. 1986).

<sup>14</sup> See LaPierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 *IOWA L. REV.* 771 (1977) (analyzing "technology-forcing" strategy for pollution control).

<sup>15</sup> See R. CRANDALL, *supra* note 12, at 60-61. A distinctive feature of the Clean Air Act of 1990 is its reliance upon market-based incentives to achieve reductions in sulphur dioxide. See Pavetto & Bae, *Acid Rain Now a Hot Commodity*, *Legal Times*, Feb. 11, 1991, at 39, col. 1.

<sup>16</sup> See S. BREYER, *supra* note 13, at 261-84 (1982); A. KNEESE & C. SCHULTZE, *POLLUTION, PRICES, AND PUBLIC POLICY* (1975); Hahn, *Economic Prescriptions for Environmental Problems: Not Exactly What the Doctor Ordered*, in *THE POLITICAL ECONOMY OF GOVERNMENT REGULATION* 131-81 (J. Shogren ed. 1989); *Law and Economics Symposium: New Directions in Environmental Policy*, 13 *COLUM. J. ENVTL. L.* 153 (1988); Passell, *Private Incentives as Pollution Curb*, *N.Y. Times*, Oct. 19, 1989, at D2, col. 1; cf. Magat & Viscusi, *Effectiveness*

This Article focuses on the influence that President Reagan's judicial appointments to the courts of appeals have had on environmental policymaking. Following a brief look at some of the mechanisms that the Reagan administration used to shape environmental policy, this Article examines the voting patterns of the appointees of Presidents Carter and Reagan on the federal courts of appeals. Further, a detailed study of two subsets of environmental cases, Clean Air Act decisions and Clean Water Act decisions, provides data to assist the reader in measuring shifts in judicial attitudes with respect to environmental regulation. This data suggests that judges appointed by President Reagan are more inclined than those judges appointed by President Carter to adopt positions that either narrow the application of existing pollution abatement requirements or discourage the recognition of new abatement obligations. The creation of Reagan/Bush supermajorities on the courts of appeals may lay the foundation for increasingly critical judicial scrutiny of pollution abatement restrictions.<sup>17</sup>

President Reagan's environmental policy goals and his efforts to achieve ideological uniformity in the judiciary are presented in Section II of this Article. The Article then presents the study of the judicial voting patterns in three parts. Section III describes the study's methodology. The observations are based on a review of 290 decisions handed down by the courts of appeals between January 20, 1977, and November 30, 1990. Section IV then outlines results of the survey of Clean Air Act and Clean Water Act decisions. Section V sets out the qualitative features of the survey data. The data reveals a sharper dichotomy in voting patterns between the Carter and Reagan appointees on the Court of Appeals for the District of Columbia Circuit than on other courts of appeals. The data reflects a similar disparity, between Carter and Reagan appointee voting, in

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*of the EPA's Regulatory Enforcement: The Case of Industrial Effluent Standards*, 33 J.L. & ECON. 331 (1990) (finding that EPA inspection programs have yielded compliance with water pollution regulations for pulp and paper industry, and that remaining challenge of water pollution control efforts is to set abatement standards that effectively balance benefits with compliance costs).

In 1982, the General Accounting Office estimated that replacing command-and-control techniques with greater reliance on market-oriented incentives could result in a 40% to 90% reduction in pollution control costs. GENERAL ACCOUNTING OFFICE, A MARKET APPROACH TO AIR POLLUTION CONTROL COULD REDUCE COMPLIANCE COSTS WITHOUT JEOPARDIZING CLEAN AIR GOALS 32 (1982). In the same year, the Congressional Budget Office calculated that, by the year 2000, the United States could save \$3.3 billion annually by permitting electric utilities to meet sulphur dioxide abatement goals by burning low-sulphur coal rather than by using mandated chemical treatment methods. See CONGRESSIONAL BUDGET OFFICE, THE CLEAN AIR ACT, THE ELECTRIC UTILITIES AND THE COAL MARKET 62 (1982).

<sup>17</sup> See *infra* notes 152-65 and accompanying text.

a review of the Court of Appeals for the District of Columbia Circuit decisions involving the Resource Conservation and Recovery Act (RCRA). Section V also presents evidence suggesting that the Reagan appointees are more inclined than their Carter counterparts to place jurisdictional and remedial hurdles in the paths of private litigants seeking to enforce or expand pollution abatement requirements.<sup>18</sup> The analysis concludes with a look at the likely impact that President Bush's appointments will have upon court of appeals decisions on environmental issues.<sup>19</sup>

## II. ENVIRONMENTAL POLICY AND THE REAGAN ADMINISTRATION

When he assumed the presidency in 1981, Ronald Reagan placed near the top of his domestic policy agenda the goal of reducing compliance burdens associated with environmental controls and other federal health and safety regulations.<sup>20</sup> In his first State of the Union message, the new President said that "a virtual explosion in governmental regulation during the past decade" had caused "higher prices, higher unemployment, and lower productivity growth."<sup>21</sup> President Reagan disavowed any "intention of dismantling the regulatory agencies, especially those necessary to protect [the] environment and assure the public health and safety."<sup>22</sup> But he warned that "we must come to grips with inefficient and burdensome regulations, eliminate those we can and reform the others."<sup>23</sup> Among the first initiatives of his administration, President Reagan established a Presidential Task Force on Regulatory Relief to identify approaches for curbing existing regulatory controls.<sup>24</sup>

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<sup>18</sup> See *infra* notes 113-44 and accompanying text.

<sup>19</sup> See *infra* notes 152-65 and accompanying text.

<sup>20</sup> The basic elements of President Reagan's regulatory reform agenda are described in G. EADS & M. FIX, *RELIEF OR REFORM: REAGAN'S REGULATORY DILEMMA* (1984); Nathan, *The Reagan Presidency in Domestic Affairs*, in *THE REAGAN PRESIDENCY: AN EARLY ASSESSMENT* 48 (F. Greenstein ed. 1983). See also M. DERTHICK & P. QUIRK, *THE POLITICS OF DEREGULATION* 212-13 (1985) (discussing importance of environmental protection as a target of Reagan administration regulatory reform); Mosher, *Reagan and Environmental Protection—None of the Laws Will Be Untouchable*, *Nat'l J.*, Jan. 3, 1981, at 17. "[I]f anything can be predicted in the new Administration, it is an effort to trim the powers of the Environmental Protection Agency (EPA) and other environmental regulators." Mosher, *supra*, at 17.

<sup>21</sup> Program for Economic Recovery—Address Before a Joint Session of the Congress, 17 *WEEKLY COMP. PRES. DOC.* 130, 135-36 (Feb. 18, 1981).

<sup>22</sup> *Id.* at 136.

<sup>23</sup> *Id.*

<sup>24</sup> In announcing the formation of the Task Force, the President said:

[R]egulatory reform . . . is one of the keystones in our program to return the Nation to prosperity and to set loose again the ingenuity and energy of the American people. Government regulations impose an enormous burden on large and small businesses

The Reagan administration immediately focused upon federal environmental protection policy in its regulatory reform efforts. The attempted redirection took several forms. The Office of Management and Budget (OMB) conducted more exacting cost-benefit reviews of proposed regulations.<sup>25</sup> President Reagan initially appointed less intervention-oriented leadership to head the Environmental Protection Agency (EPA).<sup>26</sup> The Reagan administration substantially reduced the EPA's budget, causing major staff cuts and reducing the agency's ability to initiate new enforcement matters.<sup>27</sup> The EPA experimented more extensively with market-based economic pollution abatement incentives to replace command and control techniques.<sup>28</sup>

in America, discourage productivity, and contribute substantially to our current economic woes.

Presidential Task Force on Regulatory Relief—Remarks Announcing the Establishment of the Task Force, 17 WEEKLY COMP. PRES. DOC. 33, 33-34 (Jan. 22, 1981).

<sup>25</sup> See R. HARRIS & S. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* 100-13, 257-58 (1989); Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984).

<sup>26</sup> See G. EADS & M. FIX, *supra* note 20, at 140-48; R. HARRIS & S. MILKIS, *supra* note 25, at 113-24; K. MEIER, *REGULATION—POLITICS, BUREAUCRACY, AND ECONOMICS* 163-65 (1985); Langenfeld & Walton, *Regulatory Reform Under Reagan—The Right Way and the Wrong Way*, in *REGULATION AND THE REAGAN ERA* 41, 57-58 (R. Meiners & B. Yandle eds. 1989). The crucial element of the Reagan administration's appointments strategy at the EPA was the selection of Ann Burford to head the agency. Professors Harris and Milkis aptly summarize the impact of Burford's contentious tenure at the EPA:

In the wake of disappointments within the business community, outrage among environmentalists, a drumbeat of criticism from the media about politicizing the EPA, and a contempt citation from Congress for refusing to turn over agency documents for legislative hearings, Ann Burford stepped down as administrator . . . [B]y 1983 the EPA was at its nadir in terms of effectiveness and credibility.

R. HARRIS & S. MILKIS, *supra* note 25, at 264-65.

<sup>27</sup> See R. HARRIS & S. MILKIS, *supra* note 25, at 255-56; P. HEYMANN, *THE POLITICS OF PUBLIC MANAGEMENT* 9 (1987); cf. Kovacic, *Public Choice and the Public Interest: Federal Trade Commission Enforcement During the Reagan Administration*, 33 ANTITRUST BULL. 467, 485, 497-500 (1988) (discussing Reagan administration's use of budget cuts to constrain regulatory activities of Federal Trade Commission). *But see* Ludwizewski, *Reagan Team Fought Pollution in the Courts*, *Wall St. J.*, Oct. 5, 1988, at A32, col. 3 (disputing view that EPA enforcement activity declined during first term of Reagan administration).

<sup>28</sup> See generally R. LIROFF, *REFORMING AIR POLLUTION REGULATION: THE TOIL AND TROUBLE OF EPA'S BUBBLE* (1986); Hahn & Lester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109 (1989); Tietenberg, *Uncommon Sense: The Program to Reform Pollution Control Policy*, in *REGULATORY REFORM: WHAT ACTUALLY HAPPENED?* 280-301 (L. Weiss & M. Klass eds. 1986); Tripp & Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 YALE J. ON REG. 369 (1989); Note, *The Iron and Steel Industry Consent Decree: Implementing the Bubble Policy Under the Clean Water Act*, 4 VA. J. NAT. RESOURCES L. 155 (1984). In important respects, EPA efforts during the 1980s to use market-oriented incentives built upon programs, such as the use of "bubbles," first devised in the 1970s. See Costle, *The Environ-*

These reform approaches yielded few enduring policy adjustments, when measured against the robust expectations that accompanied the beginning of the Reagan presidency.<sup>29</sup> In addition, a much-anticipated legislative effort to loosen the requirements of the Clean Air Act and the Clean Water Act never materialized.<sup>30</sup>

Beyond these direct strategies for regulatory reform, President Reagan attempted to use judicial appointments to change the course of federal regulatory policy. The Reagan administration reshaped the federal judiciary from 1981 through 1988. President Reagan appointed the Chief Justice of the Supreme Court, selected three

*mental Protection Agency's Initiatives*, in REFORMING REGULATION 130 (T. Clark, M. Kusters & J. Miller III eds. 1980) (discussing EPA experiments with bubbles during Carter administration); Landau, *Economic Dream or Environmental Nightmare? The Legality of the "Bubble Concept" in Air and Water Pollution Control*, 8 B.C. ENVTL. AFF. L. REV. 741 (1980) (discussing origins of the EPA's alternative emission production options policy). The Reagan administration's efforts in the mid-1980s to extend these programs took place only after the resignation of Ann Burford as EPA Administrator. Burford had viewed the EPA's market-oriented abatement experiments of the 1970s with suspicion because such initiatives had their roots in the Carter administration. See Langenfeld & Walton, *supra* note 26, at 57.

<sup>29</sup> Crandall, *What Ever Happened to Deregulation?*, in ASSESSING THE REAGAN YEARS 271, 280 (D. Boaz ed. 1988).

When the Reagan administration assumed office, it was expected to tackle the environmental issues with a vengeance. At the very least, it would slow the pace of new regulations and offer new clean-air legislation for congressional consideration. Unfortunately, a concerted assault on environmental issues never occurred, in part because of minor numerous controversies within EPA.

*Id.* For similar assessments of Reagan administration efforts to redirect environmental policy, see R. HARRIS & S. MILKIS, *supra* note 25, at 275-76; Langenfeld & Walton, *supra* note 26, at 55-59; Smith, *What Environmental Policy?*, in ASSESSING THE REAGAN YEARS, *supra*, at 333; Stroup, *Environmental Policy*, REGULATION, Winter 1988, at 43.

<sup>30</sup> See M. DERTHICK & P. QUIRK, *supra* note 20, at 213; Crandall, *supra* note 29, at 281-84. Several commentators have noted that the Reagan administration not only failed to roll back existing statutory requirements but acquiesced in the enactment of new legislative commands. See Crandall, *supra* note 29, at 284.

Perhaps the most disconcerting aspect of environmental policy in the past six years has been the steady shift from pollution control to political pork barrel. . . . The 1986 Superfund legislation created a new, broadbased business-tax program of \$1.8 billion per year that is more a pork barrel than a serious environmental program. . . . That the Reagan administration could not slow this assault on the taxpayer is evidence of its impotence in the environmental area.

*Id.*; see also Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVTL. L. 153, 154 (1988).

The American public . . . correctly perceived that the Reagan administration's policies would sacrifice [environmental] goals. Recent Congressional legislation has revived the environmental regulatory strategies of the early 70's, enacting ambitious and detailed command and control programs for hazardous waste control and cleanup. These statutes include highly specific, court-enforced mandates and deadlines for administrative enforcement.

*Id.*



new members of the Supreme Court, and accounted for forty-seven percent of all judges sitting on the federal district courts and circuit courts of appeals.<sup>31</sup> In making these appointments, the Reagan administration sought to alter the federal judiciary's ideological perspective by choosing individuals who were more likely to doubt the efficacy of economic regulation.<sup>32</sup> Although the notion that a president would use judicial appointments to achieve desired policy ends is not remarkable,<sup>33</sup> the Reagan administration's attempt to attain ideological uniformity often is said to have been unmatched in its determination and thoroughness.<sup>34</sup>

The ideology of the Reagan appointees is especially important to the formation of federal environmental policy. For the past twenty years, federal judges have played a pivotal role in determining the scope and content of pollution abatement statutes and other environmental policy measures.<sup>35</sup> "Recent history," Judge Malcolm

<sup>31</sup> Sheldon Goldman has calculated that President Reagan filled 346 of the 736 positions on the federal courts of appeals and district courts. Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 318-19 (1989).

<sup>32</sup> See H. SCHWARTZ, PACKING THE COURTS, 8-9 (1988); Wermiel, *Reagan Choices Alter the Makeup and Views of the Federal Courts*, Wall St. J., Feb. 1, 1988, at 1, col. 1; *The Judiciary: A Great Right Hope*, Nat'l. L.J., Apr. 18, 1988, at 22; *Law and Economics: A New Order in the Court?*, BUS. WK., Nov. 16, 1987, at 93; *Reagan Justice: A Conservative Legacy on the Appellate Courts*, Legal Times, May-June 1988 (special supplement) [hereinafter *Reagan Justice*].

<sup>33</sup> See Solomon, *The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.*, 1984 AMER. BAR FOUND. RES. J. 285 (1984).

<sup>34</sup> See D. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 102 (1990) (observing that the Reagan administration used "the most rigorous process for judicial selection ever"); H. SCHWARTZ, *supra* note 32, at 9 ("the current conservative campaign to achieve ideological purity throughout the federal judiciary goes beyond prior efforts. . . it is being pressed with much greater determination and much more systematically. . ."); Bandow, *The Conservative Judicial Agenda: A Critique*, in ECONOMIC LIBERTIES AND THE JUDICIARY 257, 264-65 (J. Dorn & H. Manne eds. 1987) (observing that the Reagan Justice Department's judicial selection process "though no more partisan than that of past presidents, places greater emphasis on ideology"); Freiwald, *The Mission: Stock Bench*, Legal Times, May-June 1988, at 6, 7 (segment from special supplement *Reagan Justice*, *supra* note 32).

If experts differ on the lasting ideological impact of the new Reagan judges, almost everyone agrees that the administration's methodology in choosing them represented a sharp break with tradition. No longer was loyalty to the party, or trial and litigating experience, as important as was a well-documented fealty to conservative ideology. Freiwald, *supra*, at 7; see also Goldman, *supra* note 31, at 319-20. "Arguably, the Reagan administration was engaged in the most systematic judicial philosophical screening of judicial candidates ever seen in the nation's history, surpassing Franklin Roosevelt's administration." Goldman, *supra*, at 319-20.

<sup>35</sup> See, e.g., R. MELNICK, *supra* note 2, at 1. "The federal courts [in air pollution cases] have done far more than adjudicate disputes between private parties or prevent administrators from exceeding their statutory authority. They have announced sweeping rulings on policy

Wilkey of the District of Columbia Circuit has said, "would indicate that the prime mover behind implementation of the Clean Air Act has not been Congress or EPA, but the courts—specifically, this court."<sup>36</sup> The immediate impact of judicial interpretations of environmental statutes and regulations is significant, but federal judges do more than affect policy development in the short run. Next to achieving a fundamental narrowing of a regulatory agency's enabling statute, the power to nominate judges with a shared vision of the government's appropriate role is probably a president's most effective

issues left unresolved by existing legislation, often expanding the scope of government programs in the process." *Id.*; see also W. RODGERS, JR., *ENVIRONMENTAL LAW* 737 (1977).

Judicial review of agency compliance with NEPA, especially the procedural aspects, is consistently rigorous. Although the courts are mindful of limitations on their powers to second-guess the agencies, they scarcely could be more demanding of the decision-making process if they were sitting in nuisance cases with absolute authority to shape the final outcome.

RODGERS, *supra*, at 737; see also Marcus, *The Environmental Protection Agency*, in *THE POLITICS OF REGULATION* 267, 293 (J. Wilson, ed. 1980).

In these air-pollution examples, the courts interfered with the administrator's efforts to carry out what he believed was a reasonable implementation strategy. They did not give him the right to make a trade-off he thought necessary for the purpose of administration. The courts also interfered with agency efforts to carry out its water-pollution implementation strategy.

Marcus, *supra*, at 293; see also F. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* (1973); R. HARRIS & S. MILKIS, *supra* note 25, at 241-43 (discussing importance of private suits in monitoring administrative execution of environmental policy); R. LIROFF, *A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH* (1976) (documenting the judiciary's role in determining NEPA's content); J. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 281-82, 287-89 (1989) (discussing judiciary's influence in shaping the EPA's behavior); McCubbins, Noll & Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 450-68 (1989) (discussing role of courts in shaping policies concerning degradation of air quality in pristine regions); O'Leary, *The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency*, 41 ADMIN. L. REV. 549 (1989); Wald, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 514-19 (1988) (Chief Judge Patricia M. Wald's description of the District of Columbia Circuit's formative role in the 1970s in reviewing implementation of new environmental protection legislation); Stewart, *The Development of Administrative and Quasi-Constitutional Law Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713 (1977) (discussing federal judiciary's role in reviewing the federal Environmental Protection Agency's implementation of the Clean Air Act).

<sup>36</sup> *Ethyl Corp. v. EPA*, 541 F.2d 1, 88 n.88 (D.C. Cir. 1976) (dissenting opinion); see also *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 848-49 (D.C. Cir. 1972).

This court has been assigned special responsibility for determining challenges to EPA's air quality standards. This judicial review rests on the premise that agency and court "together constitute a 'partnership' in furtherance of the public interest, and are collaborative instrumentalities of justice." This court is in a real sense part of the total administrative process.

*Kennecott*, 462 F.2d at 848 (citation and footnote omitted).

tive means of ensuring that his regulatory preferences will endure well after his term of office has ended.<sup>37</sup>

The potential for the Reagan appointments to guide future judicial decisionmaking has attracted considerable scholarly and popular attention.<sup>38</sup> Discussions of the Reagan administration's judicial selection process often assume that virtually all Reagan appointees have brought conservative policy preferences to the bench.<sup>39</sup> The importance of Reagan appointee policy preferences ultimately depends upon how such views shape the resolution of specific cases.<sup>40</sup> In a representative assessment of the Reagan judiciary's voting behavior,

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<sup>37</sup> On the significance of judicial appointments to the durability of an administration's regulatory preferences, see Kovacic, *Built to Last? The Antitrust Legacy of the Reagan Administration*, 35 FED. BAR NEWS & J. 244, 247 (1988); Kovacic, *supra* note 27, at 496-97. Professor Peter Strauss observes that "[o]ne of the situations that faces the country today and may be endemic for our future is that we have a Republican presidency and a Republican judiciary lined up against a Democratic Congress." *Administrative Law Symposium: Question & Answer with Professors Elliott, Strauss, and Sunstein*, 1989 DUKE L.J. 551, 554. Such an alignment could affect significantly the future role of government intervention in controlling economic activity. Professor Strauss suggests, for example, that one consequence of "an allegiance between President and judiciary against Congress" might be the inclination of judges to emphasize "plain meaning approaches to statutory construction." *Id.* at 554; see also L. BAUM, *AMERICAN COURTS—PROCESS AND POLICY* 300 (2d ed. 1990). "[I]n general, from the Supreme Court to state intermediate courts, judges' preferences on individual issues and their general positions on the liberal-conservative spectrum go far toward determining their behavior on the bench. . . . Given enough opportunities and sufficient care, a chief executive can have a fundamental effect on court policies." L. BAUM, *supra*, at 300.

<sup>38</sup> See, e.g., B. SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION* (1990); H. SCHWARTZ, *supra* note 32; Fowler, *Judicial Selection Under Reagan and Carter: A Comparison of Their Initial Recommendation Procedures*, 67 JUDICATURE 265 (1984); Fowler, *A Comparison of Their Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter*, 1 YALE L. & POL'Y REV. 299 (1983); Goldman, *Reorganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313 (1985); Goldman, *Reagan's Second Term Appointments: The Battle at Midway*, 70 JUDICATURE 324 (1987); Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48 (1986); Rowland, Songer & Carp, *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 L. & SOC'Y REV. 191 (1988); Slotnick, *Federal Judicial Recruitment and Selection Research: A Review Essay*, 71 JUDICATURE 317 (1988); Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 JUDICATURE 133 (1990); Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987) [hereinafter *All the President's Men?*]; Pilon, *Rethinking Judicial Restraint*, Wall St. J., Feb. 1, 1991, at A10, col. 4. Skoning, *Reagan Judges: Bad News for Business?*, Wall St. J., Aug. 31, 1989, at A14, col. 3.

<sup>39</sup> See, e.g., B. SCHWARTZ, *supra* note 38, at 222. "Almost all the Reagan [judicial] appointees were conservatives who shared the president's widely expressed desire to tilt the federal bench to the right." *Id.*

<sup>40</sup> See Solomon, *supra* note 33, at 343. "The crucial question concerning the relationship of law and politics to the selection of federal judges is what difference the various selection patterns have made in the outcomes of cases." *Id.*

Professor Herman Schwartz concludes that "most recent Republican appointees are considerably more hostile to civil rights, economic regulation, and other liberal programs than their Democratic colleagues."<sup>41</sup> Some commentators claim that "conservative court packing"<sup>42</sup> has yielded a significant, judicially-directed retrenchment of government programs to regulate business.<sup>43</sup>

Empirical efforts to measure the "conservative court packing" hypothesis in the context of cases involving economic regulation are rare. Typically, assessments of the Reagan judiciary rest upon an examination of the decisions of a handful of well-known judges.<sup>44</sup> Relatively few studies have attempted to evaluate the voting behavior of broad segments of the Reagan judiciary in cases involving economic regulation, specifically cases involving environmental policy.<sup>45</sup> This Article offers a broad empirical test of how President Reagan's appointments have shaped the federal judiciary's disposition of economic regulation cases. It examines voting behavior in environmental protection matters by comparing the votes of President Carter's and President Reagan's appointees in the federal courts of appeals, primarily in cases involving Clean Air Act and Clean Water Act issues.<sup>46</sup> In analyzing the voting patterns in the Court of Appeals for the District of Columbia Circuit, cases involving RCRA are included to confirm the study's Clean Water Act and Clean Air Act findings.

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<sup>41</sup> H. SCHWARTZ, *supra* note 32, at 8-9.

<sup>42</sup> *Id.* at 9.

<sup>43</sup> See B. SCHWARTZ, *supra* note 38, at 163-89; H. SCHWARTZ, *supra* note 32, at 192-98.

<sup>44</sup> See, e.g., B. SCHWARTZ, *supra* note 38, at 222-49; H. SCHWARTZ, *supra* note 32, at 103-67.

<sup>45</sup> For noteworthy exceptions, see Cohen, *The Role of Criminal Sanctions in Antitrust Enforcement*, CONTEMP. POL'Y ISSUES, Oct. 1989, at 36 (examining determinants of judicial sentencing decisions in antitrust cases); Wenner, *Judicial Oversight of Environmental Deregulation*, in ENVIRONMENTAL POLICY IN THE 1980'S 181 (N. Vig & M. Kraft eds. 1984) (examining judicial decisions involving environmental policy); Note, *All the President's Men?*, *supra* note 38 (examining voting behavior in selected areas of economic regulation); Stanfield, *Out-Standing in Court*, Nat'l J., Feb. 13, 1988, at 388 (discussing recent decisions governing standing in environmental suits); see also Pierce, *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300 (examining impact of ideological split between Carter and Reagan appointees upon the District of Columbia Circuit's review of administrative agency rules).

<sup>46</sup> I have compared the voting of Reagan appointees to that of Carter appointees because one of President Reagan's stated aims was to abandon the judicial selection philosophy that had animated President Carter's nominations for the federal bench. As Christopher Smith explains, "Clearly the Reagan administration's efforts to shape the judiciary evinced an intention to change the federal courts by generating different judicial outcomes than those produced by President Carter's Democratic appointees." Smith, *supra* note 38, at 133.

The methodology section of this Article explains the criteria used to select the relevant cases and to classify the individual voting behavior of the judges. The basic substantive distinction used throughout the survey is whether the judges have voted to increase or decrease the regulatory burdens associated with fulfilling pollution abatement requirements. On the whole, the Reagan judges have voted more "conservatively" than the Carter judges, but not by the dramatic margin often predicted in evaluations of the Reagan administration's judicial selection process. One qualifying consideration is that disagreement among Carter and Reagan appointees sitting on the same panel is relatively unusual, with agreement occurring in close to ninety percent of all cases in which appointees of both presidents participated.

The data provide qualified support for the hypothesis that Reagan appointees are more inclined than their Carter appointed counterparts to adopt positions that narrow the applications of pollution regulations. The apparent disparity between the Carter appointees' and the Reagan appointees' environmental policy preferences is most pronounced in the decisions of the Court of Appeals for the District of Columbia Circuit. This sharper dichotomy between the Carter and Reagan appointees is reflected in the Reagan appointees' votes that display a greater skepticism toward the expansion of pollution control requirements. Preliminary evidence suggests that President Bush will appoint judges who share the preferences of their Reagan counterparts on the courts of appeals. Such a trend will give Reagan/Bush judges supermajorities on most circuits by the end of 1992, thus increasing the likelihood of burden-reducing outcomes in individual cases and in en banc proceedings. Continued appointment of judges with narrow regulatory preferences also would serve to offset the effects of the Bush administration's selection of more aggressive leadership to head federal regulatory bodies such as the EPA.

### III. METHODOLOGY

Published studies of Reagan-era judicial decisionmaking in environmental law cases can be divided into four categories. The first and largest category consists of surveys that examine noteworthy environmental decisions<sup>47</sup> for a single year or a period of years. The

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<sup>47</sup> See, e.g., ABA SECTION OF NATURAL RESOURCES, ENERGY, AND ENVIRONMENTAL LAW, *THE YEAR IN REVIEW: 1988*, at 135-248 (1989) (discussing, *inter alia*, environmental case law developments in the federal courts); Goldsmith & Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 *HARV. ENVTL. L. REV.* 1 (1983) (discussing trends in Supreme Court analysis of environmental issues under NEPA, the Clean

second category contains evaluations of individual significant cases.<sup>48</sup> The third group includes analyses of trends in judicial treatment of specific environmental issues, such as the standing of private parties in environmental enforcement actions.<sup>49</sup> The final category details the environmental policy jurisprudence of individual Reagan appointees to the federal bench.<sup>50</sup> In these studies, the evaluations of voting behavior by Reagan appointees feature discussions of selected cases rather than a comprehensive examination of all relevant decisions.

In order to assess the environmental policy significance of President Reagan's appointments to the federal judiciary in a more comprehensive manner, this study takes an approach that differs from other studies. This Article evaluates Reagan appointee voting behavior on the federal courts of appeals by comparing the decisions of Reagan appointees to those of judges selected by President Carter. Rather than focusing on a small number of prominent cases, this paper affords a more complete perspective on voting behavior. This study reviews all the Clean Air Act and Clean Water Act cases in which a Carter or Reagan appointee participated. This comprehensive survey of relevant decisions provides a fuller portrait of the Reagan judiciary's environmental policy voting tendencies. Specifically, this study facilitates the reader's assessment of whether Reagan appointees as a group tend to share the conservative, deregulatory preferences commonly associated with the notable appeals court appointees such as Robert Bork, Frank Easterbrook, Douglas Ginsburg, Alex Kozinski, Richard Posner, Antonin Scalia, and Ralph Winter.

### A. Selection of Cases

To compare the voting behavior of Carter and Reagan appointees on the courts of appeals, this study focused upon two subsets of

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Air Act, and the Occupational Health and Safety Act); Comment, *The Supreme Court: The 1985-1986 Term in Review and a Look Ahead*, 16 ENVTL. L. REP. 10,325 (Nov. 1986) (analyzing Supreme Court environmental law decisions for the 1985-1986 term).

<sup>48</sup> For example, many commentators have analyzed the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) to endorse the EPA's use of a "bubble" concept in regions designated as non-attainment areas under the Clean Air Act. See Landau, *Chevron, U.S.A. v. NRDC: The Supreme Court Declines to Burst EPA's Bubble Concept*, 15 ENVTL. L. 285 (1985); Starr, Sunstein, Willard & Morrison, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353 (1987) (panel discussion moderated by R. Levin).

<sup>49</sup> See, e.g., Stanfield, *supra* note 45 (discussing how Reagan-appointed judges have dealt with standing issues in environmental law cases).

<sup>50</sup> See, e.g., Comment, *Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135 (1987) (discussing Justice Scalia's treatment of standing issues during his tenure as a member of the District of Columbia Circuit).

environmental law decisions: cases involving the Clean Air Act and the Clean Water Act. A three-step selection process was used to identify relevant cases for examination.

## 1. Judges

A complete listing of all Carter and Reagan appointees to the federal courts of appeals was assembled.<sup>51</sup> This roster includes individuals who continue to serve as court of appeals judges, as well as those who subsequently left office.<sup>52</sup> Judges who were elevated from the federal district court to the court of appeals were included only as of the day of their confirmation to the appellate court.<sup>53</sup> Judges are counted as being Carter or Reagan appointees according to the president who made the appointment to the court of appeals.<sup>54</sup> Finally, the survey counts cases in which Carter or Reagan appointees to the United States Court of Appeals for the Federal Circuit participated by designation in the decisions of the other courts of appeals.<sup>55</sup>

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<sup>51</sup> This roster was assembled by reviewing membership listings contained in each volume of the Federal Reporter (Second) and commercially available reference works dealing with the federal judiciary. See 1991 JUDICIAL STAFF DIRECTORY (A. Brownson ed. 1990); 1990 JUDICIAL STAFF DIRECTORY (A. Brownson ed. 1989); 1989 JUDICIAL STAFF DIRECTORY (C. Brownson & A. Brownson eds. 1988); 1988 JUDICIAL STAFF DIRECTORY (C. Brownson & A. Brownson eds. 1987).

<sup>52</sup> For example, the survey includes cases in which Robert Bork participated on the District of Columbia Circuit from his confirmation in 1982 until his resignation in 1988. Similarly, the survey counts cases in which Antonin Scalia participated on the District of Columbia Circuit from his confirmation in 1982 until he became an associate justice of the Supreme Court in 1986.

<sup>53</sup> For example, Judge Bruce M. Selya was appointed to the United States District Court for Rhode Island in 1982 and then was appointed to the United States Court of Appeals for the First Circuit in 1986. The survey omits votes cast by Judge Selya in First Circuit decisions in which Judge Selya participated by designation during his tenure on the United States District Court. See, e.g., *United States v. Puerto Rico*, 721 F.2d 832, 833 (1st Cir. 1983). For the same reason, the survey excludes the vote cast by Judge Ralph B. Guy, Jr. in *United States v. Tennessee Water Quality Control Bd.*, 717 F.2d 992, 993 (6th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). The *Tennessee Water Quality* panel included Judge Guy, a United States district judge appointed in 1975 by President Ford. Judge Guy was appointed to the Court of Appeals for the Sixth Circuit by President Reagan in 1985.

<sup>54</sup> For example, Judge Juan R. Torruella was appointed to the United States District Court for Puerto Rico in 1974 by President Ford and then was appointed to the United States Court of Appeals for the First Circuit in 1984 by President Reagan. Because President Reagan appointed him to the court of appeals, Judge Torruella is counted as a Reagan appointee.

<sup>55</sup> See, e.g., *Sierra Club v. SCM Corp.*, 747 F.2d 99, 100 (2d Cir. 1984) (panel including Judge Howard J. Markey, who was reassigned as Chief Judge, United States Court of Appeals for the Federal Circuit, in 1982 by President Reagan).

## 2. Cases: Initial Screening

The initial universe of court of appeals cases for study consisted of all cases meeting three criteria:<sup>56</sup> (a) a Carter or Reagan appointee participated on the panel deciding the case;<sup>57</sup> (b) the case involved, directly or indirectly, the interpretation or enforcement of abatement requirements under the Clean Air Act or the Clean Water Act;<sup>58</sup> and (c) the case was decided from January 20, 1977 (the date of President Carter's inauguration) through November 30, 1990. The initial search yielded a total of 290 cases meeting these criteria.<sup>59</sup>

## 3. Cases: Screening for Substantive Issues

Following a review of the initial set of 290 cases, the list of decisions for further study was restricted to matters that involved substantive Clean Air Act and Clean Water Act issues concerning standing, abatement requirements (and related liability rules), and remedies. Application of this criterion resulted in the omission of three types of decisions.

The first group of excluded decisions was concerned, exclusively or chiefly, with inspection disputes, discovery problems, or procedural issues that did not require the court to address standing, liability, or remedial standards. Omitted cases in this category involved matters such as the EPA's authority to conduct on-site inspection or surveillance of company facilities;<sup>60</sup> the EPA's power to

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<sup>56</sup> Lexis and Westlaw databases were used to identify relevant cases. I am deeply indebted to Sean Coleman and Steven Taylor for their assistance in identifying and screening relevant cases.

<sup>57</sup> Most of the cases reviewed were decided by three-judge panels. Thus, a case decided by a three-judge panel was included if it contained at least one Carter or Reagan appointee. During the survey period, appointees of President Bush participated in three cases involving Clean Air Act or Clean Water Act issues. The aggregate voting statistics presented below include the votes cast by Bush appointees in these cases.

<sup>58</sup> By using this criterion, the study omits cases in which either the Clean Air Act or the Clean Water Act is mentioned as part of the background of a dispute whose underlying liability and remedial issues are predicated upon neither environmental statute. *See, e.g.*, *Luterbach Constr. Co. v. Adamakus*, 781 F.2d 599, 600-02 (7th Cir. 1986) (bid protest action involving award of a contract to be performed with funds appropriated for waste water treatment facilities under the Clean Water Act); *Pennbank v. United States*, 779 F.2d 175, 176 (3d Cir. 1985) (Federal Tort Claims Act claim alleging negligence by government authorities in construction of a municipal sewer project undertaken to satisfy water quality requirements of the Clean Water Act); *Clevepak Corp. v. EPA*, 708 F.2d 137, 139-41 (4th Cir. 1983) (bid protest action involving award of a contract to be performed with funds appropriated for wastewater treatment facilities under the Clean Water Act).

<sup>59</sup> A complete list of the cases examined in this study is on file with the author.

<sup>60</sup> *See, e.g.*, *Boulos v. Wilson*, 834 F.2d 504, 505-06 (5th Cir. 1987) (resolving allegations



obtain access to company records;<sup>61</sup> deadlines for filing challenges to conditions embodied in discharge permits;<sup>62</sup> Freedom of Information Act requests;<sup>63</sup> determinations of venue in cases of multiple, simultaneous filings to attack proposed EPA rules;<sup>64</sup> issuance of protective orders;<sup>65</sup> replacement costs associated with installation of facilities mandated by the Clean Water Act;<sup>66</sup> dismissals of challenges to EPA enforcement initiatives based upon the absence of reviewable final agency action;<sup>67</sup> and the preemptive effect of the Clean Air Act upon state statutes governing the sale of gray-market automobiles.<sup>68</sup>

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that EPA officials investigating Clean Air Act violations conducted warrantless search of gasoline station and seized gasoline samples and records without the owner's consent); *Dow Chem. Co. v. United States*, 749 F.2d 307, 309 (6th Cir. 1984), *aff'd*, 476 U.S. 227 (1985) (action by chemical company to enjoin the EPA from conducting aerial surveillance and photography to detect possible Clean Air Act violations); *Mobil Oil Corp. v. EPA*, 716 F.2d 1187, 1188 (7th Cir. 1983) (upholding the EPA's authority to collect samples from streams of industrial waste); *Bunker Hill Co. v. EPA*, 658 F.2d 1280, 1282 (9th Cir. 1981) (suit over the EPA's right to enforce warrant to inspect industrial facility pursuant to the Clean Air Act); *Stauffer Chem. Co. v. EPA*, 647 F.2d 1075, 1075-77 (10th Cir. 1981) (motion to quash administrative search warrant authorizing the EPA to inspect premises of an emission source).

<sup>61</sup> *See, e.g.*, *CED's Inc. v. EPA*, 745 F.2d 1092, 1094 (7th Cir. 1984) (involving scope of the EPA's authority to copy company records under the Clean Air Act), *cert. denied*, 471 U.S. 1015 (1985).

<sup>62</sup> *See, e.g.*, *Texas Mun. Power Agency v. EPA*, 799 F.2d 173, 173 (5th Cir. 1986) (untimely filing of petition for review of EPA decision establishing conditions for National Pollution Discharge Elimination System permit).

<sup>63</sup> *See, e.g.*, *Brant Constr. Co. v. EPA*, 778 F.2d 1258, 1260 (7th Cir. 1985) (Freedom of Information Act request for unsolicited letters the EPA received concerning allegations of illegal conduct by a contractor building waste treatment facilities with an EPA grant funded under title II of the Clean Water Act).

<sup>64</sup> *See, e.g.*, *Virginia Elec. & Power Co. v. EPA*, 655 F.2d 534, 536-37 (4th Cir. 1981) (determining proper venue for petitions for judicial review of EPA regulations governing, *inter alia*, discharge permit program under the Clean Water Act); *Natural Resources Defense Council v. EPA*, 673 F.2d 392, 394-95 (D.C. Cir. 1980) (same issue as in *Virginia Elec. & Power*).

<sup>65</sup> *See, e.g.*, *New York v. United States Metals Ref. Co.*, 771 F.2d 796, 801 (3d Cir. 1985) (affirming, in Clean Air Act case, issuance of protective order that temporarily barred public release of state government report on emissions).

<sup>66</sup> *See Consumers Power Co. v. Costle*, 615 F.2d 1147, 1148 (6th Cir. 1980) (action by power company to recover costs incurred in replacing gas mains relocated to accommodate construction of waste water and sewer projects funded under title II of the Clean Water Act).

<sup>67</sup> *See Westvaco Corp. v. EPA*, 899 F.2d 1383, 1389 (4th Cir. 1990); *Greater Cincinnati Chamber of Commerce v. EPA*, 879 F.2d 1379, 1383-84 (6th Cir. 1989); *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1082 (3d Cir. 1989); *Pacificorp v. Thomas*, 883 F.2d 661, 661 (9th Cir. 1988).

<sup>68</sup> *See, e.g.*, *Sims v. Florida Dep't of Highway Safety and Motor Vehicles*, 862 F.2d 1449, 1455 (11th Cir. 1989) (Florida statute governing gray market automobile imports deemed preempted by the Clean Air Act); *Direct Auto. Imports Ass'n v. Townsley*, 804 F.2d 1408, 1409 (5th Cir. 1986) (action involving preemptive effect of the Clean Air Act upon Texas statute regulating gray market automobiles).

The second category of excluded cases consisted of decisions in which Clean Air Act or Clean Water Act claims were pursued in conjunction with claims based upon other environmental protection statutes. Certain types of conduct—for example, a company's discharge of hazardous material into a river—can expose the facility owner to liability under two or more environmental protection statutes. This survey omits decisions in which the plaintiff pled Clean Air Act or Clean Water Act claims, but the court's ruling was based on the application of a related statute such as RCRA<sup>69</sup> or the Endangered Species Act.<sup>70</sup>

The final group of omitted cases involved the disposition of NEPA claims arising from the government's performance of duties imposed by the Clean Air Act and the Clean Water Act. The survey excludes decisions involving the application of NEPA's environmental impact statement requirements to the construction of water treatment facilities funded under the Clean Water Act,<sup>71</sup> the issuance of dredging permits by the Army Corps of Engineers,<sup>72</sup> and the site preparation activities for the construction of a Department of Energy nuclear power plant.<sup>73</sup>

Of the 290 cases initially identified as potential candidates for study, 49 were excluded by applying the screening criteria described above. The remaining 241 cases provided the basis for the findings reported in Section IV below.

### *B. Classification of Decisions*

To compare the voting records of Carter and Reagan court of appeals judges, the study classifies the outcomes of Clean Air Act and Clean Water Act decisions according to their consistency with the Reagan regulatory reform agenda. The study places relevant decisions in one of three categories: decisions that increase the reg-

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<sup>69</sup> See, e.g., *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 665 (3d Cir. 1984) (interpreting RCRA requirements in context of suit alleging violations of RCRA and the Clean Water Act), *cert. denied*, 469 U.S. 1208 (1985).

<sup>70</sup> See, e.g., *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 514 (10th Cir. 1985) (ruling based chiefly upon application of Endangered Species Act).

<sup>71</sup> See *Simons v. Gorsuch*, 715 F.2d 1248, 1250 (7th Cir. 1983) (NEPA claim arising from construction of municipal sewage treatment plant funded by a federal grant under title II of the Clean Water Act).

<sup>72</sup> See *Louisiana v. Lee*, 758 F.2d 1081, 1082 (5th Cir. 1985) (NEPA suit challenging Army Corps of Engineers' renewal of shell dredging permits required under the Clean Water Act).

<sup>73</sup> See *Natural Resources Defense Council v. Zeller*, 688 F.2d 706, 707 (11th Cir. 1982) (NEPA suit challenging commencement of site preparation activities for construction of a Department of Energy breeder reactor facility).

ulatory burdens of affected actors, decisions that reduce the regulatory burdens of affected actors, and decisions in which the impact on the overall regulatory burden borne by the party with an abatement obligation is neutral.<sup>74</sup> The content of these categories is described in detail below.

### 1. Greater Regulatory Burden

The federal courts of appeals can take a number of approaches toward increasing the burdens associated with Clean Air Act and Clean Water Act compliance. Courts can be said to increase the burdens associated with Clean Air Act and Clean Water Act compliance when they:

(a) sustain challenges to proposed EPA rules or other EPA policymaking initiatives that take a comparatively narrow view of compliance obligations under the enabling statutes;<sup>75</sup>

(b) reject claims that the EPA or other government agencies have adopted impermissibly expansive interpretations of compliance requirements under the enabling statutes;<sup>76</sup>

(c) uphold EPA or state government refusals to grant extensions to abatement timetables;<sup>77</sup>

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<sup>74</sup> In most of the Clean Air Act and Clean Water Act cases reviewed for this survey, the affected entity is a business. State and municipal governments, however, also face abatement requirements under the statutes and therefore are treated as affected parties.

<sup>75</sup> See, e.g., *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1322-24 (9th Cir. 1990) (remanding final EPA rule because the EPA had erred in its narrow interpretation of the Clean Water Act's requirements governing identification of point sources); *Delaney v. EPA*, 898 F.2d 687, 695 (9th Cir. 1990) (vacating EPA approval of Clean Air Act implementation plans); *Natural Resources Defense Council v. EPA*, 790 F.2d 289, 315-16 (3d Cir. 1986) (upholding challenge to the EPA's discharge "removal credit" rule on ground that rule's standards were too lenient).

<sup>76</sup> See, e.g., *United States v. Alcan Foil Prods.*, 889 F.2d 1513, 1520-21 (6th Cir. 1989) (rejecting argument that the EPA is precluded from bringing an enforcement action against a polluter allegedly complying with proposed revised state implementation plan that the EPA has yet to endorse); *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 266 (5th Cir. 1989) (rejecting industry attacks upon the EPA's cost analysis for determining best practicable technology under Clean Water Act); *Shanty Town Assocs. Ltd. Partnerships v. EPA*, 843 F.2d 782, 792, 795 (4th Cir. 1988) (rejecting developer's claim that the EPA exceeded its authority by imposing non-point source abatement conditions in grant of sewage treatment funds to municipality); *Reynolds Metals Co. v. EPA*, 760 F.2d 549, 566-67 (4th Cir. 1985) (rejecting industry claim that the EPA underestimated cost of abatement requirements); *National Ass'n of Metal Finishers v. EPA*, 719 F.2d 624, 663-65 (3d Cir. 1983) (rejecting challenges to EPA pretreatment regulations, including claims that the EPA had failed to undertake proper cost-benefit assessment of specific pretreatment requirements), *rev'd*, 470 U.S. 116 (1985); *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323 (7th Cir. 1983) (denying petition for review of the EPA's decision to designate a nonattainment area).

<sup>77</sup> See, e.g., *General Motors Corp. v. EPA*, 738 F.2d 97, 101 (3d Cir. 1984) (rejecting claim that the EPA abused its discretion by refusing to initiate rulemaking to extend deadline for compliance with pretreatment standards).

(d) oppose EPA consideration of cost-benefit trade-offs in establishing abatement standards;<sup>78</sup>

(e) invalidate EPA experiments with market-based economic incentives to achieve existing abatement goals at lower overall cost;<sup>79</sup>

(f) reduce standing and other jurisdictional or procedural barriers for private parties seeking to vindicate statutory and regulatory abatement requirements;<sup>80</sup>

(g) approve generous damage recoveries or injunctions to private or public parties who prove violations of abatement requirements;<sup>81</sup> and

(h) reject burdensome standards of proof in determining the entitlement of private plaintiffs to attorneys' fees and in setting the amount of such fees.<sup>82</sup>

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<sup>78</sup> See, e.g., *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1087 (3d Cir. 1987) (rejecting economic infeasibility as basis for staying compliance with Clean Air Act). A burden-increasing approach also would consist of rejecting industry arguments that EPA cost-benefit assessments understated the costs associated with specific abatement standards. See Project, *The Impact of Cost-Benefit Analysis on Federal Administrative Law*, 42 ADMIN. L. REV. 545, 609 (1990).

<sup>79</sup> See, e.g., *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 718, 720 (D.C. Cir. 1982) (rejecting EPA interpretation of "source" to refer to entire plant as part of EPA effort to employ bubble concept), *rev'd sub nom.* *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>80</sup> See, e.g., *Public Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 73 (3d Cir. 1990) (environmental organizations satisfied requirements for representational standing to pursue Clean Water Act citizen suit); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1134 (11th Cir. 1990) (citizen suit plaintiffs may request injunctive relief and civil penalties for ongoing violations of Clean Water Act discharge permit); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1522-23 (9th Cir. 1987) (federal five-year statute of limitations, not state's three-year statute of limitations, governs Clean Water Act citizen enforcement actions); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 308 (4th Cir. 1986) (citizen suits brought under section 505 of the Clean Water Act may be based on alleged past violations of discharge permit), *vacated*, 484 U.S. 49 (1987); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985) (non-profit corporation's allegation of injury to aesthetic well-being established standing to challenge violation of Clean Water Act discharge permit; concurrent administrative enforcement actions against and consent agreements with defendants did not preclude filing citizen suits under § 505(b)(1)(B) of the Clean Water Act).

<sup>81</sup> See, e.g., *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1352, 1356 (9th Cir. 1990) (upholding consent judgment requiring defendant to pay \$45,000 to environmental groups to maintain and protect water quality); *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1111 (4th Cir. 1988) (upholding trial court's computation of \$977,000 in civil penalties), *cert. denied*, 109 S. Ct. 3185 (1989); *Concerned Citizens of Bridesburg v. Philadelphia Water Dep't*, 843 F.2d 679, 682 (3d Cir. 1988) (upholding civil contempt citation for violation of injunction compelling compliance with Clean Air Act state implementation plan despite failure of citizens' group to provide evidence of actual losses); *Duquesne Light Co. v. EPA*, 791 F.2d 959, 963 (D.C. Cir. 1986) (upholding EPA regulations under the Clean Air Act for calculating noncompliance penalties); *Hudson Stations, Inc. v. EPA*, 642 F.2d 261, 264 (8th Cir. 1981) (upholding the EPA's methodology in calculating civil penalty).

<sup>82</sup> See, e.g., *National Wildlife Fed'n v. Hanson*, 859 F.2d 313, 315 (4th Cir. 1988) (affirming

This study classifies decisions that take one or more of these positions as "burden-increasing." Accordingly, the votes of individual judges who endorse burden-increasing outcomes are treated as contrary to the Reagan regulatory reform program.

## 2. Lesser Regulatory Burden

Decisions reducing the regulatory burden of affected companies reflect positions that are essentially mirror images of the burden-increasing positions outlined above. To reduce an environmental regulatory burden a court of appeals might:

(a) uphold EPA rules or other regulatory commands that narrowly interpret compliance obligations under the Clean Air and Clean Water statutes;<sup>83</sup>

(b) sustain EPA efforts to set abatement obligations by recourse to cost-benefit assessments that measure incremental pollution reductions against the cost of attaining them;<sup>84</sup>

(c) approve industry or state requests for extensions of timetables for achieving emission control targets;<sup>85</sup>

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award of attorneys' fees to environmental groups); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 762 F.2d 272, 276-78 (3d Cir. 1985) (upholding, *inter alia*, award of fees to citizens' group including fees for work performed after entry of consent decree and work done by citizens' group's in-house counsel), *aff'd in part*, 478 U.S. 546 (1986), *rev'd in part*, 483 U.S. 711 (1987); *Northern Plains Resource Council v. EPA*, 670 F.2d 847, 849 (9th Cir. 1982) (approving award of attorneys' fees to non-prevailing party under the Clean Air Act), *vacated*, 464 U.S. 806 (1983).

<sup>83</sup> See, e.g., *Vermont v. Thomas*, 850 F.2d 99, 104 (2d Cir. 1988) (upholding the EPA's refusal to approve state implementation plan provisions designed to reduce "regional haze"); *New York v. EPA*, 716 F.2d 440, 445 (7th Cir. 1983) (rejecting challenge to EPA decision approving modification of state implementation plan to permit power station to increase sulphur dioxide emissions); *New York v. EPA*, 710 F.2d 1200, 1204-05 (6th Cir. 1983) (rejecting State of New York's claim that the EPA endorsed lenient emissions standard in approving State of Tennessee's state implementation plan); *Brookline v. Gorsuch*, 667 F.2d 215, 224 (1st Cir. 1981) (upholding EPA regional administrator's decision that diesel engines to be installed in cogeneration plant owned by nonprofit health and education institution are exempt from Clean Air Act's Prevention of Significant Deterioration of Air Quality Requirements); *Citizens Against the Refinery's Effects, Inc. v. EPA*, 643 F.2d 178, 179 (4th Cir. 1981) (rejecting citizens' group challenge to EPA determination that refinery's operation would not cause significant deterioration of air quality).

<sup>84</sup> See, e.g., *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (allowing the EPA to consider factors of cost and technical feasibility in setting emissions standards that will provide an ample margin of safety for toxic air pollutants).

<sup>85</sup> See, e.g., *Connecticut Fund for Environment, Inc. v. EPA*, 672 F.2d 998, 1006-07 (2d Cir.) (rejecting argument that the EPA's conditional approval of state implementation plan constituted impermissible modification of the Clean Air Act's abatement deadlines), *cert. denied*, 459 U.S. 1035 (1982); *Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 868-69 (3d Cir. 1981) (sustaining steel company challenge to the EPA's rejection of delayed compliance order issued by state department of environmental resources).

(d) approve industry or state claims that EPA has asserted broad, unsupported interpretations of statutory or regulatory abatement requirements;<sup>86</sup>

(e) apply strict standing screens and impose other jurisdictional or procedural hurdles to limit the ability of private parties (including pro-abatement environmental groups) to challenge apparent deviations from statutory and regulatory pollution control requirements;<sup>87</sup>

(f) interpret Clean Air Act and Clean Water Act remedial provisions narrowly to reduce company exposure to damages for violations of the statutes;<sup>88</sup> and

(g) apply strict standards in determining the eligibility of private plaintiffs for attorneys' fees and in setting the amount of such awards.<sup>89</sup>

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<sup>86</sup> See, e.g., *Illinois State Chamber of Commerce v. EPA*, 775 F.2d 1141, 1151 (7th Cir. 1985) (remanding EPA decision denying redesignation of two Illinois counties from nonattainment to attainment areas); *United States v. Fort Pierce*, 747 F.2d 464, 467 (8th Cir. 1984) (rejecting Army Corps of Engineers' efforts to assert violations of Clean Water Act wetlands provisions); *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 401 (6th Cir. 1984) (holding that Clean Water Act limits on use of wetlands did not apply to certain tracts of undeveloped land), *rev'd*, 474 U.S. 121 (1985); *PPG Indus., Inc. v. Harrison*, 660 F.2d 628, 634 (5th Cir. 1981) (upholding chemical manufacturer's claim that the EPA improperly applied new source performance standards for fossil fuel steam generating units to the firm's waste heat boilers); *Asarco, Inc. v. EPA*, 616 F.2d 1153 (9th Cir. 1980) (finding the EPA's order that plant owner install a sampling station in one of its stacks arbitrary and capricious).

<sup>87</sup> See, e.g., *Legal Emtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 644 (11th Cir. 1990) (rejecting citizen suit jurisdiction based upon implied cause of action under supremacy clause); *Wilder v. Thomas*, 854 F.2d 605, 614 (2d Cir. 1988) (upholding dismissal of citizen suit claim based on § 7604 of Clean Air Act for failure to allege specific violation of an existing state implementation plan), *cert. denied*, 489 U.S. 1053 (1989); *California v. Department of the Navy*, 845 F.2d 222, 224-25 (9th Cir. 1988) (concluding that Clean Water Act citizen suit provision does not confer standing on state government to seek civil penalties); *DuBois v. Thomas*, 820 F.2d 943, 951 (8th Cir. 1987) (dismissing, for lack of subject matter jurisdiction, citizen suit that challenged the EPA's failure to exercise its discretionary duties); *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1172 (5th Cir.) (holding that Clean Water Act's citizen suit provision may be invoked only by plaintiffs who allege ongoing violations), *cert. denied*, 484 U.S. 985 (1987); *Atlantic City Mun. Utils. Auth. v. Regional Adm'r*, 803 F.2d 96, 99-100 (3d Cir. 1986) (finding lack of citizen suit jurisdiction due to absence of nondiscretionary EPA authority that plaintiff sought to enforce); *Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984) (denying citizen suit standing to environmental organization on ground that organization failed to allege injury in fact from discharge of pollutants); see also *National Audubon Soc'y v. Department of Water*, 858 F.2d 1409, 1412 (9th Cir. 1988) (federal common law nuisance suit deemed preempted by Clean Water Act).

<sup>88</sup> See, e.g., *Natural Resources Defense Council v. Texaco Ref. & Mktg., Inc.*, 906 F.2d 934, 941 (3d Cir. 1990) (declining to grant permanent injunction on ground that proof of past violations of water pollution discharge permit failed to establish irreparable harm); *American Cyanamid Co. v. EPA*, 810 F.2d 493, 500 (5th Cir. 1988) (barring the EPA from imposing noncompliance penalties for four-month period between state's submission of proposed revision to state implementation plan and date the EPA rejected proposed revision).

<sup>89</sup> See, e.g., *Natural Resources Defense Council v. Thomas*, 801 F.2d 457, 462 (D.C. Cir.

This study classifies decisions that employ one or more of these approaches as "burden-reducing." Thus, the vote of an individual judge that supports a burden-reducing outcome is treated as consistent with Reagan regulatory reform objectives.

### 3. Neutral Impact on Regulatory Burden

Some cases examined in this survey do not affect the overall size of the regulatory burden, but instead determine which of the affected parties will bear the cost of achieving existing abatement targets. For example, several decisions involve disputes between neighboring municipalities over which municipality will shoulder the financial and aesthetic burdens associated with meeting Clean Water Act sewage treatment and discharge requirements.<sup>90</sup> These and other decisions affect the distribution of wealth among different polluting parties, but they neither increase nor decrease total abatement obligations. This study classifies individual votes in these decisions as being "neutral" with respect to the accomplishment of Reagan regulatory reform goals.

The survey applies the neutral characterization to one other type of vote. In three cases, the court equally rejected industry and environmental group challenges to EPA decisions.<sup>91</sup> In each instance, the industry attacked the EPA decision as excessively burdensome, and the environmental group contended that the agency's chosen abatement obligation was too lenient. Because the court endorsed the EPA's action without qualification, votes by Carter and Reagan appointees in these matters are treated as neutral.

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1986) (rejecting environmental group's request that attorneys' fees be assessed against industry intervenors); *Avoyelles Sportsmen's League v. Marsh*, 786 F.2d 631, 632 (5th Cir. 1986) (ruling that the Clean Water Act does not authorize fee awards against the government for expenses the plaintiff incurred in litigating issues on which the government prevailed or in parts of the litigation opposed only by other, nongovernmental parties); *United States v. National Steel Corp.*, 782 F.2d 62, 64 (6th Cir. 1986) (denying environmental group intervenor's application for attorneys' fees on ground that the EPA was diligently prosecuting Clean Air Act case).

<sup>90</sup> *See, e.g.*, *Mumford Cove Ass'n v. Town of Groton*, 786 F.2d 530, 531 (2d Cir. 1986) (motion by two cities to intervene in a dispute concerning construction of sewage discharge facilities).

<sup>91</sup> *E.g.*, *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 656-57 (7th Cir. 1986); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1192 (D.C. Cir. 1981); *Natural Resources Defense Council v. EPA*, 655 F.2d 318, 344 (D.C. Cir. 1981).

#### 4. Accounting for the Role of Judicial Review of Agency Decisionmaking

Although its exact boundaries are indistinct, the requirement that appellate courts defer to certain administrative agency interpretations and policy decisions is a basic foundation of modern administrative law.<sup>92</sup> In principle, the deference requirement bars an appellate judge from upsetting agency interpretations or policy choices on the ground that the agency's view collides with the judge's own policy preferences.<sup>93</sup> In practice, a judge enjoys considerable discretion to apply a nominal deference standard to endorse policy choices she approves and to overturn those she disfavors.<sup>94</sup> Thus, the amount

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<sup>92</sup> For general treatments of the scope of review in administrative law matters, see Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 382-97 (1986); Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 242-90 (1986). Environmental law decisions involving the Clean Air Act and Clean Water Act have provided important vehicles for the development of modern scope of review doctrine. See, e.g., *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984) (identifying circumstances in which reviewing courts should defer to agency interpretations of statutes that the agencies in question administer). For a recent, extensive treatment of *Chevron's* doctrinal significance and practical effects, see Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 16-42 (1990).

<sup>93</sup> See, e.g., *Arkansas Poultry Fed'n v. EPA*, 852 F.2d 324, 325 (8th Cir. 1988). "We must defer to any reasonable interpretation given the statute by the agency charged with its administration. . . . 'Great deference' is especially appropriate when a 'complex' statute like the [Clean Water] Act is at issue." *Id.* (citations omitted); see also *Vermont v. Thomas*, 850 F.2d 99, 102 (2d Cir. 1988). "[I]n view of the EPA's responsibility to administer the Clean Air Act, we must give great deference to the Administrator's interpretation of the statute." *Id.* (citations omitted); see also *Kennecott v. EPA*, 780 F.2d 445, 447-48 (4th Cir. 1985). "We may not overturn the agency's judgment simply because we might have drafted different regulations; remand is limited to cases in which the agency has acted without reasonable basis." *Id.* (citation omitted).

<sup>94</sup> R. Melnick's comprehensive study of the courts' role in overseeing implementation of the Clean Air Act skillfully documents the extensive discretion appellate judges enjoy to override EPA policy decisions while asserting fidelity to a limited standard of review. See R. MELNICK, *supra* note 2, at 11-18. Professor Melnick states that

the courts have become increasingly willing to second-guess agencies on their reading of statutes and their interpretation of evidence—especially when they fear the agency lacks aggressiveness in pursuing its statutory mission. While claiming not to substitute their opinions for those of the administrator, judges frequently disagree with agencies on the meaning of statutory terms and insist upon an expansive reading of "nondiscretionary duties."

See *id.* at 11; see also O'Leary, *supra* note 35, at 569.

[I]ndividual judicial personalities are partially responsible for the negative effects of federal court decisions on the EPA. In some instances judges have overstepped their statutory bounds to force change in the agency. In other instances judges with no scientific background have questioned the scientific expertise of EPA staff. In yet



of deference given to any single agency decision can vary directly with the agency's fidelity to the collective policy preferences of a reviewing panel on the court of appeals.<sup>95</sup>

In most respects, the exact contours of the standard of review are unimportant to the hypothesis being tested in this survey—that Reagan judges are more inclined than their Carter counterparts to embrace positions that reduce regulatory burdens under the Clean Air Act and the Clean Water Act. If Reagan judges are ideologically committed to the reduction of compliance burdens and if Carter judges are ideologically predisposed to the expansion of abatement obligations, then the existence of a nominally deferential standard of review will act as only a minor inhibition on the tendency of judges to evaluate agency decisions according to the judge's political preferences. The more confident the judge is that the agency's policy-making choices mimic her own preferences, the more willing she will be to defer to its policy decisions. Thus, if Reagan judges are truly committed to reducing pollution abatement obligations, their votes will tend to favor challenges to EPA rules that increase abatement burdens. Similarly, if Carter judges are predisposed to favor more stringent pollution controls, their votes will attack EPA rules that appear to embrace permissive abatement standards. If pro-abate-

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other instances, judges have aggressively pushed EPA in a specific direction seemingly based on their own personal biases.

O'Leary, *supra* note 35, at 569.

Perceived instances of manipulation of the deference requirement sometimes have provoked disputes between Carter and Reagan appointees in the surveyed cases. In *Natural Resources Defense Council v. EPA*, 902 F.2d 962, 965 (D.C. Cir. 1990), for example, a three-judge panel divided sharply over whether to compel the EPA to explain its decision not to initiate a rulemaking under the Clean Air Act concerning a secondary standard protecting against acid rain. A plurality including two Carter appointees, Judges Patricia Wald and Harry Edwards, ordered the EPA to explain its inaction after concluding that the EPA's failure to initiate rulemaking constituted final agency action and thus gave the court jurisdiction to review a petition challenging the EPA's conduct. 902 F.2d at 980. Chief Judge Wald's separate opinion concluded that the "EPA's inaction for ten years beyond the statutory deadline is effectively a final decision not to revise" and supported the remand requiring the agency to provide the court with "clear and cogent reasons why it has taken no action vis-à-vis an acid deposition standard." *Id.* at 988. Judge Silberman, a Reagan appointee, dissented from the decision to remand, disputing the plurality's conclusion that the EPA had made a final decision concerning acid deposition. *Id.* at 995 (Silberman, J., dissenting). Judge Silberman observed:

The picture that emerges from the record is not one of an agency sleeping on a serious public welfare problem but that of an agency moving, albeit slowly, towards a final decision. Until that time, even under the Chief Judge's reasoning, we are without jurisdiction to second-guess either the pace or outcome of that decision.

*Id.* at 998 (Silberman, J., dissenting).

<sup>95</sup> See Pierce, *supra* note 45, at 302 (discussing role of political ideology in shaping review of administrative agency decisions by Carter and Reagan judges on the District of Columbia Circuit).

ment or anti-abatement ideology genuinely dominates a judge's voting, the survey assumes that the content of the agency's decision will govern the degree of deference actually given individual cases. In effect, the conservative court packing hypothesis posits that Reagan judges will defer to EPA's policy choices only when EPA adopts burden-reducing positions.

This survey has not attempted systematically to measure the extent to which the requirement of judicial deference has inhibited Carter and Reagan appointees in giving effect to pro-abatement or anti-abatement preferences when an EPA decision contradicts those preferences. The cases do provide, however, no basis for assuming that Reagan judges invariably will set aside EPA policy judgments to reach anti-abatement outcomes. Parties seeking to weaken or avoid abatement obligations embodied in EPA regulations can not presume that Reagan-judge dominated panels will withhold deference in evaluating the agency's choice of abatement levels.<sup>96</sup> Even

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<sup>96</sup> *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) demonstrates this point. In *Rybachek*, an Alaskan mining association and individual miners attacked EPA regulations promulgated under the Clean Water Act. A Ninth Circuit panel of three Reagan appointees (Diarmuid O'Scannlain, Edward Leavy, and Stephen Trott) upheld the EPA regulation, frequently emphasizing the appellate court's limited scope of review. *Id.* at 1284-86.

Judge O'Scannlain's opinion for the court observed that

[b]ecause the EPA has been charged with administering the Clean Water Act, we must show great deference to the Agency's interpretation of the Act. We especially defer where the Agency's decision on the meaning or reach of the Clean Water Act involves reconciling conflicting policies committed to the Agency's care and expertise under the Act.

*Id.* at 1284 (citations omitted). The court acknowledged the EPA's broad discretion in considering the costs and benefits of an abatement technology in determining whether the technology is the best practicable technology currently available. *Id.* at 1289.

This point also is illustrated by *American Petroleum Inst. v. EPA*, 858 F.2d 261 (5th Cir. 1988). In *American Petroleum*, a three-judge panel, including Reagan appointees W. Eugene Davis and Jerry Smith, denied a trade association petition challenging the EPA's issuance of permits controlling the discharge of pollutants from certain offshore drilling rigs. *Id.* at 263. Writing for a unanimous court, Judge Smith said, "[W]e review deferentially not only EPA's factual evaluations, but also its statutory and regulatory interpretation and application, and its policy determinations." *Id.* In endorsing the EPA's choice of best available technology limitations, Judge Smith explained "we here affirm the agency's enforcement of its mandate pursuant to Congress's legislative policy determination. In this regard, we must be ever cognizant that '[w]e are judges, not legislators.'" *Id.* at 265 n.6 (citation omitted).

A third case demonstrating this point is *Riverside Cement Co. v. Thomas*, 843 F.2d 1246 (9th Cir. 1988), which was decided by a three-judge panel, including Reagan appointees John Noonan and David Thompson. Judge Noonan's majority opinion upheld a challenge to an EPA decision to issue a rule that approved a revised state implementation plan but omitted a state-approved condition making application of the plan's abatement requirements contingent upon the results of further fact-finding. *Id.* at 1247-48. Judge Thompson dissented on the ground that the EPA's decision to omit the condition rested upon a reasonable interpretation of the EPA's powers under the Clean Air Act. *Id.* at 1250 (Thompson, J., dissenting). Judge Thomp-

individual Reagan judges who are seen by some commentators as the epitome of conservative court packing efforts have rejected industry challenges to EPA abatement requirements. In his critique of the Reagan administration's judicial selections, Herman Schwartz cites Judge J. Harvie Wilkinson as an example of the "very conservative academics" whose appointment "ensures an aggressive, uncompromising conservatism that is willing to shake up and overturn."<sup>97</sup> Yet Judge Wilkinson's opinion for the Court of Appeals for the Fourth Circuit in *Kennecott v. EPA*<sup>98</sup> firmly resisted the petitioner's invitation to second-guess EPA's choice of certain effluent limits. Judge Wilkinson observed that "this court is bound by the general rules of deference that run throughout administrative law. We may not overturn the agency's judgment simply because we might have drafted different regulations; remand is limited to those cases in which the agency has acted without reasonable basis."<sup>99</sup> After examining and rejecting the petitioner's objections to the effluent restrictions, Judge Wilkinson noted that "[t]he technical intricacy of the judgments at issue reminds us again of the constraints and limitations of judicial review and the heavy obligations imposed upon agency specialists to bring to their tasks a sense of fairness as well as a briefcase of expertise."<sup>100</sup>

Judge Wilkinson's opinion in *Kennecott* suggests that one element of the conservatism attributed to Reagan appointees may be a prudent judicial unwillingness to engage in policymaking functions for which the courts are institutionally ill-suited. This is particularly true for the technically complex fact-finding and analysis decisions that dominate EPA's agenda.<sup>101</sup> A second possible explanation for a

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son observed: "EPA's interpretation is reasonable. And it is entitled to deference. . . . By choosing to adopt the cement companies' interpretation over the EPA's, the majority is substituting its judgment for that of the administrative agency charged with administering the Clean Air Act." *Id.* at 1250 (Thompson, J., dissenting) (citation omitted).

<sup>97</sup> H. SCHWARTZ, *supra* note 32, at 70.

<sup>98</sup> 780 F.2d 445 (4th Cir. 1985).

<sup>99</sup> *Id.* at 447-48 (citation omitted).

<sup>100</sup> *Id.* at 461.

<sup>101</sup> To respect an agency's comparative advantage in certain policymaking tasks is not to assume that the agency's judgments are routinely flawless or well motivated. Judge Wilkinson's *Kennecott* opinion, for example, cautions that the court is not "blind to the capacities of agencies to enthrone their own agendas and dismiss contending views." *Id.* at 448. While acknowledging the possibility of such distortions, Judge Wilkinson emphasized that the court of appeals' proper function in examining the policy choices underlying EPA's rules consists solely of determining whether such choices had reasonable bases. *Id.* at 447-48.

Even though a judge might find an agency's technical policy choices suspect, the same judge might defer to the agency rather than engage in an independent reevaluation of complex

Reagan judge's willingness to defer is confidence that government agencies under the leadership of other Reagan appointees are likely to exercise their regulatory powers wisely. This proposition may help explain the tendency of Reagan judges, such as Robert Bork and Richard Posner, to defer to regulatory agencies on the same types of enforcement decisions that they earlier had criticized in their academic writings.<sup>102</sup> By emphasizing the commitment to appoint conservative officials to lead federal regulatory agencies, the Reagan administration may have persuaded its judicial appointees

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information that could yield an equally flawed, or even more harmful, policy result. Wise judges know their own and their institution's limitations. See R. MELNICK, *supra* note 2, at 60. "The scientific and engineering issues that arise in many clean air cases are enough to humble even the most self-confident judge." *Id.*; cf. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 208 (1985) (advocating judicial self-restraint that entails "the judge's trying to limit his court's power over other government institutions. If he is a federal judge he will want federal courts to pay greater deference to decisions of Congress, of the federal administrative agencies, of the executive branch, and of all branches and levels of state government").

<sup>102</sup> Before their appointments to the federal bench, Judges Bork and Posner had harshly criticized the Federal Trade Commission's (FTC) performance as an antitrust enforcement agency. See R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 48, 252 (1978); Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 47, 54-61 (1969). However, as judges on the District of Columbia Circuit and Seventh Circuit respectively, Judges Bork and Posner have sustained the FTC's enforcement position in all three antitrust matters reviewed by panels on which they participated. In two cases, Judges Bork and Posner authored majority opinions sustaining lower courts' decisions to grant the FTC's request for preliminary injunctions to bar anticompetitive mergers. *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1502 (D.C. Cir. 1986). In the third case, Judge Posner wrote the majority opinion sustaining an FTC administrative decision that compelled the dissolution of a merger involving rival hospital corporations. *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1393 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987). Judge Posner's opinion emphasized the deferential nature of the court's review of the FTC's evaluation of the evidence and praised the painstaking quality of the FTC's analysis. 807 F.2d at 1384-86. Beyond their assessment of the merits in each case, it is conceivable that Judges Bork and Posner regarded the FTC's position somewhat more favorably because the decision to prosecute had been made by Reagan appointees who had committed the FTC to a retrenchment of antitrust enforcement approaches that had prevailed in the 1970s. See Kovacic, *Federal Antitrust Enforcement in the Reagan Administration: Two Cheers for the Disappearance of the Large Firm Defendant in Nonmerger Cases*, 12 RES. IN L. & ECON. 173, 177-78 (1989) (discussing Reagan administration antitrust policies); Kovacic, *supra* note 27, at 477-80 (describing Reagan FTC's antitrust agenda and intended departure from enforcement approaches of 1970s).

In another context, however, Judge Posner has suggested that such deference is simply a consequence of a judge's exercising "structural restraint" in reviewing decisions of other government bodies. See R. POSNER, *supra* note 101, at 208-09.

Structural restraint is not a liberal or a conservative position, because it is independent of the policies that the other institutions of government happen to be following.

It will produce liberal or conservative outcomes depending on whether the courts in question are at the moment more or less liberal than those institutions.

*Id.* (citation omitted).

that such agencies would promulgate "reasonable" abatement requirements. By disavowing the intervention-oriented "excesses" of previous agency leadership, the Reagan regulatory appointees also could be said to be signalling to reviewing courts that the rules or enforcement actions they did pursue were designed to stop only the most egregious conduct.<sup>103</sup>

A review of the cases in this survey provides qualitative support for the view that the judicial deference does exercise a moderating influence on judges at both ends of the ideological spectrum. Nonetheless, judges retain substantial discretion to determine what impact deference will have in a particular case. If conservative court packing truly entails a judicially imposed reduction of regulatory burdens, one can assume that Reagan appointees will be inclined to use that discretion to uphold attacks on EPA's abatement commands, and that Carter appointees will be inclined to use their discretion to see that EPA abatement commands are upheld or strengthened. The data on the voting patterns will reflect the intensity of these potentially different perspectives.

#### IV. SURVEY RESULTS

The 241 Clean Air Act and Clean Water Act cases decided from January 1977 through November 1990 were analyzed from three perspectives.<sup>104</sup> The first analysis considers all votes cast by Carter and Reagan appointees, determining how frequently Carter judges and Reagan judges embraced positions that were burden-increasing and burden-reducing respectively. The second analysis considers cases in which either a Carter appointee or a Reagan appointee authored the majority opinion. The third perspective considers cases in which at least one Carter appointee and at least one Reagan appointee sat on the panel.

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<sup>103</sup> It is reasonable to assume that many court of appeals judges are aware of the enforcement policy shifts that accompany changes in administration. Such adjustments would be evident in general news accounts, trade publications, academic journals, and speeches before bar association groups or other professional gatherings frequented by judges. In announcing a retrenchment of enforcement plans, a regulatory agency head can be said to be sending the following message to conservative judges that review the agency's decisions: "We have narrowed the focus of our enforcement efforts. When we act, you can be confident that we are seeking to correct unambiguously dangerous conduct."

<sup>104</sup> See *supra* notes 60-91 and accompanying text.

*A. All Votes Cast by Carter and Reagan Appointees in Clean Air Act and Clean Water Act Cases*

In the 241 cases selected for detailed study, Carter and Reagan appointees cast a total of 413 votes. This figure includes all votes Carter and Reagan appointees cast: in majority opinions, in support of majority outcomes, in per curiam decisions, in concurring opinions, in dissenting opinions, in support of dissenting opinions, and in decisions en banc. These votes also include cases in which more than one Carter or Reagan appointee sat on the same panel. Therefore, if two Carter appointees participated on a panel in the same case, the vote of each was treated as a separate observable event.

Carter appointees accounted for 249 of the total of 413 votes. In 158 instances (63.5%), Carter appointees supported positions with burden-increasing consequences for entities whose emission and discharge activities are governed by the Clean Air Act and Clean Water Act.<sup>105</sup> Further, in eighty-three instances (33.3%), Carter judges endorsed outcomes with burden-reducing effects.<sup>106</sup> In the remaining eight votes (3.2%), the Carter appointees approved outcomes whose impact on compliance burdens was neutral.<sup>107</sup>

In the same cases, Reagan appointees cast a total of 164 votes. In eighty-five of these votes (51.8%), Reagan appointees supported burden-increasing outcomes. In seventy-five instances (45.7%), Reagan judges endorsed burden-reducing outcomes. In four votes (2.5%), the Reagan appointees approved outcomes with burden-neutral effects. In sum, Carter appointees supported burden-increasing outcomes in a higher percentage of votes than did Reagan judges (63.5% versus 51.8%), whereas Reagan appointees endorsed burden-reducing results in a higher percentage of votes than their Carter counterparts (45.7% versus 33.3%).

*B. Majority Opinions Authored by Carter or Reagan Appointees*

A Carter or Reagan appointee authored the majority opinions in 139 of the 241 decisions selected for detailed review. Of these, Carter appointees wrote the majority opinions in seventy-seven cases. In fifty-three of these seventy-seven cases (68.8%), the Carter appointees' majority opinions endorsed positions with burden-increasing consequences. In twenty-two cases (28.6%), the Carter judges sup-

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<sup>105</sup> See *supra* notes 75–82 and accompanying text.

<sup>106</sup> See *supra* notes 83–89 and accompanying text.

<sup>107</sup> See *supra* notes 90–91 and accompanying text.

ported positions with burden-reducing effects. The Carter appointees supported burden-neutral results in the remaining two cases (2.6%).

The Reagan appointees wrote majority opinions in sixty-two cases. In twenty-seven of these matters (43.5%), the Reagan appointees endorsed burden-increasing outcomes. In thirty-two instances (51.6%), the Reagan judges took positions with burden-reducing consequences. In the remaining three cases (4.8%), the Reagan judges supported burden-neutral outcomes. Thus, a considerably higher percentage of Carter-appointee majority opinions endorsed burden-increasing results (68.8% versus 43.5%). This corresponds with the higher percentage of Reagan appointee majority opinions resulting in burden-reducing outcomes (51.6% versus 28.6%).

### *C. Votes Cast When Carter and Reagan Appointees Sat on the Same Panel*

Fifty-six of the 241 cases chosen for detailed review were decided by panels containing at least one Carter appointee and one Reagan appointee. In only seven of the fifty-six decisions (12.5%) did the Carter and Reagan appointees cast differing votes.<sup>108</sup> In four instances in which the Carter and Reagan judges disagreed, the majority view supported burden-reducing results,<sup>109</sup> and the remaining three decisions endorsed burden-increasing outcomes.<sup>110</sup> A Carter judge authored the majority opinion in only one decision,<sup>111</sup> and a Reagan judge wrote one other majority opinion.<sup>112</sup> In these seven cases, Carter judges cast a total of seven votes, with six votes supporting burden-increasing outcomes and one vote endorsing a burden-reducing result. Reagan judges cast eight votes in these

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<sup>108</sup> See, e.g., *Atlantic City Mun. Utils. Auth. v. Regional Adm'r*, 803 F.2d 96, 97, 103 (3d Cir. 1986) (majority opinion by Judge Stapleton, a Reagan appointee, and dissent by Judge Sloviter, a Carter appointee); *Illinois State Chamber of Commerce v. EPA*, 775 F.2d 1141, 1141, 1151 (7th Cir. 1985) (majority opinion by Judge Cudahy, a Carter appointee, and dissent by Judge Coffey, a Reagan appointee).

<sup>109</sup> *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 590 (6th Cir. 1988); *National Audubon Soc'y v. Department of Water*, 858 F.2d 1409, 1418 (9th Cir. 1988); *Atlantic City Mun. Utils. Auth.*, 803 F.2d at 103; *Illinois State Chamber of Commerce*, 775 F.2d at 1151.

<sup>110</sup> *Ohio v. Department of Energy*, 904 F.2d 1058, 1059 (6th Cir. 1990); *Natural Resources Defense Council v. EPA*, 902 F.2d 962, 965 (D.C. Cir. 1990); *Leslie Salt Co. v. United States*, 896 F.2d 354, 355 (9th Cir. 1990).

<sup>111</sup> See *Illinois State Chamber of Commerce*, 775 F.2d at 1141.

<sup>112</sup> See *Atlantic City Mun. Utils. Auth.*, 803 F.2d at 97.

seven cases, with one vote supporting a burden-increasing outcome and the seven other votes approving burden-reducing results.

Carter and Reagan judges cast identical votes in 87.5% of the cases in which appointees of both Presidents sat on the same panel. In twenty-six of the forty-nine cases (53.1%) in which Carter and Reagan appointees voted together, they endorsed burden-increasing outcomes. In twenty-two cases in which Carter and Reagan judges agreed (44.9%), they supported burden-reducing results. The decision in the remaining case (2%) had a burden-neutral effect.

These results qualify conclusions drawn solely from a review of aggregate voting statistics. The high level of agreement on panels containing Carter and Reagan appointees could stem from a number of sources. For example, common voting on mixed panels could indicate an underlying similarity of perspectives. Such votes also could be attributable to the persuasive influence of specific judges in marshalling support for particular outcomes. Finally, common outcomes could result from a judge's concern with the long-term institutional dynamic that might incline individual judges to achieve consensus.<sup>113</sup> Without more decisions revealing disagreement on the same panel between Carter and Reagan appointees, it is difficult to predict accurately the likelihood of Carter or Reagan judges' endorsing the positions adopted by their counterparts on panels containing judges selected by one President but not the other.

## V. THE RESULTS INTERPRETED

Aggregate data on the voting behavior of Carter and Reagan appointees to the federal courts of appeals show that Reagan judges endorsed burden-reducing outcomes in a higher percentage of cases than Carter judges. Of all votes cast by Reagan appointees, 45.7% supported burden-reducing results, 51.8% endorsed burden-increasing results, and 2.5% adopted burden-neutral positions.<sup>114</sup> Of all votes cast by Carter appointees, 33.3% supported burden-reducing

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<sup>113</sup> A study of voting behavior on three-judge appellate panels concluded that "[t]he intrinsic loneliness of dissent on the circuits may well act as a deterrent to a single judge who faces the possibility of lone disagreement with the majority of judges." Richardson & Vines, *Review, Dissent and the Appellate Process: A Political Interpretation*, 29 J. POLITICS 597, 611 (1967). A judge also might acquiesce in a somewhat disagreeable outcome in one case in the hope of obtaining a colleague's support in other matters that the judge regards as more important. See W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 56-68 (1964) (discussing "bargaining" behavior within the Supreme Court).

<sup>114</sup> See *infra* notes 75-91 and accompanying text.



results, 63.5% endorsed burden-increasing outcomes, and 3.2% adopted burden-neutral positions.

The results for majority opinions authored by Carter and Reagan appointees reveal greater statistical disparities. Majority opinions by Reagan appointees adopted burden-increasing positions 43.5% of the time, burden-reducing results 51.6% of the time, and burden-neutral positions in 4.8% of the cases. Carter appointees' majority opinions supported burden-increasing positions 68.8% of the time, burden-reducing results 28.6% of the time, and burden-neutral results in 2.6% of the cases.

The analysis of the judicial voting patterns from the three perspectives described reveals several trends. First, differences in Carter and Reagan appointees' voting behavior are most pronounced in the United States Court of Appeals for the District of Columbia. Next to the United States Supreme Court, the District of Columbia Circuit is the nation's most important judicial forum for environmental policymaking.<sup>115</sup> Second, Reagan appointees have shown a greater tendency to use procedural and remedial screens involving standing, damages, and attorneys' fees to reduce compliance burdens.<sup>116</sup> Third, Reagan appointees have resorted more frequently to economic analysis to interpret and analyze statutory and regulatory commands.<sup>117</sup> Such analysis, however, does not systematically result in outcomes that reduce compliance burdens.

#### A. *The District of Columbia Circuit*

In the field of economic regulation, the District of Columbia Circuit is preeminent among the federal courts of appeals. Because of its central role in reviewing the decisions of federal regulatory agencies, the District of Columbia Circuit is singularly influential in developing doctrines governing the conduct of administrative agencies and in forming and applying substantive regulatory policy.<sup>118</sup> Among the courts of appeals, the District of Columbia Circuit is the foremost

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<sup>115</sup> See *infra* note 119 and accompanying text.

<sup>116</sup> See *infra* notes 139-40 and accompanying text.

<sup>117</sup> See *infra* notes 147-50 and accompanying text.

<sup>118</sup> See generally Wald, *supra* note 35. Chief Judge Patricia M. Wald provides the following evidence of the District of Columbia Circuit's importance: "In 1986, nearly 30 percent of the 3,180 appeals from [federal administrative] agency decisions filed in the United States Circuit Courts came to us. No other circuit, except the Ninth with 20 percent, came close." *Id.* at 508. See generally Pierce, *supra* note 45, at 303-08; Note, *Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and Its Implications for a National Court of Appeals*, 59 N.Y.U. L. REV. 1048 (1984).

forum for judicial formulation of environmental policy.<sup>119</sup> A mark of the District of Columbia Circuit's stature in shaping regulatory policy is the exacting attention given to the filling of vacancies in its membership.<sup>120</sup> With the exception of the Supreme Court, no court in the United States is more closely watched.

District of Columbia Circuit Court decisions constituted the single largest body of case law considered in this survey. Of the 241 Clean Air Act and Clean Water Act cases chosen for detailed study, 46 (19.1%) were decided by the District of Columbia Circuit. Of the 413 votes cast by Carter and Reagan appointees in the 241 decisions, 94 votes (39%) were cast by members of the District of Columbia Circuit. By comparison, the next most active circuit in terms of relevant decisions and total votes was the Ninth Circuit, accounting for thirty-five cases (14.5% of the survey total) and sixty-seven votes (16.2% of the survey total). To gain an additional perspective on District of Columbia Circuit Court voting, this survey also examined twenty-six published decisions from January 20, 1977, through November 30, 1990, in which Carter, Reagan, or Bush appointees participated on panels reviewing issues arising under RCRA.

### 1. Clean Air Act and Clean Water Act Decisions

Compared to the other courts of appeals, the District of Columbia Circuit's Clean Air Act and Clean Water Act decisions reveal a more pronounced disparity between the voting patterns of Carter and Reagan appointees. Carter appointees cast a total of 57 votes in Clean Air Act and Clean Water Act decisions during the survey period. Of these Carter appointees' votes, thirty-one (54.4%) supported burden-increasing outcomes; twenty-one votes (36.9%) endorsed burden-reducing results; and the remaining five votes (8.7%) adopted burden-neutral positions. Reagan appointees cast a total of thirty-seven votes on the District of Columbia Circuit. Eleven of these votes (29.7%) supported burden-increasing outcomes, twenty-five votes (67.6%) endorsed burden-reducing results, and one vote (2.7%) adopted a burden-neutral position.

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<sup>119</sup> See generally R. HARRIS & S. MILKIS, *supra* note 25, at 272. In 1986, for example, the District of Columbia Circuit received 134 appeals from the EPA. The Ninth Circuit was second in EPA appeals with 23. Wald, *supra* note 35, at 508-09 (remarks of Chief Judge Wald).

<sup>120</sup> See Abramson, *Failure of Appeals Court Nomination Means Next President to Fill Key Post*, Wall St. J., Oct. 14, 1988, at B7, col. 5; Carter, *After Bork, A Rift Widens*, Nat'l L.J., Mar. 28, 1988, at 1, col. 2; Karpay, *Bork or No Bork, GOP Bloc a Force on D.C. Circuit*, Legal Times, Jan. 18, 1988, at 10, col. 1; Marcus, *Conservatives' Grip on Influential Court May Slip*, Wash. Post, Jan. 15, 1988, at A6, col. 1.

By comparison, a review of all of the votes of Carter and Reagan appointees outside the District of Columbia Circuit indicates a greater similarity in voting patterns. In 192 court of appeals votes in decisions outside the District of Columbia Circuit, Carter appointees supported burden-increasing results in 127 instances (66.1%). In sixty-two votes (32.3%) the Carter judges backed burden-reducing results, and in three votes (1.6%) Carter judges adopted burden-neutral positions. Reagan appointees cast 127 votes outside the District of Columbia Circuit. Reagan judges endorsed burden-increasing consequences in seventy-four of these votes (58.3%), burden-reducing outcomes in fifty votes (39.4%), and burden-neutral results in three instances (2.3%).

Overall, in decisions outside of the District of Columbia Circuit, the voting patterns of Reagan appointees and Carter appointees have not differed dramatically. Reagan appointees supported burden-increasing outcomes in a slightly lower percentage of votes (58.3% versus 66.1%) than their Carter counterparts. Similarly, Reagan judges endorsed burden-reducing outcomes in a marginally higher percentage of votes than did Carter appointees (39.4% versus 32.3%), but the disparity is not striking. In contrast, considering the District of Columbia Circuit alone reveals sharper differences in the voting patterns. Reagan appointees to the District of Columbia Circuit adopted burden-increasing outcomes in a markedly lower percentage of votes than did the Carter appointees (29.7% versus 54.4%). Additionally, Reagan judges endorsed burden-reducing outcomes in a correspondingly higher percentage of votes than their Carter counterparts (67.6% versus 36.9%). However, in thirteen cases in which Carter and Reagan judges sat on the same panel, disagreement between the Carter and Reagan judges occurred in a single case.<sup>121</sup> In the twelve cases in which Carter and Reagan appointees agreed, four decisions supported burden-increasing outcomes,<sup>122</sup> and eight endorsed burden-reducing results.<sup>123</sup>

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<sup>121</sup> *Natural Resources Defense Council v. EPA*, 902 F.2d 962, 965 (D.C. Cir. 1990).

<sup>122</sup> *E.g.*, *Natural Resources Defense Council v. Thomas*, 838 F.2d 1224, 1230-31 (D.C. Cir. 1988) (rejecting industry challenges to certain EPA emissions restrictions; rejecting some environmental group challenges, but approving challenge to certain grandfathering exemptions); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1563 (D.C. Cir. 1984) (rejecting automobile manufacturer's petition for review of EPA order requiring manufacturer to repair certain vehicles).

<sup>123</sup> *E.g.*, *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1527 (D.C. Cir. 1990) (denying petition to compel the EPA to initiate rulemaking to control acid deposition that causes alarm in Canada); *Sierra Club v. Thomas*, 828 F.2d 783, 784 (D.C. Cir. 1987)

## 2. Resource Conservation and Recovery Act Decisions

The voting differences evident in Clean Air Act and Clean Water Act cases emerge even more sharply in the District of Columbia Circuit's RCRA cases. In the twenty-six RCRA cases examined in this survey, Carter and Reagan/Bush appointees each cast a total of thirty-six votes. In twenty-seven instances (75%), Carter judges endorsed a burden-increasing outcome. In the remaining nine votes (25%), Carter appointees supported burden-reducing results. In contrast, Reagan/Bush appointees cast burden-increasing votes in twelve instances (33.3%) and burden-reducing votes twenty-four times (66.6%).

Carter and Reagan/Bush appointees sat on the same panel in seventeen RCRA cases. Eleven matters yielded agreement, with six decisions favoring burden-increasing outcomes<sup>124</sup> and five supporting burden-reducing results.<sup>125</sup> In six cases there was disagreement between at least one Carter appointee and a Reagan/Bush appointee.<sup>126</sup> All six of these disagreement cases reached burden-reducing results. Out of eleven votes cast in the six disagreement cases, Carter appointees approved a burden-increasing outcome seven times and a burden-reducing result four times.<sup>127</sup> By contrast, out of the fifteen votes cast in the six disagreement cases, Reagan/

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(rejecting environmental group's claim that the EPA had unreasonably delayed completion of rulemaking concerning application of fugitive emissions controls to strip mines).

<sup>124</sup> *E.g.*, *American Petroleum Inst. v. EPA*, 906 F.2d 729, 732 (D.C. Cir. 1990) (rejecting industry group challenge to EPA rule barring land treatment; granting environmental group's petition for remand to require inclusion of certain residue previously omitted from rule); *American Iron & Steel Inst. v. EPA*, 886 F.2d 390, 404 (D.C. Cir. 1989) (rejecting trade association's challenge to the EPA's regulation of treatment of certain industrial wastes).

<sup>125</sup> *E.g.*, *American Mining Congress v. EPA*, 907 F.2d 1179, 1182 (D.C. Cir. 1990) (remanding rule to the EPA for explanation of bases for relisting certain smelting wastes); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 356 (D.C. Cir. 1989) (rejecting most challenges by waste control trade group and environmental group to adequacy of EPA rule governing land disposal of solvents and dioxins).

<sup>126</sup> *Natural Resources Defense Council v. EPA*, No. 88-1657 (D.C. Cir. Oct. 5, 1990) (LEXIS, Genfed library, Current file); *Natural Resources Defense Council v. EPA*, 907 F.2d 1146, 1149 (D.C. Cir. 1990); *National Recycling Coalition, Inc. v. Reilly*, 890 F.2d 1242, 1243 (D.C. Cir. 1989); *Hazardous Waste Treatment Council*, 885 F.2d at 920; *National Recycling Coalition, Inc. v. Reilly*, 884 F.2d 1431, 1432 (D.C. Cir. 1989); *American Mining Congress*, 824 F.2d at 1178.

<sup>127</sup> Five of the seven burden-increasing votes by Carter judges in disagreement cases were cast by Chief Judge Wald, who dissented from burden-reducing opinions in *Natural Resources Defense Council v. EPA*, No. 88-1657 (D.C. Cir. Oct. 5, 1990) (LEXIS, Genfed library, Current file); *Natural Resources Defense Council*, 907 F.2d at 1166; *National Recycling Coalition*, 890 F.2d at 1243; *Hazardous Waste Treatment Council*, 885 F.2d at 927; *National Recycling Coalition*, 884 F.2d at 1438.

Bush judges endorsed burden-reducing outcomes fourteen times. The disagreement decisions did not involve a clean division between the Carter and Reagan/Bush appointees. In three of the six disagreement cases, at least one Carter appointee endorsed the views of Reagan/Bush judges.<sup>128</sup>

### 3. The District of Columbia Circuit and the Other Circuits Compared: Summary

As mentioned above, caution is appropriate in interpreting these aggregate voting statistics. The paucity of split panels involving disagreement among Carter and Reagan appointees in Clean Air Act and Clean Water Act cases precludes a more rigorous test of differences in pollution control preferences and attitudes toward economic regulation. The disparities apparent in the aggregate voting data are consistent with the hypothesis that Reagan appointees have narrower regulatory preferences. They do not, however, disprove the possibility that Carter and Reagan appointees in fact share environmental policy perspectives considerably more often than not.

The voting data for the Court of Appeals for the District of Columbia Circuit is consistent with studies that have identified pronounced ideological splits in that court's disposition of economic regulation disputes.<sup>129</sup> Although judges on the Court of Appeals for the District of Columbia Circuit sometimes have sought to downplay the degree of division,<sup>130</sup> the divergence of Carter and Reagan judges

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<sup>128</sup> *Natural Resources Defense Council v. EPA*, No. 88-1657 (D.C. Cir. Oct. 5, 1990) (LEXIS, Genfed library, Current file) (Carter judges Ruth Ginsburg and Abner Mikva joined the majority in casting burden-reducing votes); *Natural Resources Defense Council*, 907 F.2d at 1149 (burden-reducing votes cast by Reagan appointee Stephen Williams and Carter appointee Ruth Ginsburg); *National Recycling Coalition*, 884 F.2d at 1432 (burden-reducing votes cast by Reagan appointee James Buckley and Carter appointee Ruth Ginsburg).

<sup>129</sup> Professor Pierce, for example, writes that "the fate of a major agency policy decision reviewed by the D. C. Circuit will vary with the composition of the panel that reviews the agency action." Pierce, *supra* note 45, at 300. He finds that "[i]n cases with significant ideological implications—most major rulemakings—democratic D.C. Circuit judges are more likely to reverse agency policies at the behest of individuals, and republican D.C. Circuit judges are more likely to reverse agency policies challenged by business interests." *Id.* at 302; see also Karpay, *En Banc Furor, Liberal Fury*, *Legal Times*, May-June 1988, at 10 (segment from special supplement *Reagan Justice*, *supra* note 32).

<sup>130</sup> See Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619 (1985); Wald, *supra* note 35, at 552; Lewis, *Dismissing the Politics in a Capital Circuit Court*, *N.Y. Times*, Feb. 1, 1991, at B4, col. 3; Sturgess, *As Chief, Wald Kept Peace, Reorganized Court*, *Legal Times*, Jan. 21, 1991, at 6. Some public statements by the court's Carter appointees could be interpreted as critical of the Reagan administration's ideologically driven selection process. See Wald, *Random Thoughts on a Random Process: Selecting Appellate Judges*, 6 J.L. & POL. 15, 20-

along the burden-reducing and burden-increasing lines is striking especially when compared to the results from other circuits. This divergence is particularly accentuated in RCRA decisions. The aggregate voting data on Clean Air Act, Clean Water Act, and RCRA decisions suggests that a party favoring a lesser compliance burden probably will fare better before the District of Columbia Circuit with a panel dominated by Reagan appointees than with a panel controlled by Carter judges. Drawing a Carter-dominated panel, however, would not ensure a burden-reducing result.

*B. Treatment of Jurisdictional and Remedial Issues in Cases Involving Private Rights of Action*

The Clean Air Act and the Clean Water Act rely on decentralized monitoring and enforcement to ensure compliance with pollution abatement requirements.<sup>131</sup> By inviting oversight by private parties, decentralized monitoring serves the two aims of pressing governmental agencies to fulfill their statutory and regulatory obligations and supplementing the government's efforts to attack private violations of various legal commands.<sup>132</sup> Although the use of decentralized oversight is hardly a new phenomenon,<sup>133</sup> recourse to private monitoring schemes has become an increasingly prominent congress-

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21 (1989) (questioning whether "an executive intent upon perpetuating her ideology on the court" gives adequate attention "to the personality factors that are so indispensable to the making of a good judge and a smoothly functioning appellate court").

<sup>131</sup> For discussions of the structure and significance of decentralized monitoring and enforcement in environmental protection, see Albert, *Citizen Suits Under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?*, 16 B.C. ENVTL. AFF. L. REV. 283, 309-27 (1988); Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 835-50, 868-80 (1985); Comment, *Environmental Law—Citizen Suits and Recovery of Civil Penalties*, 36 U. KAN. L. REV. 529, 554-79 (1988); cf. Greve, *The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law*, 22 CORNELL INT'L L.J. 197 (1989) (discussing West German rejection of decentralized monitoring techniques in environmental regulation).

<sup>132</sup> See Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1205-20 (1982) (distinguishing between "private rights of action," permitting challenges to private violations of federal law, and "private rights of initiation," allowing suits against agency officials to compel them to enforce regulations).

<sup>133</sup> See Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1988)) (authorizing private treble damage suits for injuries resulting from restraints of trade or monopolistic conduct); False Claims Act, ch. 67, 12 Stat. 696 (1863) (current version at 31 U.S.C. §§ 3729-3731 (1988)) (authorizing private citizens to sue on behalf of the United States to recover damages and civil penalties for claims fraudulently presented to the government for payment).

sional strategy for ensuring fidelity to its policy commands.<sup>134</sup> Federal judges play a major role in determining the efficacy of decentralized monitoring through their interpretations of statutory provisions that govern matters such as standing, remedies, and reimbursement for attorneys' fees.<sup>135</sup> Indeed, the treatment of standing and remedial issues in evaluating suits by private parties can be as important as the choice of liability standards in establishing the impact of a specific regulatory system.<sup>136</sup>

Of the 241 Clean Air Act and Clean Water Act cases examined in this survey, 48 involved issues concerning the ability of private parties to vindicate the policies of these environmental statutes. Carter appointees cast a total of forty-five votes in these cases. In thirty-five instances (77.8%), the Carter judges endorsed burden-increasing outcomes,<sup>137</sup> by facilitating private challenges either to government action or to private conduct in violation of statutory abatement requirements. In the remaining ten votes (22.2%) the Carter judges supported burden-reducing results.<sup>138</sup> Reagan judges cast a total of thirty-seven votes in the subset of forty-eight cases, casting eighteen burden-increasing votes (48.6%) and nineteen burden-reducing votes (51.4%).

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<sup>134</sup> This trend has been especially evident in the area of public procurement. In 1986, Congress substantially expanded the ability of, and incentives for, private citizens to attack misconduct by government contractors. See Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341-49 (1989); Waldman, *The 1986 Amendments to the False Claims Act: Retroactive or Prospective*, 18 PUB. CONT. L.J. 469, 470-75 (1989). Over the past decade Congress also has increased the ability of disappointed bidders to attack government violations of federal procurement statutes and regulations. See AMERICAN BAR ASSOCIATION, SECTION OF PUBLIC CONTRACT LAW, *THE PROTEST EXPERIENCE UNDER THE COMPETITION IN CONTRACTING ACT* (July 6, 1989).

<sup>135</sup> See, e.g., Wardzinski, *The Doctrine of Standing: Barriers to Judicial Review in the D.C. Circuit*, NAT. RESOURCE & ENV'T, Fall 1990, at 7, 7-9, 42-43 (recent trend in the Court of Appeals for the District of Columbia Circuit—applying more stringent standing requirements for private parties challenging agency action in environmental litigation).

<sup>136</sup> For example, the Supreme Court's development of restrictive standing and remedial tests for private plaintiffs has been a crucial ingredient of the retrenchment of antitrust doctrine since the mid-1970s. See, e.g., *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 110 S. Ct. 1884, 1889 (1990) (limiting standing of private antitrust litigant to challenge a rival's establishment of a maximum resale price maintenance scheme); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (creating requirement that private antitrust plaintiffs plead and prove "antitrust injury"). But see *California v. American Stores, Inc.*, 110 S. Ct. 1853 (1990) (upholding ability of private litigants to obtain divestiture to remedy antitrust violations).

<sup>137</sup> See *supra* notes 80-82 and accompanying text for illustrations of votes and cases that involve private rights of action and have burden-increasing effects.

<sup>138</sup> See *supra* notes 87-89 and accompanying text for illustrations of votes and cases that involve private rights of action and have burden-reducing results.

The aggregate voting data suggest that, compared to Carter appointees, the Reagan appointees have displayed a tendency to apply more restrictive procedural tests to claims of private citizens' groups in Clean Air Act and Clean Water Act disputes. For example, these decisions suggest an inclination among Reagan appointees to apply jurisdictional requirements more strictly<sup>139</sup> and to scrutinize requests for attorneys' fees more closely.<sup>140</sup> Carter appointees, by contrast, have tended to treat citizens' suits more generously, both in the analysis of jurisdictional requirements<sup>141</sup> and in the disposition of attorneys' fees and remedial issues.<sup>142</sup>

Just as it was important to compare voting patterns of mixed panels in the analysis of all 241 Clean Air Act and Clean Water Act decisions,<sup>143</sup> it is also important to compare the voting behavior in all private suit/remedies cases with the results involving decisions by mixed panels. Of the subset of forty-eight cases, fourteen were decided by a panel containing at least one Carter appointee and one Reagan/Bush appointee. The Carter and Reagan/Bush appointees agreed in twelve of the fourteen cases, reaching burden-increasing outcomes seven times, and endorsing burden-reducing consequences four times. In the two cases in which there was a disagreement, Reagan judges twice authored majority opinions that supported burden-reducing outcomes.<sup>144</sup> Each of those opinions elicited a dissent by a Carter judge. Thus, without a larger number of observations

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<sup>139</sup> See, e.g., *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1170-72 (5th Cir. 1987) (decision by a panel of three Reagan appointees affirming dismissal of environmental group's lawsuit for failure to meet Clean Water Act jurisdictional requirements), *cert. denied*, 484 U.S. 1083 (1988); *Atlantic City Mun. Utils. Auth. v. Regional Adm'r*, 803 F.2d 96, 99-100 (3d Cir. 1986) (dismissing effort by municipal authority to invoke citizen suit provision of the Clean Water Act).

<sup>140</sup> See, e.g., *United States v. National Steel Corp.*, 782 F.2d 62, 63 (6th Cir. 1986) (decision by panel including two Reagan judges affirming denial of environmental group/intervenor's application for attorneys' fees under the Clean Air Act).

<sup>141</sup> See, e.g., *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987) (decision by panel including two Carter appointees, including opinion's author; held that federal five-year statute of limitations period, not state's three-year period, applies to citizen suit civil penalty action).

<sup>142</sup> See, e.g., *Northern Plains Resource Council v. EPA*, 670 F.2d 847, 849 (9th Cir. 1982) (decision by three Carter appointees approving award of attorneys' fees to non-prevailing environmental group), *vacated*, 464 U.S. 806 (1983).

<sup>143</sup> See *supra* notes 108-112 and accompanying text.

<sup>144</sup> See *Atlantic City Mun. Utils. Auth. v. Regional Adm'r*, 803 F.2d 96 (3d Cir. 1986) (majority opinion by Judge Stapleton, a Reagan appointee; dissent by Judge Sloviter, a Carter appointee); *National Audubon Soc'y v. Department of Water*, 858 F.2d 1409 (9th Cir. 1988) (majority opinion by Judge Brunetti, a Reagan appointee; dissent by Judge Reinhardt, a Carter appointee).



indicating conflict among the Carter and Reagan/Bush appointees on the same panel, one must be cautious in assuming that judges chosen by one president would have disputed the outcome of cases decided by unmixed panels containing one or more judges selected by a different president.

If the aggregate voting data indicates a genuine division in views concerning jurisdictional and remedial issues, the burden-reducing impact of Reagan/Bush appointee decisionmaking will be substantial. Private parties will encounter greater restrictions, such as harsher standing and jurisdictional tests, on their ability to raise and sustain Clean Air Act and Clean Water Act challenges. At the same time, the attractiveness of bringing suits will decline as prospective plaintiffs encounter additional difficulty in establishing entitlements to damages and in demonstrating eligibility to obtain attorneys' fees. Despite the limited number of mixed panel disagreement cases surveyed, the aggregate voting data, nevertheless, suggests a genuine difference in preferences.

### C. *Economic Analysis*

President Reagan's appointments to the courts of appeals included a number of individuals with extensive law and economics backgrounds.<sup>145</sup> Among the most prominent Reagan appointees were academics such as Robert Bork, Pasco Bowman, Frank Easterbrook, Douglas Ginsburg, Richard Posner, Ralph Winter, and Stephen Williams, many of whom have advocated greater attention to wealth maximization as a decisionmaking principle in cases involving economic regulation.<sup>146</sup> To some observers, the appointment of conservative law and economics scholars foreshadows broad-based efforts by Reagan judges to apply efficiency criteria in reviewing statutes and regulations governing business conduct.<sup>147</sup> Majority opinions authored by prominent Reagan law and economics appointees have

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<sup>145</sup> Dwyer, *Law and Economics: A New Order in the Court?*, BUS. WK., Nov. 16, 1987, at 93. Reagan appointees, however, did not constitute the only subset of economically sophisticated court of appeals judges. See Latin, *Legal and Economic Considerations in the Decisions of Judge Breyer*, L. & CONTEMP. PROBS., Autumn 1987, at 57 (discussing decisions of Carter appointee Stephen Breyer).

<sup>146</sup> See, e.g., R. BORK, *supra* note 102, at 66, 405-07 (arguing for efficiency-oriented interpretation of federal antitrust statutes); R. POSNER, *supra* note 101, at 286-315 (advocating use of economics in judicial decisionmaking); Easterbrook, *The Supreme Court 1983 Term—Forward: The Court and the Economic System*, 98 HARV. L. REV. 4, 8-18 (1984) (presenting criteria for evaluating judicial performance in resolving economic issues).

<sup>147</sup> See B. SCHWARTZ, *supra* note 38, at 163-89, 231-40, 255-57.

relied more extensively on economic analysis to assess the validity of pollution control requirements. For example, in *Natural Resources Defense Council v. United States Environmental Protection Agency*<sup>148</sup> the Court of Appeals for the District of Columbia Circuit ruled that the EPA could consider economic and technological feasibility when establishing the "margin of safety" for hazardous pollutants.<sup>149</sup> Judge Bork's opinion for a unanimous en banc court warned that to do otherwise might compel the EPA to promulgate a regulation that was irrational because its compliance costs would vastly outweigh abatement benefits.<sup>150</sup> Nonetheless, the application of economic analysis has not systematically served to yield burden-reducing outcomes.<sup>151</sup>

#### D. *The Influence of the Bush Administration's Nominees*

The first two years of George Bush's presidency have featured noteworthy departures from the Reagan administration's philosophy toward economic regulation. In environmental protection President Bush has appointed regulatory agency officials with greater enthusiasm for government intervention than many of their Reagan administration counterparts.<sup>152</sup> The Bush EPA has emphasized its intent to enforce existing abatement requirements vigorously.<sup>153</sup> Further, the Bush administration supported the enactment of the 1990 amendments to the Clean Air Act.<sup>154</sup> In tone and content, the

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<sup>148</sup> 824 F.2d 1146 (D.C. Cir. 1987).

<sup>149</sup> *Id.* at 1163.

<sup>150</sup> *See id.* at 1163-66.

<sup>151</sup> *See, e.g.,* Bethlehem Steel Corp. v. EPA, 782 F.2d 645 (7th Cir. 1986) (opinion by Judge Posner); Kennecott v. EPA, 780 F.2d 445 (4th Cir. 1985) (opinion by Judge Wilkinson), *cert. denied*, 479 U.S. 814 (1986).

<sup>152</sup> *See* Hahn, *The Politics and Religion of Clean Air*, REGULATION, Winter 1990, at 21, 22; *see also* Cahan, *Can the EPA Chief Clean up Bush's Image?*, BUS. WK., Dec. 11, 1989, at 135; Waldman, *The Accidental Regulator*, NEWSWEEK, May 7, 1990, at 24.

<sup>153</sup> *See, e.g.,* *Criminal Prosecutions, State Cooperation Seen as Key Enforcement Priorities in 1990*, 20 Env't Rep. (BNA) 1714, 1715 (1990) (discussing Bush administration's commitment to expanded criminal prosecution for abatement noncompliance; quoting Richard Stewart, Assistant Attorney General for Land and Natural Resources as saying, "We're no longer happy just nudging violators toward compliance. We intend to send a message that we want compliance now with no more foot-dragging."); Gold, *Increasingly, Prison Term Is the Price for Polluters*, N.Y. Times, Feb. 15, 1991, at B6, col. 3 (describing Bush administration criminal enforcement initiatives).

<sup>154</sup> The Bush administration's original clean air legislative package is presented in Remarks Announcing the Clean Air Act Amendments of 1989, 25 WEEKLY COMP. PRES. DOC. 880-90 (June 12, 1989). Consideration of revisions to the Clean Air Act featured continuing disagreement between President Bush and Congress over the content of the 1990 amendments. *See* Letter to Congressional Leaders on the Clean Air Act Amendments of 1990, 26 WEEKLY

Bush administration has moved federal environmental policy to the left of its Reagan-era equilibrium.

The Bush administration's leftward shift in economic regulatory policy raises the question of how President Bush's judicial nominations will shape the regulatory preferences of the federal bench. From January 1989 through December 1990, the Bush administration accounted for only twenty-two new judges on the courts of appeals.<sup>155</sup> The pace of nominations began to increase after a period of little activity during the first six months of the Bush presidency.<sup>156</sup> These judicial appointments promise to be particularly important for the future of environmental policy and other forms of economic regulation. Not only will the Bush appointments affect the regulatory preferences of the judiciary as a whole, but the filling of vacancies on the Court of Appeals for the District of Columbia Circuit will help determine how the nation's most influential intermediate appellate tribunal will review decisions by the EPA and other federal regulatory agencies.<sup>157</sup>

Should the Bush administration accelerate the pace of appointments and secure confirmation of its nominees, the cumulative impact of Reagan and Bush appointments could affect the disposition of economic regulation cases to an extent not yet evident in decisions since 1981.<sup>158</sup> Reagan judges now either hold parity with non-Reagan judges or constitute narrow majorities on most of the federal courts of appeals.<sup>159</sup> If one assumes what may not be an entirely realistic

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COMP. PRES. DOC. 1462 (Sept. 26, 1990). In signing the new clean air bill, President Bush applauded the new measure, particularly its emphasis upon market-based incentives for pollution abatement. *See* Remarks on Signing the Bill Amending the Clean Air Act, 26 WEEKLY COMP. PRES. DOC. 1822, 1823 (Nov. 15, 1990) (President Bush: "For the first time, we've moved away from the redtape bureaucratic approach of the past. The old tradition of command and control regulation is not the answer").

<sup>155</sup> *See* Moran, *In His Own Image*, Legal Times, Dec. 31, 1990, at 15.

<sup>156</sup> *See* Pelham, *Progress Seen in Filling Federal Bench*, Legal Times, Oct. 2, 1989, at 1; *see also* Glaberson, *Delays in Filling Vacancies Create U.S. Court Backlogs*, N.Y. Times, Sept. 15, 1989, at B3, col. 5 (describing delays in judicial appointments early in Bush administration); Marcus, *Federal Judgeship Vacancies Pile up as Administration Enters Fifth Month*, Wash. Post, May 23, 1989, at A13, col. 1 (same as Glaberson article).

<sup>157</sup> Through December 31, 1990, President Bush had appointed three members of the District of Columbia Circuit: Judges Karen Henderson, A. Raymond Randolph, and Clarence Thomas. *See* Moran, *supra* note 155, at 14.

<sup>158</sup> As of December 31, 1990, there were 126 vacancies on the federal district courts and courts of appeals—approximately 15% of the federal judiciary. Eighty-five of these positions were established by the Federal Judgeship Act of 1990. *See id.*

<sup>159</sup> This condition is true for the following circuits: District of Columbia, First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Tenth. *See* Marcus, *Bush Quietly Fosters Conservative Trend in Courts*, Wash. Post, Feb. 18, 1991, at A1, col. 3.

condition, that Reagan judges will serve long terms,<sup>160</sup> the Bush appointments could create supermajorities of Reagan/Bush judges by 1992. If previous historical trends hold true, Reagan/Bush nominees could account for as many as seventy-five percent of all federal court of appeals judges by the end of 1992.<sup>161</sup>

Preliminary evidence suggests that President Bush will nominate judicial candidates who hold roughly the same bundle of ideological preferences held by Reagan administration appointees.<sup>162</sup> Establishing supermajorities with narrow regulatory preferences would increase the chances that two or more Reagan/Bush judges would sit on any individual panel. This could influence the disposition of cases in two important respects. First, it might raise the likelihood that burden-reducing outcomes would be achieved in any single case.<sup>163</sup>

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<sup>160</sup> In recent years, a great deal has been written about the possibility of mass defections from the federal bench if Congress did not increase compensation for judges substantially. See Grey, *How to Guarantee a Mediocre Judiciary*, N.Y. Times, Apr. 4, 1989, at A27, col. 2; Bork, *Miserable Wages, Miserable Leaders*, N.Y. Times, Dec. 23, 1988, at A39, col. 2; Raven, *Maintaining a Quality Judiciary: The Need for Adequate Compensation*, ABA JOURNAL, Dec. 1, 1988, at 8. In 1989, Congress approved a new pay scale that sets a ceiling of \$132,700 for federal court of appeals judges. See *Rehnquist Lauds Raise for Judges*, Wash. Post, Jan. 1, 1991, at A21, col. 1. This measure is likely to discourage departures for the time being. However, Reagan and Bush appointees have tended to be younger than their non-Reagan counterparts, and many face higher professional opportunity costs for staying on the bench. It remains possible that a Reagan/Bush "judicial revolution" within the federal district courts and courts of appeals will be impeded if periodic salary increases are not forthcoming.

<sup>161</sup> See Kamen & Marcus, *A Chance to Deepen Stamp on the Courts*, Wash. Post, Jan. 29, 1989, at A1, col. 4.

<sup>162</sup> See Goldman, *supra* note 31, at 329-30; Marcus, *supra* note 159, at A1, col. 3; Moran *supra* note 155, at 15; Lewis, *Turning Loyalty and Service to Bush into Power as Presidential Counsel*, N.Y. Times, Dec. 12, 1990, at B12, col. 1; Johnston, *Bush Appears Set to Follow Reagan by Putting Conservatives on Bench*, N.Y. Times, May 31, 1989, at B5, col. 1; Kamen & Marcus, *supra* note 161; Abramson, *Conservative Legal Groups Plan Efforts to Keep Bush Administration on Reagan's Judicial Path*, Wall St. J., Nov. 21, 1988, at A18, col. 1.

<sup>163</sup> It should be noted that voting results from the 241 cases in the Clean Air Act and Clean Water Act survey do not reveal a difference in voting patterns when Carter or Reagan judges constitute a panel majority. In 64 cases, Carter appointees either constituted a majority in an en banc proceeding or held two or more seats on a three-judge panel. Forty of these cases (62.5%) reached burden-increasing outcomes; 18 cases (28.1%) adopted burden-reducing positions; 4 cases (6.3%) involved burden-neutral results; and, in two instances involving three-judge panels, the two Carter judges disagreed with each other. These patterns are essentially consistent with aggregate Carter voting patterns in the Clean Air Act and Clean Water Act cases. Out of 249 total votes, Carter appointees supported burden-increasing outcomes 158 times (63.5%) and burden-reducing results 83 times (33.3%).

Reagan appointee voting behavior reveals a similar consistency. Reagan judges held majorities in en banc deliberations or on three-judge panels in 38 cases. Twenty of these decisions (52.6%) supported a burden-increasing outcome; 15 decisions (39.5%) endorsed burden-reducing results; 1 case (2.6%) adopted a burden-neutral position; and, in two cases involving three-judge panels, the two Reagan appointees disagreed with each other. Out of 164 total votes in

Second, and perhaps more important, it could alter the expressed basis on which a panel might impose a burden-reducing result. Where they constitute a majority on any given panel and hold a supermajority within a given circuit, Reagan/Bush judges might be inclined to endorse more extreme positions in writing majority opinions. This tendency to adopt extreme positions would flow from the reduced need to achieve consensus with more moderate judges on three-judge panels and in en banc deliberations. Thus, the manner in which the Bush administration fills existing and forthcoming court of appeals vacancies could exert an increasingly pronounced qualitative influence on the course of environmental policy and other economic regulatory doctrine.

There is a final respect in which President Bush's appointments will shape the overall impact of his administration's economic regulatory policies. As noted above,<sup>164</sup> Bush appointees to federal regulatory bodies such as the EPA have adopted noticeably more expansive views of their agencies' roles than did their Reagan predecessors. The Bush regulators have pursued enforcement initiatives that the Reagan administration disfavored.<sup>165</sup> Continued selection of conservative appellate judges will mean that the fruits of new regulatory activism will face review by judges with narrower regulatory preferences. Although principles of judicial deference will constrain review of some agency actions, truly significant efforts to expand abatement obligations, either by rulemaking or choice of enforcement techniques, may receive unsympathetic treatment by regulation skeptics on the appellate courts. What the revitalized Bush regulatory agencies give, the Reagan/Bush appellate judges may take away.

## VI. CONCLUSION

Presidents can limit the reach of federal economic regulation in several ways. They can persuade Congress to narrow the statutory charters under which regulatory agencies operate. They can cut the budgets of enforcement agencies and thereby constrain the ability of regulators to bring new cases or enact new rules. They can appoint administrators with deregulatory philosophies, or they can attempt

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Clean Air Act and Clean Water Act cases, Reagan appointees supported burden-increasing outcomes 85 times (51.8%) and burden-reducing outcomes 75 times (45.7%).

<sup>164</sup> See *supra* note 153 and accompanying text.

<sup>165</sup> See Meier, *FTC is Re-Emerging as a Watchdog on Prices*, N.Y. Times, Jan. 28, 1991, at A16, col. 1 (discussing recent expansion of federal antitrust enforcement).

to use the Office of Management and Budget to examine proposals for new rules. In making appointments to the federal bench, presidents can select regulation skeptics who will review regulatory commands with an eye toward limiting the compliance burden on affected parties.

Each of these techniques varies in its capacity to encumber future presidents when their constituency brings a more expansive set of regulatory preferences to the White House. Among the strategies with the greatest potential long-term impact is the choice of federal judges, particularly those in the courts of appeals who review the actions of influential regulatory bodies such as the EPA. The gradual process of judicial interpretation can have a profound effect upon the content of a regulatory scheme. As with the Clean Air Act and the Clean Water Act, the power to shape the substance of regulation is greatest when Congress has given an administrative body broad authority to implement general statutory commands.

The cases reviewed in this Article suggest that the Reagan appointees to the federal courts of appeals have a greater inclination than their Carter counterparts to adopt positions that would reduce the burden of compliance in Clean Air Act and Clean Water Act cases. The results are not entirely clear-cut, as the relevant cases contained relatively few instances in which Carter and Reagan appointees sat on the same panel and disagreed as to the appropriate outcome. Keeping this important qualification in mind, it nonetheless appears that the Reagan administration succeeded in bringing less intervention-minded judges to the courts of appeals. This trend seems most pronounced on the Court of Appeals for the District of Columbia Circuit, whose influence over federal environmental policy among judicial tribunals is second only to that of the Supreme Court.