

The Senate's new filibuster rules stir up plenty of reaction

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A central theme of the Nov. 22 front-page article "[Senate eliminates filibusters on most nominees](#)" was that, since President Obama can now fill three vacancies on the U.S. Court of Appeals for the D.C. Circuit, upcoming Obama administration regulations — especially greenhouse gas regulations from the Environmental Protection Agency (EPA) — are more likely to survive judicial review. The Post quoted a professor as saying that Mr. Obama's appointees will move the court "quite substantially to the left" and quoted an advocacy group source as saying that the administration's rules will now "get a fair hearing" in the court.

As a longtime practitioner before the D.C. Circuit, I believe that EPA rules and all other agency rules have always received a "fair hearing" when that court reviews them — regardless of the "political" makeup of the particular three-judge panel. Judges on that court (as well as other federal courts) must and do adhere to well-established legal principles in reviewing agency actions.

In my own cases challenging EPA rules on behalf of industry, I have been on the losing side where Republican appointees were in the majority and on the winning side where Democratic appointees were in the majority. A few years ago, I was able to secure a 2 to 1 reversal of an EPA rule on behalf of industry; the judge who wrote the opinion in favor of my clients was appointed by President Bill Clinton, while the judge who wrote a dissenting opinion (favoring the EPA) was appointed by President Ronald Reagan.

Yes, sometimes in close cases judges' opinions reviewing agency rules may reflect their social-political views. But consider that, with the current allegedly conservative and "unfair" makeup of the court, over the past few years many major EPA regulations — including greenhouse gas regulations — have been upheld against industry attacks.

Judges' political affiliation, I believe, is in most cases not a factor on judicial review of agency rules. To suggest otherwise is an unfair attack on the integrity of the judges on the D.C. Circuit and other federal courts.

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