

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION AND RESPONSIBLE GOVERNMENT

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Time and circumstances may shape the mark of a man's work in ways that cannot be foreseen. At the same time, the man himself determines the depth of his cut in the bark of history. Each of these influences seems to have molded Chief Judge Bazelon's impact upon the changing and still uncertain relations between administrative agency and reviewing court.

David L. Bazelon came to the federal court of appeals, at the age of 40, with more experience in agency litigation than in the agencies themselves.¹ His personal interests, if one may judge from a distance, are drawn more toward the cruel problems of mental health and of criminal justice than to the less vivid issues of administrative law.²

Yet one cannot, on the United States Court of Appeals for the District of Columbia Circuit, avoid a pervasive concern with judicial review of administrative agencies.³ For many reasons the major

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1. Chief Judge Bazelon had been Assistant United States Attorney in the Northern District of Illinois for five years and was called from private practice to Washington to be Assistant Attorney General, in charge first of the Lands Division and then of the Office of Alien Property, for three years prior to his appointment to the United States Court of Appeals for the District of Columbia Circuit.

2. One may accept *Who's Who in America* as a measure of interest as well as accomplishment. Chief Judge Bazelon in the past 15 years has been a lecturer in psychiatry or in law and psychiatry at the University of Pennsylvania Law School, the Menninger Foundation, the Harvard Medical School, the University of California, Los Angeles, George Washington University, and Hebrew University. At the same time, he has chaired or has served as a member of 10 commissions or advisory committees concerned with psychiatry and medical care. He has carried out most of this formidable program since assuming the responsibilities of chief judge in 1962.

3. Three judges of the court each contributed within a three-month period to the scholarly literature of judicial review. See Leventhal, *Environmental Decisionmaking*

flow of agency litigation moves through that court.⁴ The court is, under the conventional review statute, an alternate to the court of appeals of the petitioner's residence,⁵ and some review statutes give exclusive review jurisdiction to the District of Columbia Circuit.⁶ In district court review suits, the principal officials are amenable to service of process in Washington. Finally, much of the agency litigation is conducted by the Washington bar, which finds it convenient to seek review in the District of Columbia. In consequence, judicial review of agency action comprises about three times as much of the District of Columbia Circuit's docket as it does of other circuits' dockets.⁷ Whether judicial review of agency action were in the abstract a major or a minor concern of Chief Judge Bazelon, he necessarily would play a major role in the development of the field.

The Bazelon impact on the development of administrative law thus seems to derive initially from the frequency of his exposure to judicial review. But the force of that impact, as we view his opinions, derives from an impatience with shibboleth and a lively concern for the practical. Chief Judge Bazelon, with some regularity, submerges doctrinal nicety by a pragmatic inquiry into the consequences of agency action or court decision. This pragmatic approach is so basic that, although self-evident to those who practice before the Bazelon court, it warrants illustration.

In *Environmental Defense Fund, Inc. v. Hardin*⁸ Chief Judge Bazelon saw no reason to reconcile the confusion over whether the district court of the court of appeals had jurisdiction over a suit challenging official failure to act in a proceeding without a record; he decided simply that "where the facts in issue lie peculiarly within the special competence of the Secretary. . . . [t]he district

and the Role of the Courts, 122 U. PA. L. REV. 509 (1974); Wilkey, *Agency Problems in Light of Environmental Problems*, 26 AD. L. REV. 143 (1974); Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 AD. L. REV. 199 (1974). One may add Judge McGowan's 1972 article for good measure. McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

4. The statistical data for fiscal year 1972 show that 351 "administrative agency review or enforcement appeals" were filed in the District of Columbia Circuit as compared to an average of 150 in all federal courts of appeals. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS FOR THE UNITED STATES DC-O 1973 [hereinafter cited as MANAGEMENT STATISTICS].

5. See Act of Sept. 6, 1966, § 4(e), 28 U.S.C. § 2343 (1970).

6. See, e.g., Federal Coal Mine and Safety Act of 1969, § 503, 30 U.S.C. § 953(d) (1970); Noise Control Act of 1972, § 15, 42 U.S.C. § 4915(a) (Supp. II, 1972); Communications Act of 1934, § 402, 47 U.S.C. § 402 (1970); Federal Aviation Act of 1958, § 1006, 49 U.S.C. § 1486 (1970).

7. Administrative appeals comprised 27 percent of the cases filed in 1973 in the District of Columbia Circuit and ranged for the other courts from three percent in the Fourth and Fifth Circuits to 13 percent in the Ninth and averaged eight percent. MANAGEMENT STATISTICS, *supra* note 4, Intro. at F.

8. 428 F.2d 1093 (D.C. Cir. 1970).

court could do no more than remand to the Secretary, as we do here; there seems to be no reason to inject another tribunal into the process.”⁹ This practicality was also reflected in Chief Judge Bazelon’s first opinion, *Kristensen v. McGrath*,¹⁰ where he approved the use of a declaratory judgment proceeding in place of the traditional habeas corpus procedure to challenge a deportation order because to “compel [the defendant] to go into custody before he has his rights determined would be to defer to formalism and order the performance of a useless act.”¹¹

Similarly, Chief Judge Bazelon has disposed of finality and ripeness, as prerequisites for review, not by refined analysis of polyglot authority but rather by the simple inquiry whether the man has yet been hurt: “Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action.”¹² So, too, “when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction.”¹³ His impatience with permitting labels to determine consequences boiled over in *National Student Association v. Hershey*.¹⁴

It matters little whether his directive is a “rule,” an “order,” a set of “instructions,” or only a *sui generis* “directive.” Whatever it is in law, it purports to be an authoritative declaration of policy issued for the guidance of the System’s line officers. Neither they nor the average would-be war protester whose destinies they control are likely to suspect that, for all its official pretensions, it is really only a reflective letter from an interested citizen, and that its exhortation to “expedite responsive classification,” is nothing but the personal prayer of a venerable patriarch.¹⁵

Chief Judge Bazelon usually applies the same practical touchstone to assess the interaction between judicial review and agency procedures. The District of Columbia Circuit took jurisdiction over the “Hershey directive” partially because the suit “does not attack

9. *Id.* at 1099.

10. 179 F.2d 796 (D.C. Cir. 1949), *aff’d*, 340 U.S. 162 (1950).

11. *Id.* at 800.

12. *Isbrandtsen Co. v. United States*, 211 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

13. *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970). *See also* *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 593 (D.C. Cir. 1971).

14. 412 F.2d 1103 (D.C. Cir. 1969).

15. *Id.* at 1115.

any specific classification and thus does not interrupt the recruitment process."¹⁶ The court also reviewed a bargaining-unit certification without awaiting an unfair labor practice order since the circumstances of the case made the likelihood that anyone would provoke such an order "too remote and conjectural to be viewed as providing an adequate remedy."¹⁷ The Bazelon court roundly lectured the Federal Communications Commission in *Pikes Peak Broadcasting Co. v. FCC*.¹⁸

Whenever a hearing is denied, the Commission points out to this Court the cost and delay of hearings and the number of petitioners with which it must deal. I sympathize with its plight. I also sympathize, however, with the petitioners in this and other cases who take the Commission at its repeated word that there are "special circumstances" that will justify a hearing. It does not seem impossible to demand of the FCC that it tell present and potential petitioners, as well as this Court, just what those "special circumstances" might be.¹⁹

We will not, then, be surprised to find that Chief Judge Bazelon has approached cases in each area discussed below more as practical problems to be solved than as exercises in theory or in close analysis of precedent.

OPENING THE COURTHOUSE GATES

In recent years, an almost revolutionary increase in the hospitality of the reviewing courts to those with complaints about agency action has taken place. We believe that Chief Judge Bazelon has done more to speed the change and to consolidate the result than has any other judge. His drive to expand judicial review of agency action may be found principally in the three areas of standing, reviewability, and ripeness.

STANDING

The requirement that a party seeking review prove sufficient standing to obtain review of agency action reflects, of course, the article III requirement that a case or controversy exist,²⁰ and probably also the feeling of courts that only those with a very clear interest

16. *Id.* at 1109.

17. *Leedom v. Kyne*, 249 F.2d 490, 492 (D.C. Cir. 1957), *aff'd*, 358 U.S. 184 (1958).

18. 422 F.2d 671 (D.C. Cir. 1969).

19. *Id.* at 684.

20. U.S. CONST., art. III, § 2.

in the agency's action should be allowed to unsettle the agency process and to burden the court's docket.

For almost a generation, from 1940 to 1970, courts were largely free to choose between two markedly different requirements for standing.²¹ If the controversy seemed inappropriate for judicial resolution, the court could require the complainant to establish a claim that one of his own legal rights was being abridged by the challenged action. Thus, the Supreme Court in *Tennessee Electric Power Co. v. TVA*²² held that a party cannot challenge governmental action "unless the right invaded is a legal right,—one of the property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."²³ In *L. Singer & Sons v. Union Pacific R.R.*²⁴ the Court held that even a statute providing that "any person aggrieved" by agency action could seek review of the agency order was not sufficient to confer jurisdiction on the courts if a party did not assert a claim of legal right.²⁵ If, on the other hand, review seemed appropriate, courts could look instead to the Supreme Court's decision in *FCC v. Sanders Brothers Radio Station*,²⁶ decided nine months before *Singer*. The Communications Act of 1934²⁷ allowed review upon the application of a "person aggrieved or whose interests are adversely affected,"²⁸ which is a fitting description of a competitor. The Supreme Court accordingly held in *Sanders* that a licensee had standing to challenge a Federal Communications Commission grant of a license to a potential competitor even though such a grant affected no legal rights of the protestant.²⁹ As a result, given the apparently free choice between *Singer* and *Sanders*, the law of standing was confused, a "complicated specialty of federal jurisdiction."³⁰

There could not have been much doubt that Chief Judge Bazelon would be more comfortable with *Sanders* than with *Singer*. Indeed, he dramatically expanded the boundaries of *Sanders* in the first major case in which he addressed the standing question, *National Coal*

21. Here, as elsewhere, we outline the governing law with a broad brush and certainly overlook fine qualifications and possibly expound error; however, a comprehensive treatise on each point would cost both the reader's attention and our own livelihoods to no significant gain.

22. 306 U.S. 118 (1937).

23. *Id.* at 137-38.

24. 311 U.S. 295 (1940).

25. *Id.* at 301.

26. 309 U.S. 470 (1940).

27. Ch. 652, 48 Stat. 1064 (codified in scattered sections of 15, 47 U.S.C.).

28. *Id.* § 402, 47 U.S.C. § 402 (1970).

29. 309 U.S. at 477.

30. *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953); see K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 22.01 (1972).

Association v. FPC.³¹ The Natural Gas Act gave standing to "persons aggrieved."³² Chief Judge Bazelon held that an association of coal manufacturers, a coal mining union, and a coal carrier railroad union each could challenge the certification of a new natural gas service on the ground that the new service would diminish the need for coal in the area.³³ In granting the competitors standing, the Chief Judge relied heavily upon an opinion of Judge Frank in the Second Circuit,³⁴ which placed a broad gloss on *Sanders* and its progeny,³⁵ and noted that the legislative history of the Natural Gas Act demonstrated that the Congress was concerned about the effects that the licensing of natural gas would have on competing fuels.³⁶ Then, since competitors had standing, it was only logical to conclude that the employees of the competitors also had standing.³⁷

Chief Judge Bazelon in *City of Pittsburgh v. FPC*³⁸ carried *National Coal* one step further by basing standing on probable but rather more indirect injury. He held that barge companies had standing to challenge a Federal Power Commission order allowing a natural gas pipeline company to abandon a pipeline that, once abandoned, was to be used for the carriage of petroleum in direct competition with the barges. "Aggrievement," he stated, "is a status conferred by Congress upon a party who, though he may have no interests that must be considered in an administrative determination, is likely to suffer injury by that determination."³⁹

In his final opinions before the Supreme Court largely settled the law of standing, Chief Judge Bazelon went further than the Supreme Court was to go a year later. In *National Association of Securities Dealers, Inc. v. SEC*⁴⁰ he joined in a decision allowing an association of mutual funds to challenge the grants by the Securities

31. 191 F.2d 462 (D.C. Cir. 1951).

32. § 19(b), 15 U.S.C. § 717r(b) (1970).

33. 191 F.2d at 466.

34. *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir.), *rev'd per curiam*, 320 U.S. 707 (1943).

35. *Id.* at 705; *see FCC v. National Broadcasting Co. (KOA)*, 319 U.S. 239, 247 (1943) (station claiming electrical interference from license applicant has standing as an aggrieved party); *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14-15 (1942) (station challenging license grant as contrary to the public interest has standing to appeal to circuit court for stay of FCC order pending appeal).

36. 191 F.2d at 464-65.

37. *See id.* at 466-67. Professor Jaffe finds in *National Coal* a "striking doctrinal liberality" because it not only upheld the standing of a competitor with no direct legal interest, but also permitted a competitor who was not even a member of the relevant regulated industry to challenge the agency's actions. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 568 (1965).

38. 237 F.2d 741 (D.C. Cir. 1956).

39. *Id.* at 746.

40. 420 F.2d 83 (D.C. Cir. 1969), *vacated on other grounds*, 401 U.S. 617 (1971) (*per curiam*).

Exchange Commission and the Comptroller of the Currency of permission to a national bank to operate accounts similar to a mutual fund.⁴¹ Chief Judge Bazelon, in a concurring opinion, reviewed the legislative history of the governing statute and found that neither mutual funds nor, for that matter, any potential competitors of national banks were its intended beneficiaries.⁴² Hence, the mutual funds did not meet the test developed by the Supreme Court the next year, which granted standing to those "arguably within the zone of interests" of the applicable statute.⁴³ But they did suffer competitive injury, and, with Chief Judge Bazelon's attention to practicalities, should be able to challenge the action because competitors were the only parties likely to challenge the action and to act as a check on the Comptroller.⁴⁴ Finally, in *National Student Association v. Hershey*⁴⁵ and *United Federation of Postal Clerks, AFL-CIO v. Watson*,⁴⁶ he firmly established that an organized association has standing to protest a violation of its members' rights.⁴⁷

The law of standing was substantially clarified, largely along the path marked by Chief Judge Bazelon, by the Supreme Court in *Association of Data Processing Service Organizations v. Camp*⁴⁸ and *Barlow v. Collins*.⁴⁹ In each case, the Supreme Court accepted the principle that if the party was experiencing "injury in fact, economic or otherwise" as a result of the agency action and if the interest to be protected was "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," the party had standing.⁵⁰ The principles were reaffirmed and the requirement of actual injury highlighted, in *Sierra Club v. Morton*,⁵¹ where the plaintiff organization did not allege that any

41. *Id.* at 84.

42. *Id.* at 98 (Bazelon, C.J., concurring); see Glass-Steagall Act §§ 10(a), 10(b), 16, 12 U.S.C. §§ 347a, 347b, 412 (1970).

43. See note 50 and accompanying text.

44. 420 F.2d at 99 (Bazelon, C.J., concurring).

45. 412 F.2d 1103 (D.C. Cir. 1969).

46. 409 F.2d 462 (D.C. Cir.), *cert. denied*, 396 U.S. 902 (1969).

47. See 412 F.2d at 1108-09; 409 F.2d at 470-71.

48. 397 U.S. 150 (1970). Contradicting the conclusion reached by Chief Judge Bazelon in *National Association of Securities Dealers, Inc. v. SEC*, the Court in *Data Processing* found that the Glass-Steagall Act was intended to protect national bank competitors and accordingly added the "zone of interests" test as a supplement to injury in fact. *Id.* at 153; see 420 F.2d 83, 98 (D.C. Cir. 1969) (Bazelon, C.J., concurring); Glass-Steagall Act §§ 10(2), 10(6), 16, 12 U.S.C. §§ 347a, 347b, 412 (1970).

49. 397 U.S. 159 (1970). Justices Brennan and White as well as Professor Davis would join with Chief Judge Bazelon in looking to the fact of injury alone. See *id.* at 167, 170 (Brennan & White, JJ., concurring and dissenting); K. DAVIS, *supra* note 30, § 22.07.

50. See 397 U.S. at 164; 397 U.S. at 153.

51. 405 U.S. 727 (1972). See also *United States v. Richardson*, — U.S. —, 42 U.S.L.W. 5076 (U.S. June 25, 1974); *Schlesinger v. Reservists Comm. to*

of its members would be affected by the challenged activity. Because of that defect in pleading the Supreme Court held that there was not sufficient injury in fact under the *Data Processing* doctrine.⁵²

From the foundation of his cases and of *Data Processing* and *Barlow*, it was an easy step to *Environmental Defense Fund, Inc. v. Hardin*.⁵³ Chief Judge Bazelon noted that the Federal Insecticide, Fungicide and Rodenticide Act contained a "party aggrieved" provision⁵⁴ and that the Congress had rejected an amendment limiting review to only registrant challenges.⁵⁵ He concluded, therefore, that the environmental groups came within the "zone" to be protected if they could prove the requisite injury:

Consumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit. . . . Like other consumers, those who "consume"—however unwillingly—the pesticide residues permitted by the Secretary to accumulate in the environment are persons "aggrieved by agency action within the meaning of the relevant statute." Furthermore, the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.⁵⁶

REVIEWABILITY

The next of the obstacles that challengers must hurdle on the way to judicial relief is the test of whether the agency action is reviewable at all. The obstacle has not been one of fixed height, but has been raised and lowered in accordance with the tides of political history. The Supreme Court initially required a clear statutory provision for judicial review; in Chief Justice Taney's view, "The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief."⁵⁷ By the time of *American School of Magnetic Healing v. McAnnulty*,⁵⁸ the obstacle had been reduced to its lowest level, and Justice Peckham declared for the

Stop the War, — U.S. —, 42 U.S.L.W. 5088 (U.S. June 25, 1974). In both of these cases the Supreme Court emphasized, *inter alia*, that to obtain standing in a taxpayer's suit the petitioner must demonstrate personal and unique injury resulting from the challenged activity.

52. 405 U.S. at 733.

53. 428 F.2d 1093 (D.C. Cir. 1970).

54. § 4(d), 7 U.S.C. § 135(d) (1970).

55. 428 F.2d at 1096 & n.10.

56. *Id.* at 1097 (footnotes omitted).

57. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840).

58. 187 U.S. 94 (1902).

court that "[t]he acts of all officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."⁵⁹ In the post-New Deal era the Court again raised the barrier, and reviewability turned on the balance of inferences from the history and structure of the applicable act, which led often to the conclusion that judicial review was precluded.⁶⁰

This trend was itself reversed, and by 1958, two opinions of the Supreme Court had demonstrated clearly that the "presumption of judicial review ha[d] reasserted itself"⁶¹ In both opinions, *Harmon v. Brucker*⁶² and *Leedom v. Kyne*,⁶³ the Supreme Court affirmed the position taken by Chief Judge Bazelon below. *Harmon* arose because a soldier who had been discharged from the Army for his refusal to answer questions about his parents' affiliation with the Communist Party sued to have his discharge changed to "honorable." Judge Prettyman for the majority in the court of appeals found review precluded because the relevant statute provided that "[n]o person shall be discharged . . . except in the manner prescribed by the Secretary," and thus indicated "a Congressional intent that the Army be administered solely by the executive branch of the Government."⁶⁴ Chief Judge Bazelon, dissenting, viewed the critical question as "whether appellee may withhold an honorable discharge from a soldier whose conduct and efficiency ratings have never been less than 'excellent,' even assuming the correctness of all of the information appellee relies upon."⁶⁵ He summarily concluded that the discharge clearly involved an issue of law and "therefore [was] within the jurisdiction of the District Court."⁶⁶ In a per curiam opinion, the Supreme Court reversed the District of Columbia Circuit and basically adopted Chief Judge Bazelon's reasoning.⁶⁷

Chief Judge Bazelon's approach in *Leedom v. Kyne*⁶⁸ closely followed the approach taken in *Harmon*, and indeed in *American School*

59. *Id.* at 108.

60. See *Switchmen's Union v. National Mediation Bd.* 320 U.S. 297, 303 (1943) (certifications by Mediation Board pursuant to Railway Labor Act not subject to judicial review).

61. L. JAFFE, *supra* note 37, at 346.

62. 355 U.S. 579 (1958) (per curiam).

63. 358 U.S. 184 (1958).

64. *Harmon v. Brucker*, 243 F.2d 613, 617-18 (D.C. Cir. 1957), *rev'd per curiam*, 355 U.S. 579 (1958).

65. *Id.* at 626 (Bazelon, J., dissenting).

66. *Id.* at 626-27.

67. See *Harmon v. Brucker*, 355 U.S. 579 (1958), *rev'g per curiam* 243 F.2d 613 (D.C. Cir. 1957).

68. 249 F.2d 490 (D.C. Cir. 1957), *aff'd*, 358 U.S. 184 (1958).

of *Magnetic Healing v. McAnnulty*.⁶⁹ The District of Columbia Circuit reviewed the legality of a certificate of employee representation granted to the plaintiff union,⁷⁰ although the Supreme Court had already held in *Switchmen's Union v. National Mediation Board*⁷¹ that a certification by the National Mediation Board could not be reviewed.⁷² Chief Judge Bazelon, distinguishing *Switchmen's Union* as a suit challenging the Board in an area of its expertise and discretion, argued that the controversy in *Leedom* presented a different problem because the governing statute clearly prevented certain types of employees from being included in the unit: "It is clear that this provision was intended to protect the professionals; that the professionals' right to this benefit does not depend on Board discretion or expertise; and that denial of this right must be deemed to result in injury. Thus this case presents Board violation of a statutory requirement and resulting injury."⁷³ The Supreme Court followed Chief Judge Bazelon's reasoning very closely: "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."⁷⁴

The Congress has no easy task if it seeks to bar a deserving litigant from the Bazelon court. In *National Student Association v. Hershey*⁷⁵ the Chief Judge reviewed a Selective Service directive that threatened war protesters with loss of their draft deferments and, in some case, with immediate induction into the armed services. The Universal Military Training and Service Act provided: "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards or the President except as a defense to a criminal prosecution. . . ."⁷⁶ Chief Judge Bazelon, after examining the legislative history of this provision, concluded that it precluded review only of specific classification orders: "[W]e cannot assume that Congress sought deliberately to insulate illegal or unconstitutional practices from judicial review as an end in itself."⁷⁷

Finally, in the hardly timorous assumption of jurisdiction in *Environmental Defense Fund, Inc. v. Hardin*,⁷⁸ the Bazelon court

69. 187 U.S. 94 (1902).

70. *Id.* at 491.

71. 320 U.S. 279 (1943).

72. *Id.* at 303.

73. 249 F.2d at 491; see Labor-Management Relations Act (Taft-Hartley) § 101, 29 U.S.C. §§ 152(12), 159(b)(1) (1970).

74. 358 U.S. at 190.

75. 412 F.2d 1103 (D.C. Cir. 1969).

76. § 10, 50 U.S.C. App. § 460(b)(3) (1970).

77. 412 F.2d at 1109.

78. 428 F.2d 1093 (D.C. Cir. 1970).

reviewed the Secretary of Agriculture's refusal to suspend the registration of a DDT pesticide pending a hearing on the cancellation of registration.⁷⁹ The court rejected the argument that the governing statute, which provided that the Secretary "may" suspend the registration of a pesticide,⁸⁰ committed the emergency suspension decision to agency discretion:

Preclusion of review is not lightly to be inferred, however, it requires a showing of clear evidence of legislative intent. That evidence cannot be found in the mere fact that a statute is drafted in permissive rather than mandatory terms. . . . [W]e conclude that [the Secretary's] decision is not thereby placed beyond judicial scrutiny.⁸¹

RIPENESS

The litigant who complains of agency action has not always passed the threshold when he shows standing and reviewability; he must often show, too, that the agency action is ripe for review. Here, again, his burdens have been lightened by Chief Judge Bazelon.

Professor Davis finds "[t]he basic principle of ripeness . . . easy to state: Judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote."⁸² Davis further notes that prior to its clarifying decisions in *Abbott Laboratories, Inc. v. Gardner*⁸³ and *Gardner v. Toilet Goods Association*,⁸⁴ "the Supreme Court had fluctuated over an exceedingly wide range" in dealing with the ripeness problem.⁸⁵

Chief Judge Bazelon has neither suffered the doubts nor experienced the vacillations of the Supreme Court in this area. Declaratory judgment, he held in *Kristensen v. McGrath*,⁸⁶ would lie without the appellants awaiting habeas corpus relief from deportation custody:

79. *Id.* at 1096.

80. Federal Insecticide, Fungicide and Rodenticide Act § 4(d), 7 U.S.C. § 135 (b)(d) (1970).

81. 428 F.2d at 1098.

82. K. DAVIS, *supra* note 30, § 21.01.

83. 387 U.S. 136 (1967).

84. 387 U.S. 167 (1967).

85. K. DAVIS, *supra* note 30, §§ 21.01, 21.03, 21.04; *see, e.g.*, *Local 37, Int'l Longshoremen's Union v. Boyd*, 347 U.S. 222 (1958) (labor union's suit to enjoin a particular interpretation of a statute whose sanctions had not yet been invoked not a concrete case or controversy); *Public Util. Comm'n v. United Air Lines*, 346 U.S. 402 (1953) (whether federal government or California had jurisdiction over airlines' rates not yet ripe for decision); *Eccles v. Peoples Bank*, 333 U.S. 426 (1948) (bank's need for equitable relief too remote to justify declaratory judgment against agency).

86. 179 F.2d 796 (D.C. Cir. 1949), *aff'd*, 340 U.S. 162 (1950).

Determination of appellant's right at this juncture detracts not one whit from the administrative process for the Attorney General has already reached his "final" decision and refused to reconsider it. Instead, it satisfies the underlying purposes of the Declaratory Judgment Act which is to decide cases in their incipency before the law's coercive machinery is brought into play. At the same time, it reinforces the ever-growing concern manifested by the courts for personal liberty and its protection. . . .⁸⁷

He pushed on from this foundation in the series of cases already discussed, to establish the general rule that the existence of present injury made immaterial the lack of a final agency action for which review is expressly provided.⁸⁸

Chief Judge Bazelon had no greater difficulty in reading a "final order" review statute to reach an interlocutory order. In *Isbrandtsen v. United States*⁸⁹ the Federal Maritime Board gave temporary and conditional approval to a "dual rate contract," designed to strengthen the position of an association of steamship lines in a rate war, pending a statutory hearing on the agreement that the Board had already commenced.⁹⁰ Relying on helpful Supreme Court language in dissimilar situations,⁹¹ Chief Judge Bazelon concluded that since the interlocutory order produced present injury, "a final order need not necessarily be the very last order."⁹²

Without his settled tradition of using a realistic appraisal of practical consequences in place of statutory or procedural implications, Chief Judge Bazelon might not have been able to press so far as he did in *Environmental Defense Fund, Inc. v. Hardin*⁹³ and *Environmental Defense Fund, Inc. v. Ruckelshaus*.⁹⁴ The conclusion of the two cases, simply stated, is breathtaking: a failure to take timely action, either to grant or to deny a petition for interim suspension

87. *Id.* at 801.

88. See, e.g., *National Student Ass'n v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969); *Leedom v. Kyne*, 249 F.2d 490 (D.C. Cir. 1957), *aff'd*, 358 U.S. 184 (1958); *Farmer v. United Elec. Radio & Mach. Workers*, 211 F.2d 36 (D.C. Cir.), *cert. denied*, 347 U.S. 943 (1953).

89. 211 F.2d 51 (D.C. Cir. 1951).

90. *Id.* at 55-56.

91. See *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948) (administrative orders reviewable when they impose obligations, deny rights, or fix legal relationships); *Columbia Broadcasting Sys. v. United States*, 316 U.S. 407, 425 (1942) (review appropriate where necessary to protect petitioners from adverse rulings that will become effective prior to administrative hearings).

92. 211 F.2d at 55.

93. 428 F.2d 1093 (D.C. Cir. 1970).

94. 439 F.2d 584 (D.C. Cir. 1971).

of registration pending a cancellation hearing, is a "final order" permitting judicial review.⁹⁵

Chief Judge Bazelon's basic reasoning was set forth in *Hardin*:

But when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief. . . . The suspension of power is designed to protect the public from an "imminent hazard"; if petitioners are right in their claim that DDT presents a hazard sufficient to warrant suspension, then even a temporary refusal to suspend results in irreparable injury on a massive scale. The controversy over interim relief is ripe for judicial resolution, because the Secretary's inaction results in a final disposition of such rights as the petitioners and the public may have to interim relief.⁹⁶

In *Ruckelshaus* he elaborated on the interest protected:

The FIFRA gives this Court jurisdiction to review any order granting or denying the cancellation of a pesticide registration. The Secretary could defeat that jurisdiction, however, by delaying his determination indefinitely. . . . In order to protect our appellate jurisdiction, this court has jurisdiction to entertain a request for relief in the form of an order directing the Secretary to act in accordance with the FIFRA.⁹⁷

It is, we believe, hard to quarrel with the practical desirability of the *Hardin-Ruckelshaus* results and even more difficult not to admire the vigorous determination by which those commanding results were fashioned.

CONTROL OF INFORMAL AGENCY ACTION

The Supreme Court by now has confirmed—at least for this swing of the pendulum—much of the work of Chief Judge Bazelon in making judicial review more accessible. Once review has been

95. See 439 F.2d at 539; 428 F.2d at 1098-99.

96. *Id.* at 1099. *Hardin* resulted in a remand to the agency with directions to consider the suspension petition and to explain the reasons for its grant and denial. When the case returned to the court of appeals as *Environmental Defense Fund, Inc. v. Ruckelshaus*, Chief Judge Bazelon ordered a still more complete record to justify the failure to suspend and directed that a notice of cancellation be issued in order to put the ultimate question to hearing. 439 F.2d 584, 593 (D.C. Cir. 1971). In a collateral discussion Chief Judge Bazelon accepted the en banc decision in *Nor-Am Agricultural Products v. Hardin*, where the United States Court of Appeals for the Seventh Circuit held that a denial of suspension was a final order, but he noted his disagreement with that circuit's view that a grant of suspension would not be a final order. *Id.* at 584, 596; see 435 F.2d 1151 (7th Cir. 1970).

97. 439 F.2d at 593.

undertaken, the inquiry into the nature and scope of that review remains. We largely pass by the conventional judicial review of statutory hearings held on a record and move directly to judicial review of informal agency action. This field of law, in contrast to the threshold issues already surveyed, is still unsettled and developing and probably will be for a long time to come. The diversity of informal governmental action will prevent generalization, and the complexity of contemporary issues will induce caution. In short, our discussion will record pioneer explorations of new territory, not its conquest or settlement.⁹⁸

ISSUES NOT RAISED BEFORE THE AGENCY

Chief Judge Bazelon has insisted that even in hearings on the record the agency was not confined to the issues presented by the parties: "Unlike courts, . . . [a]dministrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest . . ."⁹⁹ A fortiori, it would seem, Chief Judge Bazelon concluded that when the agency action under consideration was discretionary, "The statute contemplates that, in appropriate cases, the Commission's inquiry will extend beyond matters alleged in the protest in order to reach any issue which may be relevant. . . ."¹⁰⁰

Thus, agencies have been held to the duty of independent agency investigation in both on the record and informal adjudicatory action. It seems paradoxical that in the area of informal rulemaking, where one would expect the constraints of the record and the positions taken by the parties to be less confining than in adjudicatory proceedings, the opinions of the District of Columbia Circuit, including those of Chief Judge Bazelon, have restricted the scope of judicial review to require that parties present the grounds of their challenge to the agency before it will be considered on review.¹⁰¹

98. References to "the courts" will relate primarily to the District of Columbia Circuit, which has the lion's share of the judicial review by the circuit courts of appeals. See note 4 *supra*. The state of the Supreme Court's docket and interests ensures that only the most exceptional case of judicial review will be re-examined there. As the District of Columbia Circuit moves, and move it does, it carries with it the general law of judicial review.

99. *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204, 211 (D.C. Cir.) (Bazelon, J., dissenting), *cert. denied*, 350 U.S. 1007 (1956); see *Hall v. FCC*, 237 F.2d 567, 571 (D.C. Cir. 1956); *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 515 (D.C. Cir. 1955).

100. *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204, 211 (D.C. Cir.) (Bazelon, J., dissenting), *cert. denied*, 350 U.S. 1007 (1956).

101. See *Public Serv. Comm'n v. FPC*, 487 F.2d 1043, 1064 (D.C. Cir. 1973) (Leventhal, J.) (court enforced statutory requirement that review of natural gas

PUBLISHED STANDARDS

An important and growing body of law calls for public standards to define and control the exercise of agency discretion. Chief Judge Bazelon has fully supported the development of this requirement. His most extensive effort has been a five-year battle to force St. Elizabeth's Hospital to adopt procedural regulations for patients' complaints in respect to treatment, transfer, and release; he suggested procedures in 1966,¹⁰² urged them in 1968 and 1969,¹⁰³ and by 1970 encouraged the adoption of such regulations by providing the sanction of allowing, in their absence, patient testimony outside the hospital record.¹⁰⁴ So, too, Chief Judge Bazelon's concurring opinion in *Pikes Peak Broadcasting Co. v. FCC*¹⁰⁵ took the Federal Communications Commission to task for its failure to publish in its regulations a definition of the "special circumstances" that would lead it to grant a discretionary hearing:

An evidentiary hearing involves cost and delay. But so does protracted administrative proceedings and appeal to decide whether a hearing is necessary. The FCC might well reduce its often-complained of workload by announcing with greater particularity the standards which govern the decision to grant a hearing.¹⁰⁶

Finally, in *Environmental Defense Fund, Inc. v. Ruckelshaus*¹⁰⁷ Chief Judge Bazelon emphasized that, as a general rule, "Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible."¹⁰⁸ The Chief Judge insisted that an explanation of the reasons for the agency's refusal to suspend registration of DDT be provided, either by way of general regulation or through the articulation of reasons for the particular action.¹⁰⁹

orders be confined to matters raised before the agency); *id.* at 1088 n.9 (Bazelon, C.J.) (supports enforcement of statutory requirement); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 386-87 (D.C. Cir. 1973) (same requirement imposed without statutory foundation). Other courts have followed the same rule. See *Bunny Bear, Inc. v. Peterson*, 473 F.2d 1002 1006-07 (1st Cir. 1973); *Boating Indus. Ass'n v. Boyd*, 409 F.2d 408, 412 (7th Cir. 1969).

102. See *Rouse v. Cameron*, 373 F.2d 451, 456 n.22 (D.C. Cir. 1966).

103. *Bolton v. Harris*, 395 F.2d 642, 652 n.58 (D.C. Cir. 1968); see *Covington v. Harris*, 419 F.2d 617, 621-22, 626-27 (D.C. Cir. 1969).

104. *Williams v. Robinson*, 432 F.2d 637, 643 (D.C. Cir. 1970).

105. 422 F.2d 671, 684 (D.C. Cir. 1969) (Bazelon, C.J., concurring).

106. *Id.*

107. 439 F.2d 584 (D.C. Cir. 1971).

108. *Id.* at 598.

109. See *id.* at 596.

AGENCY'S REASONS FOR ACTIONS

In no area of judicial review has Chief Judge Bazelon been more demanding than he has been in his regular insistence that an agency explain adequately the reasons for informal or discretionary action. His basic analysis was forcefully stated in *Covington v. Harris*:¹¹⁰

The principal purpose of limited judicial review of administrative action is to ensure that the decision-makers have (1) reached a reasoned and not unreasonable decision, (2) by employing the proper criteria, and (3) without overlooking anything of substantial relevance. More than this the courts do not pretend to do, and probably are not competent to do. To do less would abandon the interests affected to the absolute power of administrative officials.¹¹¹

In the DDT cases he vigorously applied this requirement.¹¹² In *Hardin* the court remanded the case for explanation of the reasons for inaction on a petition to suspend registration of DDT pesticides. When the case returned to the court, as *Ruckelshaus*, the agency had provided the reasons for its inaction. The court found them inadequate to justify the failure to suspend, but sufficient to ground an order in the nature of mandamus that the agency institute cancellation proceedings.¹¹³

The Supreme Court shortly afterward solidified the requirement of stated reasons for informal action.¹¹⁴ At the same time, Chief Judge Bazelon was consolidating his own territory. In *District of Columbia Federation of Civic Associations v. Volpe*¹¹⁵ he found unsatisfactory, as a substitute for an administrative record, the district court testimony of the Secretary as to the reasons for the authorization of the "Three Sisters" bridge.¹¹⁶ Then, in *Citizens Association of Georgetown, Inc. v. District of Columbia Zoning Commission*¹¹⁷

110. 419 F.2d 617 (D.C. Cir. 1969).

111. *Id.* at 621.

112. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 596-98 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1100 (D.C. Cir. 1970).

113. See 439 F.2d at 596-98; note 100 *supra*.

114. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-21 (1971) (Court required reasons for the Secretary of Transportation's conclusion that there was no "feasible and prudent" alternative to a highway route through a park). See also *Camp v. Pitts*, 411 U.S. 138 (1973) (Court required reasons for denial of an application to organize a national bank). One of his colleagues described Chief Judge Bazelon's *Ruckelshaus* opinion as "a reasonably clearcut precursor" of the Supreme Courts' opinion in *Overton Park*. Leventhal, *supra* note 3, at 512.

115. 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

116. See *id.* at 1237, 1238.

117. 477 F.2d 402 (D.C. Cir. 1973).

he extended the rule to require a statement of reasons from what he called "a quasi-legislative body" because "even where findings are not required, a disclosure of an agency's reasons is often desirable".¹¹⁸

Those reasons may be crucial in order for the court to know what the agency has really determined, hence what to review. Courts ought not to have to speculate as to the basis for an administrative agency's conclusions; nor can a court "assume without explanation that proper standards are implicit in every act of agency discretion." And, when faced with a complex problem, having widespread ramifications, like that before us today, a court should surely have the benefit of the agency's expertise. Finally, the articulation of reasons by an agency—for itself and for the public—does afford a safeguard against arbitrary and careless action and is apt to result in greater consistency in an agency's decisionmaking.¹¹⁹

There may be, from the agency viewpoint, a certain element of "catch 22" in the requirement that it state the reasons for its discretionary action. The articulation of the reasons creates the hazard that a court will discover that the agency omitted a consideration believed important by the court. In accordance with a line of his opinions remanding cases after an agency hearing on the record,¹²⁰ Chief Judge Bazelon remanded *Wellford v. Ruckelshaus*¹²¹ for further consideration of a refusal to suspend the registration of an herbicide because he found that the Secretary of Agriculture had overlooked an important question:

118. *Id.* at 409.

119. *Id.* at 408. Chief Judge Bazelon had applied this reasoning in an earlier case remanding a denial of a broadcast license after a hearing on the record. See *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). In *Melody Music* the Chief Judge stated:

We think the Commission's refusal at least to explain its different treatment of appellant and NBC was error. Both were connected with the deceptive practices and the renewal applications were considered by the Commission at virtually the same time. Yet one was held disqualified and the other was not. . . . [W]e think the differences are not so "obvious" as to remove the need for explanation.

Id. at 733.

120. See *Beaumont Broadcasting Corp. v. FCC*, 202 F.2d 306, 311 (D.C. Cir. 1952) (Commission failed to consider detriments as well as benefits of granting license); *Democrat Printing Co. v. FCC*, 202 F.2d 298, 301 (D.C. Cir. 1952) (Commission failed to consider detriments as well as benefits). See also *City of Pittsburgh v. FPC*, 237 F.2d 741, 754 (D.C. Cir. 1956) (remand where Commission failed to consider antitrust and defense implications of abandonment of natural gas pipeline).

121. 439 F.2d 598 (D.C. Cir. 1970).

The Secretary stated that the risk of harm from that use is insufficient to warrant suspension, because residues are negligible in food products that reach the consumer. He did not discuss the risk of injury to farm workers or others who might be exposed to the chemical by virtue of its use on food crops, despite the fact that he clearly recognized a hazard from direct exposure.¹²²

One can imagine a continuing regression: if the Secretary adequately showed that the risk of harm to farmworkers was insufficient to require suspension, the court easily might remand for agency consideration of the effect upon the factory workers who manufacture the herbicide.

THE RECORD

Appellate courts have not found it easy to adapt review techniques based upon the survey of a formal record to the review of the formless and unrecorded proceedings that often underlie informal action. In general, the reaction of Chief Judge Bazelon, and of other judges as well, has been to force the agency into making a record, rather than to give it the benefit of unresolvable doubt. The Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*¹²³ sent the case back to the agency for development of a record admitting of judicial review, which would include the administrative record before the Secretary of Transportation at the time of decision supplemented, if necessary, by courtroom testimony about the reasons or by fully prepared though post hoc findings.¹²⁴ Chief Judge Bazelon, confronted with a similar lack of a record in *District of Columbia Federation of Civic Associations v. Volpe*,¹²⁵ followed the same course of action, but did so rather more emphatically:

Furthermore, it is hard to see how, without the aid of any record, the Secretary could satisfactorily make the determinations required by statute. The absence of a record, in other words, simultaneously obfuscates the process of review and signals sharply the need for careful scrutiny. Secretary Volpe's testimony before the District Court did little to allay the doubts generated by the lack of an administrative record. Indeed, his testimony—on occasion uncertain and inconsistent with the testimony of others—itself gives rise to at least a serious question whether he considered all possible alternatives to the plan eventually approved.¹²⁶

122. *Id.* at 602.

123. 401 U.S. 402 (1971).

124. *See id.* at 420.

125. 459 F.2d 1231 (D.C. Cir. 1972), *cert. denied*, 405 U.S. 1030 (1972).

126. *Id.* at 1238.

In *National Cable Television Association, Inc. v. FCC*¹²⁷ Chief Judge Bazelon, in a Freedom of Information Act suit, provided concrete guidance on the sort of record he was insisting upon for review of otherwise unexplained action. Documents relied upon by the agency were surely "identifiable" without specification by the plaintiff, policy recommendations surely could be excised, if necessary, from factual material, and earnings statements could surely be masked if really confidential.¹²⁸

SCOPE OF REVIEW

We have not been able to define confidently the scope of review that Chief Judge Bazelon considers appropriate for informal action; clearly, however, his supervision of agency judgment is closer when he is dealing with the results of a formal hearing on the record. He has invalidated a gas rate increase after a hearing because of an agency's inadequate attention to rate of return and to the proper valuation of abandoned property and of a standby plant.¹²⁹ Further, he has with some regularity returned license cases to the Federal Communications Commission because of its failure to consider technical matters such as station interference,¹³⁰ signal overlap,¹³¹ and propagation curves,¹³² as well as policy matters such as buy outs by a competitor,¹³³ and media diversification.¹³⁴

Chief Judge Bazelon's opinions do not, however, give any sure guide to his general standard of judicial review of informal agency action. In *Environmental Defense Fund, Inc. v. Ruckelshaus*¹³⁵ he overruled the Secretary of Agriculture's determination that the dangers of DDT did not require an immediate cancellation hearing.¹³⁶

127. 479 F.2d 183 (D.C. Cir. 1973). In this Freedom of Information Act proceeding, Chief Judge Bazelon reversed a summary judgment for the Federal Communications Commission. *Id.*; see 5 U.S.C. § 552 (1970). The Commission had not explained its allocation criteria for a fee system designed to meet all its expenses. Thus, the Commission had exempted itself from external criticism of its method and rationale and had left nothing open to challenge except the legality of its result. See 479 F.2d at 187.

128. See 479 F.2d at 190-94.

129. See *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 23 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951).

130. See *Beaumont Broadcasting Corp. v. FCC*, 202 F.2d 306, 311 (D.C. Cir. 1952); *Democrat Printing Co. v. FCC*, 202 F.2d 298, 301 (D.C. Cir. 1952).

131. See *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 516 (D.C. Cir. 1955).

132. See *Hall v. FCC*, 237 F.2d 567, 574-75 (D.C. Cir. 1956).

133. *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 519-20 (D.C. Cir. 1955).

134. *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204, 210 (D.C. Cir.) (Bazelon, J., dissenting), *cert. denied*, 350 U.S. 1007 (1956).

135. 439 F.2d 584 (D.C. Cir. 1971).

136. See *id.* at 595. Judge Robb dissented because he believed that the decision "substitutes the judgment of this Court for the judgment of the Secretary." *Id.* at 598 (Robb, J., dissenting).

Yet, in *International Harvester Co. v. Ruckelshaus*,¹³⁷ although concurring in the result, he disagreed with Judge Leventhal's close study of the available technology for pollution control of motor vehicles: "I recognize that I do not know enough about dynamometer extrapolations, deterioration factor adjustments, and the like to decide whether or not the government's approach to these matters was statistically valid. Therein lies my disagreement with the majority."¹³⁸ In *Friends of the Earth v. AEC*,¹³⁹ while regretting that the necessary emergency procedures prevented more probing inquiry, he was quite prepared to accept the Atomic Energy Commission's judgment concerning the hazards of fuel densification.¹⁴⁰ The attack on the merits of the Federal Aviation Administration's conclusion that medical risks required the retirement of airline pilots at age 60 was dismissed in a sentence in *O'Donnell v. Shaffer*.¹⁴¹

ADDITIONAL PROCEDURES

The District of Columbia Circuit is leading the way toward requiring agency rulemaking procedures beyond those specified by statute. Judge Leventhal has erected most of the milestones in this hazardous territory;¹⁴² but Chief Judge Bazelon seems prepared to go at least as far. *International Harvester Co. v. Ruckelshaus*,¹⁴³ dealing with the difficult evidence bearing on automobile emission systems, found Chief Judge Bazelon unwilling to examine the merits as closely as did Judge Leventhal but prepared to go considerably further in requiring full cross-examination and even to

137. 478 F.2d 615 (D.C. Cir. 1973).

138. *Id.* at 650-51 (Bazelon, C.J., concurring).

139. 485 F.2d 1031 (D.C. Cir. 1973) (per curiam).

140. *See id.* at 1033.

141. 491 F.2d 59 (D.C. Cir. 1974). Chief Judge Bazelon concluded: "Given the inconclusiveness of appellant's evidence and the existence of contrary views, we are unable to find that the F.A.A.'s decision was unreasonable." *Id.* at 62-63.

142. Judge Leventhal's opinions indicate a firm view that the reviewing court can in appropriate cases remand for procedures in addition to the minimum notice and comment required by section four of the Administrative Procedure Act. 5 U.S.C. § 553 (1970). This was stated generally in *American Air Lines, Inc. v. CAB* and in *Kennecott Copper Corp. v. EPA*. *See* *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972); *American Airlines, Inc. v. CAB*, 359 F.2d 624, 631-32 (D.C. Cir. 1966). The District of Columbia Circuit also has approved additional procedures. *See, e.g.,* *Public Serv. Comm'n v. FPC*, 487 F.2d 1043, 1080 (D.C. Cir. 1973) (per curiam) (remand for agency consideration of petitioner's challenge); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-93, 402 (D.C. Cir. 1973) (remand for manufacturer comment); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649-50 (D.C. Cir. 1973) (remand to provide opportunity for cross-examination); *Environmental Defense Fund, Inc. v. EPA*, 465 F.2d 528, 541 (D.C. Cir. 1972) (remand for new evidence); *Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971) (remand for oral argument).

143. 478 F.2d 615 (D.C. Cir. 1973).

abrogate the statutory 60-day decision period if necessary.¹⁴⁴ Moreover, in *Public Service Commission v. FPC*¹⁴⁵ he added an issue to those specified by Judge Leventhal to be reconsidered, with additional evidence and reasons, by the agency.¹⁴⁶

THE COURTS, THE AGENCIES, AND RESPONSIBLE GOVERNMENT

Chief Judge Bazelon, in *Environmental Defense Fund, Inc. v. Ruckelshaus*,¹⁴⁷ flung wide the gates leading to a better world:

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. . . . Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.

. . . [However, strict] judicial review alone can correct only the most egregious abuses. Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. . . . When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.¹⁴⁸

We seek here an answer to the natural inquiry whether this passage is visionary rhetoric or, in truth, the key to a more effective and more responsible government. We conclude that it is a little of each.

THE PROBLEM OF INFORMAL ACTION

The popular estimate is that about 90 percent of the Government's work is done by informal action of one form or another. Most of this informal action is very loosely structural and is typically conducted in the absence of published standards and without articulated explanations. Discrimination and injustice, if not inevitable,

144. See *id.* at 651-52 (Bazelon, C.J., concurring).

145. 487 F.2d 1043 (D.C. Cir. 1973) (per curiam).

146. Compare *id.* at 1087-88 (Bazelon, C.J.) with *id.* at 1054 (Leventhal, J.).

147. 439 F.2d 584 (D.C. Cir. 1971).

148. *Id.* at 597-98.

are at least possible consequences of most of the Government's work. All of this has become increasingly evident in the five years that have followed the publication of Professor Davis's seminal study of the discretionary process.¹⁴⁹

If the problem is plain to be seen, its cure is the reverse. One principle emerges with clarity: no generalized and mandatory solution analogous to the Administrative Procedure Act as it is applied to formal hearings on the record can be devised to regulate informal action. The federal government carries out by informal means thousands of functions, each different from all others. No generalization can be true, and no proposal practicable if it reflects the circumstances of one informal activity and is applied without re-examination to another. The annual volume of business may vary from the handling of four construction-differential subsidy contracts for ship construction¹⁵⁰ to the processing of 113.1 million income tax returns or the issuance of 309.6 million payments to social security beneficiaries.¹⁵¹ The dollar amounts will range from the few cents involved in a claim for overdue postage to the several billions of dollars required to develop a new aircraft. One function will be discharged by a scandalously underemployed staff, another by a staff too overburdened to give thoughtful attention to any part of its business. One function has by long tradition been discharged with meticulous care for the rights of those affected, another by an equally long tradition of substantial indifference to individual consequences. Delay in decisions may be viewed within one agency as the normal prerogative of Government, but within another as unforgivable inefficiency. There is, in short, an almost infinite diversity among the agency functions and practices. Only one generalization may be made safely: there *can* be no sound generalization about informal procedures.¹⁵²

If this sprawling aggregation of thousands of essentially independent activities known as the Government of the United States is to be brought under control, one must have an extremely flexible means of supervision. There must be a capability of applying a broad principle to particular cases with a discrimination that will produce

149. K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

150. See MARITIME ADMINISTRATION, *ANNUAL REPORT*, 1969, at 27.

151. COMM'R OF INTERNAL REVENUE, *ANNUAL REPORT* 1970, at 1; see DEP'T OF HEALTH, EDUCATION, AND WELFARE, *ANNUAL REPORT*, 1970, at 275.

152. Gardner, *The Procedures by Which Informal Action is Taken*, 24 AD. L. REV. 155, 157-58 (1972). This paragraph is a modified extraction without a pedantic modernization of the figures from another article by one of the authors of this article. See *id.* That piece was an experimental and bravura effort to sketch a generalized statutory framework, which met with condemnation by every scholar who read it.

diverse, and even apparently contradictory, results. The supervision must be firm and authoritative. Finally, it seems better that the supervision be available to respond to calls for help than that it function as an inspector-general of the bureaucracy, which could of itself require a 10,000-man staff that would soon develop its own bureaucratic ways.

The courts, through judicial review of agency action, seem, of all our institutions, the best fitted for the task of supervising informal agency action. Yet, they can offer only a partial and imperfect solution to the problem. First, the coverage by the courts is very limited. The private citizen who has less than \$20,000 at stake ordinarily would not be well advised to seek judicial review of agency action. Public interest organizations and firms are achieving some spectacular results in broadening the availability of judicial review, but they can never hope to pursue a numerically significant number of cases. Second, a considerable proportion of administrative action is immune from judicial review simply because of time constraints. If action must be taken promptly to be meaningful judicial reversal 18 months later can provide only emotional satisfaction.¹⁵³ Conversely, as a sort of compensatory poetic injustice, if the agency is deeply concerned with time, it cannot seek Supreme Court relief from action by the courts of appeal.¹⁵⁴ Finally, in many instances any form of review, judicial or administrative, that requires the investment of money or time would not be worthwhile. If, for example, there are 20 applicants for a single benefit that has been awarded to a nephew or a campaign contributor, any applicant who obtained reversal on review would receive only a 5.3 percent chance of ultimate success in obtaining the benefit.

153. The District of Columbia Circuit, which in 1973 averaged 11.7 months from the filing of the record to disposition, is the slowest circuit. *MANAGEMENT STATISTICS*, *supra* note 4, at DC-O. In administrative appeals the time interval from the filing of the record to disposition probably is longer than in the average case, and that time interval does not begin until the 60 days for the filing of the petition and the subsequent 40 days for the filing of the record have elapsed.

154. The Supreme Court, in its comparatively few recent ventures into judicial review of agency action, seems much more attached to the conventional limitations on review than is the District of Columbia Circuit. *See, e.g.*, *NLRB v. Bell Aerospace Laboratories*, 416 U.S. 267 (1974) (agency not limited to adjudication in individual cases); *United States v. Florida East Coast Ry.*, 410 U.S. 224, 235, 240 (1973) (trial-type oral hearing not required for rulemaking); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 753 (1972) (judicial review less strict where rulemaking involved). Under those limitations, we should expect the Supreme Court, if it granted certiorari, to reverse cases such as *International Harvester Co. v. Ruckelshaus* and *Pillai v. CAB*, but in neither case could the agency possibly invest the year or more necessary to obtain vindication. *See Pillai v. CAB*, 485 F.2d 1018 (D.C. Cir. 1973) (review where agency discretion unsupported); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1971) (review where agency methodology inadequate).

These limitations upon the effectiveness of judicial review are pervasive and very real. Yet, even if only a tenth—to take an arbitrary fraction—of informal government actions were practicably subject to judicial review, that possibility of review might affect a considerably broader range of governmental activity. For one thing, an agency could not be sure whether court action would be feasible for a disappointed party. More significantly, lessons learned in one case are likely to be applied by the agency in other cases that would not themselves reach the courts.

Above all, judicial review is the only generally available mechanism that now exists for the control of otherwise unconfined and unchecked informal administrative action. If the eloquent statement of Chief Judge Bazelon that introduces this section should prove prophetic, and not merely visionary, ours will be a far better government. In the paragraphs that follow, we examine and attempt to assess the particular areas of judicial review in which the vigor of the Bazelon court may offer promise or danger.

THRESHOLD ISSUES

At least the senior of the authors has an archaic distaste for a group of college students' bringing railroad ratemaking and the Interstate Commerce Commission into the courts.¹⁵⁵ Yet if the objective is to subject informal and discretionary governmental action to as much control as feasible, there can be no doubt that eased access to a reviewing court is a healthy and important development. Moreover, no doubts as to judicial power need be resolved; the barriers of standing, reviewability, and ripeness are largely judge-made and are freely open to judicial relaxation.

STANDARDS

The most pervasive defect in informal governmental action is the failure to promulgate regulations, announce policies, or make available the precedents that in fact guide the informal decision.¹⁵⁶ Courts

155. See *ICC v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

156. The Administrative Conference of the United States has made 15 recommendations concerning informal agency functions and has conducted studies, not presented for Conference recommendation, of another 10 functions. The studies were conducted by diverse consultants and moved through the Conference by diverse procedures. Yet, in 18 of the 25 inquiries, or 72 percent, the studies found an important need for published regulations to advise of the standards of decision and agency procedures. It may illuminate the diversity and prevalence of the problem to indicate, with shortened titles, the agency functions studied that caused the Conference to conclude that published regulations are needed. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS & REPORTS, No. 70-2 (SEC

in theory offer a unique and flexible capability to force a crystallization and publication of regulations and standards. They are moving, rapidly and over a broad front, to put that capability into practical effect. In so doing, they have selected any of three theories as the foundation of their supervision.

One theory elevates the unfairness of absolute and uncontrolled discretion to constitutional dimensions and strikes down administrative action without standards as a violation of due process. This is the most widely used supervisory tool¹⁵⁷ and is the natural foundation for forcing regulations upon state prison administrators.¹⁵⁸ It has, however, the vice that "the uncertainty of the constitutional standard makes it impossible for correctional officials to anticipate what is required of them,"¹⁵⁹ and therefore is hardly the best approach to cure the uncertainty caused by the lack of standards.

A second approach is to restore section three of the Administrative Procedure Act¹⁶⁰ to the coin of the realm. This provision of the Act requires publication in the *Federal Register* of all "adopted" rules and policies of general applicability.¹⁶¹ The conclusion that any rule or standard actually applied by the agency has been "adopted as authorized by law" or "formulated and adopted by the agency" within the meaning of the provision, and therefore must be pub-

No-Action Letters), No. 70-5 (Renegotiation Board), No. 71-2 (FOI Act Procedures), No. 71-3 (Articulation of Agency Policies), No. 71-4 (Grant Programs), No. 71-5 (I&NS—Change of Status), No. 71-9 (Enforcement in Grant Programs), No. 72-3 (Parole Board), No. 73-1 (Adverse Publicity), No. 73-2 (Alien Labor Certification), No. 74-1 (Grants in Aid), No. 74-3 (Mining Claims). ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, STUDIES, No. 73-1 (Land Sales Disclosure—"Ministudy" series), No. 73-5 (Labor Organization Reporting), No. 73-9 (New Community Guarantees), No. 73-11 (NSF Grants), No. 73-4 (Alien Labor Certification Advice). The "ministudy" program for the summer of 1974 is directed toward this single problem of the need for published regulations. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 1973-74 REPORT.

157. See, e.g., *Soglin v. Kauffman*, 418 F.2d 163, 167 (7th Cir. 1969) (expulsion of students for "misconduct"); *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968) (applications for public housing); *Overseas Media Corp. v. McNamara*, 385 F.2d 308, 313-14 (D.C. Cir. 1967) (newspaper sale at overseas post exchanges); *Hornsby v. Allen*, 326 F.2d 605, 609-12 (5th Cir. 1964) (issuance of liquor licenses); *Smith v. Ladner*, 288 F. Supp. 66, 68-69 (S.D. Miss. 1968) (charter of nonprofit corporations).

158. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 417 (1974) (mail censorship involving both free speech and due process); *Sands v. Wainwright*, 357 F. Supp. 1062, 1090-91 (M.D. Fla. 1973) (prison rules must be specified); *Landown v. Royster*, 333 F. Supp. 621, 644-45, 656 (E.D. Va. 1971) (regulations for prisoner conduct must be promulgated); *Sinclair v. Henderson*, 331 F. Supp. 1123, 1129 (E.D. La. 1971) (regulations for prisoner conduct must be promulgated).

159. *Procunier v. Martinez*, 416 U.S. 396, 407 (1974).

160. 5 U.S.C. § 552(a)(1) (1970).

161. *Id.*

lished, is only a short step from the provision. Justice Burger, then a circuit court judge, writing for the District of Columbia Circuit a decade ago, invalidated a contractor debarment by the Department of Agriculture because the rules and policies had not been published.¹⁶² This rationale recently has been followed by the Court of Appeals for the Fourth Circuit in another debarment case,¹⁶³ but seems not to have been followed in other cases until the Supreme Court accepted it in *Morton v. Ruiz*¹⁶⁴ as an alternative or related ground of decision.¹⁶⁵

We find the third approach to be the most satisfactory. When the Congress enacts, as it usually does, a statute with extremely general and vague standards, it can be said by plain implication to have cast upon the administering agency the duty of formulating regulations and standards sufficient to permit application of the statutory standards to specific cases. That implication is nearly express when the statute also authorizes regulations, and is entirely express when it directs that regulations be promulgated.¹⁶⁶ This third approach seems to underlie the primary analysis of Justice Blackmun, writing for an unanimous Court, in *Morton v. Ruiz*.¹⁶⁷

The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly, by Congress.¹⁶⁸

This, without the constitutional overtones, seems to be essentially the approach urged by Professor Davis as the "non-delegation doctrine."¹⁶⁹

162. *Gonzalez v. Freeman*, 334 F.2d 570, 577-78 (D.C. Cir. 1964).

163. See *W.G. Cosby Transfer & Storage Corp. v. Froehlke*, 480 F.2d 498, 503 (4th Cir. 1973).

164. 415 U.S. 199 (1974).

165. See *id.* at 235-36. When the Bureau of Indian Affairs declined welfare payments to off-reservation Indians, it necessarily formulated a rule, which the Administrative Procedure Act required to be published in the *Federal Register*. *Id.*

166. See, e.g., Water Pollution Control Act Amendments of 1972, § 2, 33 U.S.C. § 1313(b)(1) (Supp. II, 1972); Clean Air Act of 1964, § 301, 42 U.S.C. § 1857g (a) (1970); The Shipping Act of 1916, § 7, 46 U.S.C. § 841(a) (1970).

167. 405 U.S. 199 (1974).

168. *Id.* at 231.

169. See K. DAVIS, *supra* note 30, § 2.09. With the atrophy of the constitutional doctrine that the Congress could not delegate legislative power without prescribing standards, Professor Davis finds an equivalent duty upon the agency to provide the standards that the Congress has omitted. See *id.*; Davis, *A New Approach to Delegation*, 36 U. CHI L. REV. 713, 725-30 (1969). Judge Friendly's dictum in *Fook Hong Mak v. Immigration and Naturalization Service* is to the same effect: "When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles

The court-enforced, or court-stimulated, development of agency regulations and published standards to confine discretionary action seems to us a major contribution to good government. In addition to the practical virtues of regularizing discretionary decisions and advising the public of what is in fact the governing law, the development has the structural virtue of leaving the agencies themselves responsible for the substantive content of their programs and less subject to ad hoc judicial reversal of particular actions.

REASONS

The requirement that the agency state reasons for its actions, so effectively advocated by Chief Judge Bazelon and now crystallized by the Supreme Court, is so salutary as to seem almost self-evidently necessary. We do not, accordingly, stop to rejoice or to praise, but note instead—with some regret—two inherent limitations upon the reach of the doctrine. One limitation is practical. There are many agency functions conducted in such volume that individual explanation is not feasible. The checklist, such as the one effectively used by the Internal Revenue Service, is in high-volume functions an imperative, though not completely satisfactory, substitute for stated reasons.¹⁷⁰ Its utility depends upon the skill with which it is constructed and the care with which it is used. Neither its construction nor its use is susceptible to much improvement from judicial review.

The second limitation has a more theoretical foundation. We find some difficulty in grounding the requirement of stated reasons on either the due process clause or on an implication from a statute. There is no such difficulty in deriving it from the function of judicial review itself; a court cannot properly review unless it knows why the agency took the action under review.¹⁷¹ This formulation of the basis of the requirement of reasons implies a second limitation

and rules.” 435 F.2d 728, 730 (2d Cir. 1970), quoting K. DAVIS, *DISCRETIONARY JUSTICE* 55 (1969).

It should be noted that the constitutional “non-delegation” doctrine, as applied to the Congress, received surprising new support in *National Cable Television Ass’n., Inc. v. United States*, — U.S. —, 42 U.S.L.W. 4306, 4307-8 (U.S. Mar. 24, 1974). Justice Douglas, writing for a unanimous seven-man Court, favorably cited *Schechter Poultry Corp. v. United States*, the Supreme Court’s most notable endorsement of the nondelegation principle. The *Schechter* decision had been a disfavored precedent, largely ignored by courts for decades.

170. Recommendation 72-3 of the Administrative Conference of the United States suggests that the Board of Parole, faced with about 90 decisions per working day, use a checklist with a sentence or two of individual explanation. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *RECOMMENDATIONS AND REPORTS*, No. 72-3.

171. See, e.g., *Secretary of Agriculture v. United States*, 347 U.S. 645, 654 (1954); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196-97 (1941).

on the full scope of the requirement of stated reasons. It seems to render the requirement operative only in respect of agency actions that will or might be subject to judicial review and thus to leave no effective requirement except the force of analogy for the cases not reviewed.

PROCEDURES

The District of Columbia Circuit, we believe, stands alone in its practice of frequently remanding disputes to agencies for the implementation of procedures beyond those required by statute, a practice we believe to be unfortunate. That belief does not rest upon a view that the required procedures were inappropriate; one cannot read the opinions in *Holm & Co. v. Hardin*,¹⁷² *International Harvester Co. v. Ruckelshaus*,¹⁷³ or *Portland Cement Association v. Ruckelshaus*¹⁷⁴ without agreeing that the extra-statutory procedures there directed would contribute greatly to the soundness of the agency action. Our disagreement rests, rather, on our inability to see the basis for the court's authority and on our fear of its debilitating practical consequences for the agencies.

The simplest and most typical case is that of rulemaking subject only to the notice and comment requirements of the Administrative Procedure Act.¹⁷⁵ It can hardly be urged, and the court has not so claimed, that the Constitution requires in addition oral argument, cross-examination, or a scrupulously provided opportunity to comment on agency data. Judge Leventhal is beginning to view the procedural requirements, like the requirement of stated reasons, as deriving from the process of judicial review itself.¹⁷⁶ Chief Judge Bazelon seems to prefer the related but more broadly phrased view that with adequate agency procedures to bring out all considerations, he can more comfortably entrust to agency expertise the decision on the merits. As he said, concurring in *International Harvester*:

172. 449 F.2d 1009 (D.C. Cir. 1971).

173. 478 F.2d 615 (D.C. Cir. 1973).

174. 486 F.2d 375 (D.C. Cir. 1973).

175. § 4, 5 U.S.C. § 553 (1970).

176. See *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972). In *Kennecott* Judge Leventhal explained the remand for more revealing reasons as "in aid of the judicial function" and footnoted a reference to *American Airlines v. CAB* and *Holm & Co. v. Hardin* with the comment that they "establish that in a particular case fairness may require more than the APA minimum, but are not to be taken as suggesting in any way that the court considers" the EPA regulations "to require more than the written submissions specified by Congress." *Id.*; see *Holm & Co. v. Hardin*, 449 F.2d 1009 (D.C. Cir. 1971); *American Airlines v. CAB*, 359 F.2d 624 (D.C. Cir. 1966). In *International Harvester Co. v. Ruckelshaus* the necessities of judicial review were deemed to require a limited cross-

But in cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision. Rather, it is to establish a decision-making process which assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public.¹⁷⁷

To allow the cross-examination he considered necessary for sound judicial review, the Chief Judge was prepared to abrogate the statutory 60-day period for decision.¹⁷⁸ Judge Leventhal, in post hoc rejoinder, said, "In the absence of restraints in the interest of fairness, which have an aura of both constitutional requirement and implied legislative accord, I think a court has no principled basis for overriding a clear-cut sixty-day mandate."¹⁷⁹ Our agreement with Judge Leventhal would go one step further to ask on what principled basis, short of constitutional compulsion, a court can direct limited cross-examination in a rulemaking procedure that the Congress has declared may be done by notice and comment alone.

Our fear of the practical consequences of requiring procedures beyond those required by statute rests on the quandary into which the agencies are cast as they structure their rulemaking procedures. If the District of Columbia Circuit adheres to its views, it will in some cases rule the statutory procedure of notice and comment inadequate. The court's decision will typically occur about two years after the rulemaking notice is composed. A remand for additional procedures could often have devastating consequences for the agency program. Federal agencies issue about 5,000 notice and comment regulations a year.¹⁸⁰ No one can be confident, even after the regulation is issued and briefs and argument in the court of appeals are completed, that the agency procedures will be held adequate. No living man could analyze the subtle shadings in the District of Columbia Circuit opinions and determine in advance of the regula-

examination: "The procedures followed in this case, whether or not based on rulings that were 'mistaken' when made, have resulted in a record that leaves this Court uncertain" 478 F.2d 615, 649 (D.C. Cir. 1973); see Leventhal, *supra* note 3. In his article, Judge Leventhal quite explicitly declared that "inadequate procedures, like inadequate findings, would lead to a remand in aid of the function of appellate review rather than a declaration that the order as issued was invalid for inadequate procedures." *Id.* at 539.

177. 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring).

178. *Id.*

179. Leventhal, *supra* note 3, at 538.

180. The estimate of 5,000 is based on the following fact: during the week of April 1 to April 5, 1974, some 98 rulemaking notices and unnoticed rules were published. See 39 Fed. Reg. 11855-12720 (1974).

tion and in advance of the protest and controversy just what procedures might in the end be held necessary. Consequently, when rulemaking calls for expedition, agency counsel cannot do other than advise the agency to proceed with notice and comment and to hope for the best if the regulation is brought under judicial review. This is not a very good way to run the government. Yet it seems better than converting the whole of notice and comment rulemaking into procedures made awkwardly elaborate from fear of distant reversals.

SCOPE OF REVIEW

We have little to say about the scope of judicial review of informal agency action except to emphasize the traditional virtues of judicial restraint. To use the vivid example of *International Harvester*,¹⁸¹ we do not believe that the courts should reach a judgment either that the agency has not proven its mastery of automobile emission technology or that it would more surely be right if it opened rulemaking to cross-examination. For better or for worse, the Congress has committed decisions such as these to the agencies.

We believe that traditional judicial restraint leads to better, rather than worse, results. One cannot read *International Harvester* without concluding that Leventhal, the judge, had a surer grasp of emission technology than did Ruckelshaus, the defendant, nor without concluding that the search for truth would have been much advanced by the cross-examination sought by Chief Judge Bazelon. But important as the issues in that case were, the overall relations between the court and agency are even more important. On two independent grounds, we consider either opinion in *International Harvester* to contain the seeds of danger.

One ground is "expertise," a term in current disfavor because of decades of overuse. The fact remains that men of ordinary ability who have spent some time, in the case of agency heads and members, or many years, in the case of the staff, dealing with specialized issues do have a special competence in their fields. In unnoticed accretions prior proceedings, luncheon conversations, the daily press, and countless other sources add to their knowledge and understanding. As a rule, we consider their judgment likely to be better than that of the most brilliant of judges, confined as the judge is to the accidents of a single record and perhaps influenced by the skill or the ineptitude of the accidentally chosen counsel. As a rule, the confusion and delays of cross-examination are more likely to be of comfort to the reviewing court than they are to be of real aid to

181. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

men already familiar, personally or through their staffs, with the issues.

The District of Columbia Circuit has not been conspicuous in its endorsement of agency "expertise." But, if Judge McGowan writing for the majority, including Chief Judge Bazelon, in *Union of Concerned Scientists v. AEC*¹⁸² has correctly foretold the future, the court may be a compulsory adherent of agency "expertise." After 48 pages of closely reasoned opinion, Judge McGowan concluded:

It is patent from the foregoing that, despite the procedural nature of the issues raised, we have had to deal with subject matter ranging far beyond the normal ken of judges. This case is only one among many such these days, and, thus, suggests the extraordinary tasks that the seemingly endless statutory proliferation of judicial review of agency action is imposing on the federal courts. How meaningful judicial review on this scale can be over any sustained period of time, at least if not invariably invoked with an acute sense responsibility and a willingness to recognize that many of these more esoteric battles must largely be won or lost at the agency level, is problematic.¹⁸³

Our second reason for endorsing judicial restraint is time. The typical agency is going to be slow to act in the best of circumstances. If, a year or two after it does act, the proceeding is remanded to start again, the costs of delayed action often can be high. In 1973, according to our count of the slip opinions of the District of Columbia Circuit, the court entered 51 opinions on direct review of administrative agencies; of these, 31 cases, or 61 percent, resulted in a remand for further proceedings.¹⁸⁴ Occasionally, the court has remanded a case and then, on the second review, remanded again.¹⁸⁵ In much, though by no means all, of government one could properly prefer possibly erroneous action today in place of possibly correct action two years later. The government of men rests more on rough judgment than on perfect syllogism, and the probing and polishing of that rough judgment in a possibly vain effort to draw closer to certainty often may not be worth some years of delay.

182. 499 F.2d 1069 (D.C. Cir. 1974).

183. *Id.* 1094.

184. By the same token, the 54 District of Columbia opinions in 1973 relating to district court review of agency action show that the circuit court put the matter to rest in 25 cases and required further proceedings, by the agency or by the district court, in 29 cases, or 54 percent.

185. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). See also *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (agency error consisting of inaction).

CONCLUSION

Putting aside our one clear complaint, that against exacting procedures beyond those required by the Congress, the cause of responsible government has been well served by the District of Columbia Circuit and its Chief Judge. Chief Judge Bazelon has led the way in opening the court to any party with a real grievance and in moving toward a pragmatic insistence that the agencies act fairly. Yet, with only an occasional exception, he has allowed the agencies the freedom from judicial second-guessing that is essential to effective government. Our hopes for the next quarter-century of his work are as high as is our satisfaction with that of the past.