

The Regulator and Its Judge(s): US Perspectives

William E. Kovacic

George Washington University/King's College London

The Club of Regulators – Paris Dauphine

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Modern Environment

- Fragmented Regulatory Authority
 - National level/member states
- Scaleable Regulatory Mandates
- Multiple Goals (“Public Interest”)
- Commercial Dynamism: E.g. Communications
- Intense Political Concern (Pressure)
- Dynamic Conceptual Framework

Issues

- Knowledge of Courts
 - Concepts
 - Effects
- Deference
 - Tradeoffs: speed, accuracy, sound process
- Conversation: Courts and Regulators
- Political Involvement

Caveat

- Personal Views Only
- Contact: wkovacic@law.gwu.edu

Simplified View of the US Federal Judicial System and Regulation

- Supreme Court
- US Court of Appeals for the District of Columbia
 - For regulatory matters: Second (?) most important court in the United States

Knowledge and the Courts

- Concepts
- Commercial Developments
- Effects
 - Regulatory ecology
 - Markets

Academic/Professional Hubs

- Universities
 - “Convenors”
 - Research
 - Teaching
- Professional Societies
 - E.g.: Administrative Law Section, ABA
 - E.g.: Antitrust Law Section, ABA
 - E.g.: NARUC

Public Agency Regulatory Analysis Hub

- Administrative Conference of the United States
 - Academics, agency officials, judges, practitioners
 - Sponsored research, reports, discussions, recommendations
- Main Focus: How Process Affects Substance
 - Judicial review standards: in theory, in practice
 - Efficiency of agency/judicial process
 - Agency quality control measures
 - Role of agency hard/soft law tools (rules/guides)

Judicial Deference to Regulator

- In Theory (Given); In Practice (Earned)
 - Basis: Interviews with S.Ct./DC Circuit members
- Agency Branding
 - Research
 - Decisions
 - Process
 - Disclosure
 - External engagement
 - Evaluation

Judicial Review and Legitimacy

- Tougher Judicial Review
 - Takes more time
 - Frustrates regulators
 - Provides shield from political interference --
Especially with openended mandates

Judicial Appointments

- Preferences for Regulatory Intervention
- Pre-Appointment Training
- Focal Points
 - Supreme Court: e.g., Breyer and Scalia
 - US Court of Appeals for the District of Columbia: e.g., D. Ginsburg, Williams, Garland, Bork, Scalia

Learning Curves: Comparative Study

- Academic and Professional Hubs
- International Hubs: OECD, UNCTAD
- Regional Hubs