DC Circuit Cases Foreshadow The Shape of Things to Come If GOP excludes Democrats From the Judicial Appointments Process

What will happen to our laws if senate Republicans exclude 45 Democratic senators from participating in selecting federal judges? If all appointments will be made by a Republican president and the GOP, will we have judges committed to the fair enforcement of rights under laws enacted by congress? Or will we have zealots bent on imposing an agenda that does not respect our rights?

For an answer, let's look at two decisions of the U.S. Court of Appeals for the District of Columbia concerning our rights to equal opportunity. A footnoted version of this letter appears at www.eeo1.com. The DC Court of Appeals is the second most important Federal court in the country because it reviews the actions of all federal agencies with headquarters in the District.

In two cases involving the Federal Communications Commission rules against employment discrimination in the radio and TV industry, Republican appointed Judges on the DC Circuit destroyed civil rights to equal employment opportunity for three quarters of our population—women and minorities.

Congress gave the FCC the authority to prohibit employment discrimination in the radio-tv industry.[1] The DC Court of Appeals made this

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[1] "The Federal Communications Commission draws its authority to issue EEO rules from the Communications Act of 1934, 47 U.S.C. § 151 *et seq.,* which authorizes the Commission, in

Congressional grant virtually meaningless, not through broad pronouncements, but through detailed opinions that distorted the Constitution and stripped federal agencies of powers granted by Congress.

The Court appears prepared to defy forty years of consistent, and partly successful efforts by both political parties, to reduce job discrimination through legislation and administrative implementation.[2] Since the Court considers its own decisions as precedents to follow in later cases, as do the other Circuits, it is reasonable to evaluate these decisions as they will apply not only to employment opportunity laws, but voting rights, fair housing rights and all other civil rights laws. [3]

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considering whether to grant a license or renewal to a broadcast station, to determine "whether the public interest, convenience, and necessity will be served by the granting of such application." *Id.* at § 309(a). In 1969 the Commission determined that it would not serve the public interest to grant licenses to broadcasters with discriminatory hiring practices. The Commission therefore prohibited licensees from discriminating in employment on the basis of race or sex and required them to establish EEO programs. *See* Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d 240, 1969 WL 16274 (1969). In 1992 the Congress prohibited the Commission from "revis [ing] ... the regulations concerning equal employment opportunity ... as such regulations apply to television broadcast station licensees." 47 U.S.C. § 334(a)(1).” MD/DC/DE Broadcasters v. FCC, 236 F.3d 344(D.C. Cir. 2001) rehearning en banc denied, 253 F.3d 732 (D.C. Cir. 2001) cert. denied, sub nom. Minority Media and Telecommunications Council v.FCC, 534 US 1113 (200).

[2] . See Alfred W. Blumrosen and Ruth G. Blumrosen, THE REALITIES OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999, at www.eeo1.com, and law.newark.rutgers.edu/Blumrosen.html. The analysis shows an increase of 8 million minorities and women in higher level jobs in 1999, than they would have held under the occupational distribution of 1975, above the level that would have been reached without the Equal Employment Opportunity effort. For details, see Alfred W. Blumrosen and Ruth G. Blumrosen, *Intentional Job Discrimination—New Tools for our Oldest Problem,* 37 Univ. of Michigan Jour. of Law Reform, 681-699 (2004).

In the first case, Lutheran Church, decided in 1998, three Republican appointed judges, Laurence Silberman, Stephen Williams, and David Sentelle invalidated an FCC rule that prohibited employment discrimination in hiring based on race or sex, and required stations to compare their workforce with the proportion of available minorities and women in the relevant labor market, and to offer employment and promotion in a non-discriminatory manner where discrimination was found.[4]

The Court held that these regulations "encouraged" the station to hire minorities and women in proportion to their participation in the labor market. This "encouragement" was called "pressure" which became a "preference" for minorities and women.[5] The Court then misapplied the Adarand decision of the Supreme Court requiring a narrow interpretation of laws or regulations because the FCC rule was "based on race."[6] The Adarand decision did not hold that all governmental actions related to race were to be narrowly construed. It required narrow construction only where the action provided an illegal preference for minorities.

Narrow construction meant that there had to be a compelling interest before such a law or regulation would be valid at all, and that it had to be

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[3] See Berkley v. U.S. 287 F.3d 1076, (C.A.Fed.,2002)for a discussion of cases reacting to the D.C. Circuits opinions analyzed here.

[4] 141 F.3d 344 (DC Cir. 1998), pet. for reh'g denied, 154 F.3d 487, pet. for reh'g en banc denied, 154 F.3d 494 (D.C. 1998).

[5] 141 F.3d at 388-391.

[6] Id. At 391. In denying a rehearing, the same judges explained that it was the encouragement to hire minorities and women that created the "racial classification" that in turn required strict scrutiny.154 F.3d 487, 492

necessary to accomplish its valid purpose. The DC Court found that the purpose of the regulation was to encourage diversity in programming. This was held not to be a "compelling" interest, and that the regulation was not "narrowly tailored" because it included personnel who were not engaged in programming activities.

This analysis—that any actions to reduce employment discrimination must be narrowly interpreted before it will be upheld--is contrary to forty years of interpretation by the Supreme Court. If followed, it will virtually destroy all the Equal Opportunity programs of the last forty years. As the Supreme Court explained in 1975 –

"...the Civil Rights Act of 1964 was intended to be a spur or catalyst to cause employers and unions to self-examine and to self evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[7]

This proposition, of course, applies to all civil rights laws. Employers and others may not ignore the effect of their actions on minorities or women. The purpose of the civil rights laws is to obtain compliance without awaiting litigation. To this end, the employer or other person must be race and sex conscious.[8] The DC Court of Appeals opinion will

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[7] Albemarle Paper Co. v. Moody, 422 US 405, 418 (1975).

[8] Alfred W. Blumrosen, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY, 289-317, (University of Wisconsin Press, 1993)

necessarily require "strict scrutiny and narrow tailoring" for employment, housing, voting rights and other civil rights laws that have the same purpose.

The DC Court of Appeals also ignored a 1986 opinion of the Supreme Court by Justice O'Connor that carefully distinguished an illegal quota from a "sensible rule of thumb":

> ".....a racial hiring or membership goal must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination, rather than as a rigid numerical requirement that must unconditionally be met on pain of sanctions. To hold an employer or union to achievement of a particular percentage of minority employment or membership, and to do so regardless of circumstances such as economic conditions or the number of available qualified minority applicants, is to impose an impermissible quota." [9]

The DC Court of Appeals ignored this distinction and invalidated the FCC regulation in its entirety.

After this decision, the FCC gave up trying to influence employer hiring practices, and instead attempted to assure that stations would recruit to fill vacancies through non-discriminatory practices. It based its rule on its power to prevent employment discrimination, a power the Court acknowledged.

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[9] Sheet Metal Workers Local 28 v. EEOC, 478 U.S. 421, 494-95 (1986)

The FCC found that many stations were discriminating by use of word of mouth recruiting of new employees by incumbent employees.

> **"We believe that repeated hiring without broad outreach may unfairly exclude minority and women job candidates when minorities and women are poorly represented in an employer's staffB particularly when they are poorly represented in the ranks of management employees who make hiring decisions. It is not enough to say that one will not discriminate against anyone who applies for a job when not all have been given a fair opportunity to apply. Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process." [10]**

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[10] 15 F.C.C.R. 2329 & 3 (2000); 2000 WL 124381, & 3. The Notice of Proposed Rule Making, 13 F.C.C.R. 23,004,& 61-64 (1998) containes similar language. &61 states, AEffective recruitment for job vacancies is important to ensure that all qualified applicants, whether minority or non-minority, male or female, are notified of, and have an opportunity to a compete on a level playing field for, job openings. Historically, women and minorities have had difficulty in finding out about, or taking advantage of, opportunities in the communications industry. Therefore, we believe that active recruitment efforts are especially essential to afford women and minorities the opportunity to learn of available vacancies and to guard against the insular effects of word-of-mouth recruiting, in which only acquaintances of current sation employees learn of openings, and applicants thus tend to be drawn from the same background as current employees.@

This decision was reviewed by the DC Court of Appeals in 2001, in MD/DC/DE Broadcasters v. FCC, by Judges Douglas Ginsburg and David Sentelle, who were Republican Appointees and Karen Henderson, a Republican appointee to the District Court, promoted to the Court of Appeals by Democratic President Clinton. [11]

The DC Court of Appeals stated it was applying the Adarand decision to the FCC recruiting rule, but it ignored the first question under that decision, whether there was a compelling interest in preventing racial discrimination.

There is no "compelling interest" in denying minorities the opportunity to obtain knowledge in order to compete for jobs with Whites. In fact, the "compelling interest" runs in exactly the opposite direction. The Supreme Court has recognized that:

> .... if the city [or other government agency] could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. **It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn**

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[11] 236 F.3d 13 (D.C. Cir. 2001) rehearning en banc denied, 253 F.3d 732 (D.C. Cir. 2001) cert. denied, sub nom. Minority Media and Telecommunications Council v.Fcc, 534 US 1113 (200).

> **from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.**[12] [emphasis added]

A Fortiori, the federal agency charged with responsibility for preventing discrimination in employment on the public airwaves through "word of mouth" recruiting by white incumbents of their white friends could take "affirmative steps to dismantle" this system by opening vacancy information to all. The FCC was attempting to expand the knowledge of job vacancies in an industry regulated by the government.

The DC Court of Appeals found the outreach rule was unconstitutional because whites "are less likely to receive notification of job vacancies solely because of their race."[13] How did they arrive at this conclusion? They reasoned that each station had a limited budget to spend for recruiting. Any money spent on outreach to minorities or women would reduce the amount available to whites. Thus the employer might place a smaller advertisement in a paper of general circulation than it would have but for the need to spend money on advertisements focused on minorities or women![14] There was no evidence to support this argument.

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[12] City of Richmond v. J.A. Croson Co. 488 U.S. 469, 492 ((1989).

[13] 236 F. 3d 13, 21 (D.C. Cir, 2001)

[14] ibid, fn. "Recruiting expenditures are fixed in the short run; even if an employer increases its recruiting budget in response to the Commission's EEO rule, it then must follow the Commission's directive in determining how to allocate those funds. Here, the purpose of the rule is to raise the percentage of women and minorities in the applicant pool and, thereby, increase their chances of being hired.... If an employer believed that it could reach the maximum number of good prospects with a display ad in the local newspaper, but they would likely be non-minorities, then it nonetheless would

The Court never discussed the FCC's rationale for its new regulations: that they were intended to reduce the advantage of "insider information" on vacancies that incumbent white employees could pass along to their friends and associates.[15] In ignoring the FCC's reason, the Court violated one of the most fundamental rules of modern administrative law, set forth by the Supreme Court in 1947:

> "..... we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."[16]

The DC Court of Appeals ignored the FCC findings that "word of mouth recruiting" by a largely white work force perpetuates the racial pattern. It insisted that the FCC's only goal was that licensees recruit with a "broad outreach." That goal, the court said, could not support recruiting efforts among minorities and women who had been left out of the web of

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> choose to run a smaller newspaper ad and use its remaining funds to run an ad in a publication targeted at minorities. This redirection of resources hurts those prospective non-minority applicants who would respond to the display ad but not to the smaller ad, and it does so only because of their race."

[15] . See Alfred W. Blumrosen, The Duty of Fair Recruitment under the Civil Rights Act of 1964, 22 Rutgers L. Rev. 465 (1968), reprinted, A.W. Blumrosen, BLACK EMPLOYMENT AND THE LAW, 218-295 (1971). The advantages to an employer of using "word of mouth" recruitment are explained by Judge Posner in Consolidated Services, Inc., v. EEOC, 289 F.2d 233,236 (7th Cir. 1993).

[16] SEC v. Chenery Corp., 332 US 194, 196 (1947)

informal information about job vacancies. Neither the Supreme Court nor Congress permit a court to ignore the reasons given by an agency for adopting a program, or to substitute their own reasons and impute them to the agency.

The DC Court of Appeals technique of ignoring agency findings of fact and distorting agency policies allows any court to impose its own views of policy on federal agencies. This is government by men without law.

Finally the DC Court of Appeals was wrong to assume that whites would be adversely affected by the FCC requirement of public notice of job vacancies. There are far more whites than minorities or women who lack information about job vacancies. The FCC rule would have required that they too would have access to this information. Only a small minority of whites who had "inside connections" in the industry would face enlarged competition, and that would come from members of all races who obtained this information for the first time. Most whites, along with minorities and women would have gained information about job vacancies under the FCC rule. In this situation, as in many others, affirmative action programs that help minorities and women would also help many whites; witness the employment of short white cops. Height requirements that would have excluded them were struck down as discriminatory against women and some minorities.[17]

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[17] Dothard v. Rawlinson, 433 US 321 (1977).

After this decision, the FCC abandoned it efforts to protect minorities and women against discrimination. It adopted a "sanitized" version of its regulations, that expressly prohibited the stations from taking any actions to recruit minorities or females. It now insists that stations "utilize media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one race, national origin, color, religion or sex over another."[18] This rule permits the stations to continue to employ the "word of mouth" recruiting system that the Commission had found to discriminate against minorities and women.

This example of piece-meal destruction of a regulatory program that was intended to eliminate a common form of exclusion of minorities and women is a vision of an American legal system gone wrong. Faced with this record of Republican appointed federal judges dismantling human rights law enforcement, we should all reject the effort to exclude Democratic Senators from participating in the judicial appointment process.

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[18] 2002 WL 31600823 (F.C.C.); 17 F.C.C.R. 24096, as part of Appendix C, 24094, adopting a new Sectin 73.2080 (4)(iv). Statement of FCC Chairman Powell appears at 17 F.C.C.R. 24127, Nov. 7, 2002.

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Biographical Note: Prof. Blumrosen has his BA and JD degrees from the University of Michigan and taught at Rutgers Law School, Newark, from 1955 until became emeritus at the end of 2001. He has advised Federal, state and local Agencies in the employment discrimination field since 1965, serving in both Republican and Democratic Administrations. His books include BLACK EMPLOYMENT AND THE LAW (1971), MODERN LAW-THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY, (1993) and, with Ruth G. Blumrosen, THE REALITIES OF INTENTIONAL JOB DISCRIMINATION—1999 (2002 at eeo1.com), and, also with Ruth G. Blumrosen, SLAVE NATION: HOW SLAVERY UNITED THE COLONIES AND SPARKED THE AMERICAN REVOLUTION (2005). His legal writings in employment law have been cited by seven Supreme Court justices; **Justice O'Connor, Smith v. City of Jackson, Miss (2005); Justice Brennan, Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C. (1986); Justice Stewart and Justice Marshall, International Broth. of Teamsters v. U.S. (1977); Justice Powell, Abood v. Detroit Bd. of Ed. (1977); Justice Powell, McDonnell DouglasCorp.v.Green (1973); Justice White, Vaca v. Sipes (1967).**