

Richard J. Pierce, Jr.,
*The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the
Nondelegation Doctrine*

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Abstract by Christopher Lisy

In this article, Professor Pierce focuses on the recent D.C. Circuit decision, *American Trucking Ass'ns v. EPA* (ATA), and uses the case to show that excessive judicial intervention in agency discretion is misplaced. The author argues that the case was wrongly decided and that it is a good candidate for reversal by the Supreme Court. The article begins with an overview of the ATA case and a review of both the majority and dissenting opinions. The remainder of the piece focuses on the flawed reasoning behind, and the ramifications of, the D.C. Circuit's opinion.

The author contends that the majority decision in ATA was unfairly influenced by the "science charade" - that government demands more of science than science can provide. In believing that science could solve the problems that the EPA did not, the judges in ATA base a large part of their argument on this "science charade." Next, the author evaluates four separate approaches by which the EPA could have evaluated the Act at issue in ATA. He then argues that the D.C. Circuit's decision is undemocratic, because it is formed by judges who are not politically accountable for their actions. Further, he fears that the decision will create a policy decision that will bind all future presidents and administrations. The author argues that this is an undesirable part of our democratic system. Finally, he contends that such broad delegations of policy, like the one the D.C. Circuit struck down in ATA, are not unconstitutional. His reasoning is based on the idea that agencies, unlike judges, are accountable-their heads are appointed by the President. The author concludes by making a rational claim that because of this accountability, presidential elections do matter - so long as judicial control is not overreaching.