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History Belongs to the Winners: The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action Administrative Law Discussion Forum

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"HISTORY BELONGS TO THE WINNERS": THE BAZELON-LEVENTHAL DEBATE AND THE CONTINUING RELEVANCE OF THE PROCESS/SUBSTANCE DICHOTOMY IN JUDICIAL REVIEW OF AGENCY ACTION

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INTRODUCTION

The aphorism that "history belongs to the winners"[1] has particular relevance to the longstanding dispute regarding the ability of judges to master difficult scientific, economic, or statistical information when engaging in judicial review of final agency action. Prior to the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* which definitively rejected process-based review of agency action in favor of substantive "hard look" review,[2] a lively debate raged among scholars of administrative law over the proper scope of judicial review of final agency action.[3] This debate occurred perhaps most prominently within the pages of dueling opinions that Judges David Bazelon and Harold Leventhal, both members of the U.S. Court of Appeals for the D.C. Circuit, authored, with Bazelon advocating process-based review and Leventhal defending hard look review. The vanquished were not immediately willing to concede the field in the immediate aftermath of *Vermont Yankee.*[4]

Since 1978, however, the history of judicial review of agency action seemingly has been written by the winners—advocates of "hard look" review by generalist judges, rather than the advocates of judicially crafted

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1. This quotation, in one form or another, has been attributed to Alex Haley, Jawaharlal Nehru, Winston Churchill, Josef Stalin, and others. *See, e.g.*, MY SOUL LOOKS BACK, 'LESS I FORGET: A COLLECTION OF QUOTATIONS BY PEOPLE OF COLOR 191 (Dorothy Winbush Riley ed., 1993) (quoting *Roots* author Alex Haley as saying that "[h]istory is written by the winners" during an April 20, 1972 interview with David Frost); THE OXFORD DICTIONARY OF POLITICAL QUOTATIONS 265 (Antony Jay ed., 2d ed. 2001) (attributing the quotation "[h]istory is almost always written by the victors and conquerors and gives their viewpoint" to Nehru's THE DISCOVERY OF INDIA (1946)). Variations on the aphorism substitute "victors" for "winners" (viz., "History belongs to the victors") or "is written by" for "belongs" (viz., "History is written by the winners or victors"). A definitive etymology of the aphorism lies beyond the scope of this Article. *See generally* DICTIONARY OF QUOTABLE DEFINITIONS 263 (Eugene E. Brussell ed., 1970) (attributing "The propaganda of the victorious" to "Anon").

2. *See* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 524 (1978) ("Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.").

3. For a discussion of this debate, see Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1407-08 (1996) (describing and discussing the "fundamental disagreement about appropriate judicial function" that preceded the Supreme Court's *Vermont Yankee* decision); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 225-26, 228-29 (1996) (reviewing the "well-publicized debate between Judges Bazelon and Leventhal" that "titillated academics and administrative lawyers of the time") [hereinafter Wald, *Judicial Review in Midpassage*]. *See also* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 Admin. L. Rev. 1139 (2001).

4. *See* Richard B. Stewart, Vermont Yankee *and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1805, 1816-18 (1978) (calling the *Vermont Yankee* principle "unsound" and "self-contradictory," among other critiques).

procedures that likely would ensure rational outcomes if observed.[5] A review of administrative law casebooks published since 2000 establishes that many casebook authors no longer view the question as one worthy of consideration for, or discussion with, future practitioners of administrative law.[6]

For example, the 1976 D.C. Circuit decision in *Ethyl Corp. v. EPA*[7] once appeared as a matter of course in the major casebooks.[8] The standard presentation featured excerpts from the majority opinion by Judge J. Skelly Wright, along with excerpts from the concurring opinions of Judges David Bazelon and Harold Leventhal. Today, *Ethyl Corp.* largely has vanished from the canon. As a co-editor of a casebook in the field (which does not discuss *Ethyl Corp.*), I can report that our exclusion of this case and any related materials reflects our view that the process/substance debate is a matter of purely historical interest. In trying to keep a book within the bounds of plausible teachability for a three-hour survey course, much more has to be excluded than included—even if the material holds intrinsic intellectual interest or might possess significant pedagogical value.

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5. *See, e.g.*, Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 345-48, 356-57, 366-67 (lauding *Vermont Yankee* on the merits as a necessary restatement of basic APA principles and observing that "[i]t is important to appreciate that, however little support the D.C. Circuit's approach to the APA could find in the opinions of the Supreme Court, it was fast becoming an accepted part of administrative law theory and practice").

6. Casebooks that do not include any reference to *Ethyl Corporation v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc) *cert. denied*, 426 U.S. 941 (1976), include RONALD A. CASS, COLIN S. DIVER & JACK M. BEERMAN, ADMINISTRATIVE LAW: CASES AND MATERIALS (4th ed. 2002); WILLIAM A. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES (3d ed. 2006); CHARLES H. KOCH, JR., WILLIAM S. JORDAN, III & RICHARD W. MURPHY, ADMINISTRATIVE LAW: CASES AND MATERIALS (5th ed. 2006); JOHN M. ROGERS, MICHAEL P. HEALY & RONALD J. KROTOSZYNSKI, JR., ADMINISTRATIVE LAW (2003). I should note, however, that several major casebooks continue to include the Bazelon/Leventhal debate. *See, e.g.*, STEPHEN BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & MATTHEW L. SPITZER, ADMINISTRATIVE LAW & REGULATORY POLICY 353-56 (4th ed. 1999) (including an extended discussion of *Ethyl Corp.*); GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 539-43 (3d ed. 2004) (same). Another major casebook, the Gellhorn/Byse successor, retains coverage, but in a shorter note than existed in earlier editions. *See* PETER STRAUSS, TODD D. RAKOFF & CYNTHIA FARINA, GELLHORN AND BYSE'S ADMINISTRATIVE LAW 512-14 (10th ed. 2003) (providing three pages on the process/substance debate); *cf.* ERNEST GELLHORN, CLARK BYSE, PETER STRAUSS, TODD D. RAFOFF & CYNTHIA FARINA, ADMINISTRATIVE LAW 463-67 (8th ed. 1987) (providing five pages on the process/substance debate).

7. *Ethyl Corp.*, 541 F.2d at 67 (Bazelon, C.J., concurring) ("But I do believe that in highly technical areas, where our understanding of the import of the evidence is attenuated, our readiness to review evidentiary support for decisions must be correspondingly restrained."); *id.* at 68-69 (Leventhal, J., concurring) ("Our present system of review assumes judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions.").

8. *See* Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2630 (2002) ("*Ethyl Corp.* . . . has become famous for encapsulating the Bazelon-Leventhal hard look debate at its height, before the Supreme Court finally ended the dispute.").

This Article suggests that the dominant view that the process/substance debate is over and settled (in favor of substantive hard look review) might be something of an oversimplification (though not entirely mistaken). Even if the Supreme Court has rejected the strongest iteration of the Bazelon position, the ghost of Bazelon's process driven theory of judicial review haunts the pages of *U.S. Reports*. In other words, process values still undergird and inform substantive "hard look" review in important and varied ways, to a degree that federal courts generally have failed to acknowledge or explain. Even though the Supreme Court has prohibited judicial imposition of specific procedures on agencies, it has, at the same time, made the quality of process an important factor in judicial review.[9]

An agency that ignores process values invites presumably unwanted judicial scrutiny. Conversely, an agency that scrupulously observes fundamentally fair processes will receive a higher measure of deference from a reviewing court. In this way, "weak form" process review remains an integral part of judicial oversight of agency action.[10] Thus, to truly understand *United States v. Mead Corp.*,[11] students undoubtedly would benefit from some familiarity with the process/substance debate.

Accordingly, I propose that Judge Bazelon's opinion for the D.C. Circuit in *Vermont Yankee*[12] is an undervalued part of the administrative law canon (if by "undervalued" one means either "untaught" or "under-taught"). Just as administrative law casebook editors reflexively include *Vermont Yankee* as a principal case, they also should include at least a note on Judge Bazelon's alternative, process-based theory of judicial review.

Part I of this Article reviews the Bazelon/Leventhal debate over the ability of judges to engage in meaningful substantive review of agency decisionmaking. Part II takes up the problems and benefits of having generalist judges reviewing highly specialized technical, economic, and scientific matters, with attention paid to the alternative models that exist in some civil law nations (like Germany) that reject review by generalist judges in favor of specialized administrative law courts with very limited, often agency or program specific, jurisdictions. In Part III, I argue that

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9. For a discussion of this phenomenon, see Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 739-41, 750-54 (2002) (reviewing Supreme Court deference to agency actions following the decision in *Chevron*).

10. *See* discussion *infra* Part III.

11. *See* United States v. Mead Corp., 533 U.S. 218, 227-31 (2001) (holding that *Chevron* deference rests on either an express or implied delegation of lawmaking responsibility to an administrative agency, but also holding that the best evidence of such a delegation is the formality of process used by the agency to arrive at its interpretation of the ambiguous statutory language).

12. *See* Natural Res. Def. Council v. Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom.*, Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519 (1978).

Bazelon's basic objection to hard look review retains continuing validity and that a greater overt emphasis on process values might improve the quality of administrative decisionmaking. Simply put, even if the federal courts cannot legitimately mandate particular procedures on administrative agencies, perhaps the judiciary should more directly acknowledge and explain the relationship of process values to judicial deference to agency action.

I. A BRIEF REVIEW OF THE BAZELON/LEVENTHAL DEBATE

Beginning in the 1970s, Judges David Bazelon and Harold Leventhal engaged each other, and their colleagues on the D.C. Circuit, in an extended debate about the proper scope and limits of judicial review of agency action. Although routinely portrayed as antagonists advocating radically different approaches to judicial review of agency action, a careful reading of the principal decisions in the grand debate strongly suggests that each judge relied on the other's preferred method of analysis. Judge Bazelon's arguments for more process often arose from a factual analysis that led him to doubt the wisdom of the agency's action. Similarly, from time to time, Judge Leventhal acknowledged the need for more procedures, even if he was more reluctant than Judge Bazelon to specify precisely what those additional procedures should be.

A. Judge Bazelon's Claim of Judicial Incompetence

Judge Bazelon believed that judges should acknowledge their own professional limitations and devise a system of judicial review that incorporated and reflected those professional limits. More specifically, he disclaimed *any* ability to engage in meaningful review of highly technical or scientific data. He argued that, in cases involving such issues, "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."[13] Instead, judges should "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."[14]

In *Ethyl Corp.*, Judge Bazelon went so far as to label generalist federal judges "technically illiterate," describing their ability to review complex mathematical, technical, and scientific data as "dangerously unreliable."[15]

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13. Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring); *see also* Envtl. Def. Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) ("For 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.").

14. *Int'l Harvester Co.*, 478 F.2d at 652.

15. Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976) (en banc) (Bazelon, C.J.,

Accordingly, he adhered to his prior view that concentrating efforts on strengthening administrative procedures was "the best way for the courts to address problems with agency decisionmaking."[16]

Of course, Bazelon's approach did not entirely avoid the necessity of mastering enough technical data to ascertain whether the agency's procedures were sufficient to ventilate the issues. For example, in *Aeschliman v. United States Nuclear Regulatory Commission*,[17] the companion case to *Vermont Yankee*, Judge Bazelon reversed the Nuclear Regulatory Commission's (NRC) issuance of permits for the construction of nuclear reactors because the NRC failed to consider alternatives to nuclear power that might pose fewer environmental risks.[18] Of course, to ascertain the adequacy of the NRC's consideration of conservation measures, the reviewing court had to analyze the substance of the materials before the agency. At a minimum, the court had to find that the alternative was a plausible one before requiring the NRC to further explain its failure to consider or pursue it.[19]

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concurring); *see also Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 547 F.2d at 657 (Bazelon, C.J., concurring) ("I am convinced that in highly technical areas, where judges are institutionally incompetent to weigh evidence for themselves, a focus on agency procedures will prove less intrusive, and more likely to improve the quality of decisionmaking, than judges 'steeping' themselves 'in technical matters to determine whether the agency has exercised a reasoned discretion.'").

16. *Ethyl Corp.*, 541 F.2d at 67; *see also Int'l Harvester Co.*, 478 F.2d at 652 (Bazelon, C.J., concurring) (arguing that "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" but instead is to ensure that the agency's procedures are sufficiently demanding that they will routinely produce reliable outcomes); David L. Bazelon, *Coping With Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 822 (1977) [hereinafter Bazelon, *Coping With Technology*] (arguing that "it makes no sense to rely upon the courts to evaluate the agency's scientific and technological determinations; and there is perhaps even less reason for the courts to substitute their own value preferences for those of the agency, to which the legislature has presumably delegated the decisional power"); David L. Bazelon, *The Impact of the Courts on Public Administration*, 52 IND. L.J. 101, 107 (1976) [hereinafter Bazelon, *Impact of the Courts*] ("Significant or not, decisions involving scientific or technical expertise present peculiar challenges for reviewing courts. The problem is not so much that judges will impose their own views on the merits. The question is whether they will even know what is happening.").

17. 547 F.2d 622 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519 (1978).

18. *Id.* at 628-29 ("We hold that rejection of energy conservation on the basis of the 'threshold test' was capricious and arbitrary for the reasons heretofore stated.").

19. Judge Bazelon conceded that consideration of the adequacy of the procedures that an agency followed related back to the substantive questions before the agency. Bazelon, *The Impact of the Courts*, *supra* note 16, at 104 n.14; *see also* Natural Res. Def. Council v. Nuclear Regulatory Comm'n, 547 F.2d at 660 n.8 (Tamm, J., concurring) (noting that Bazelon's majority opinion focused on numerous substantive issues and "demonstrates that judges cannot avoid the task of immersing themselves in difficult and often technical matters in order to evaluate administrative action and assure themselves that the agency has in fact dealt with all major issues," and suggesting that "arguments about whether our focus here is 'procedural' or 'substantive' may be more semantic than determinative").

Further, Judge Bazelon did not always specify the particular additional procedures that an agency must use on remand.[20] Ironically, this was true in his opinion for the D.C. Circuit in the *Vermont Yankee* litigation itself.[21] Although Judge Bazelon would write remedial orders in procedural terms (for example, requiring an agency to ensure that "genuine opportunities to participate in a meaningful way were provided"[22] and calling for a "genuine dialogue" between the administrative agency and interested parties, including both public interest groups and interested members of the public),[23] on remand the agency often remained free to decide which specific procedures to undertake. In this sense, his approach as applied did not necessarily force agencies through any more procedural hoops than *Motor Vehicle Manufacturers' Ass'n*'s "reasoned explanation" requirement for major changes in agency policies shackles agencies with specific procedural obligations.[24]

Although Judge Bazelon believed in process-based review, he argued that it was improper for judges to prescribe specific procedures. Indeed, in his opinion for the D.C. Circuit in *Vermont Yankee*, Bazelon wrote "[a]bsent extraordinary circumstances, it is not proper for a reviewing court to prescribe the procedural format which an agency must use to explore a given set of issues."[25] He further acknowledged that "[u]nless there are statutory directives to the contrary, an agency has discretion to select procedures which it deems best to compile a record illuminating the issues."[26]

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20. *See, e.g.*, *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 547 F.2d at 653-54 (noting that "[m]any procedural devices for creating a genuine dialogue on [relevant] issues were available to the agency," observing that "[w]e do not presume to intrude on the agency's province by dictating to it which, if any, of these devices it must adopt to flesh out the record," and holding that "[w]hatever techniques the Commission adopts, before it promulgates a rule limiting further consideration of waste disposal and reprocessing issues, it must in one way or another generate a record in which the factual issues are fully developed").

21. *See id.*; Scalia, *supra* note 5, at 356 ("Moreover, the remand order had mandated no specific additional procedures–indeed, it had not clearly ordered any additional procedure beyond what the agency had already provided–so that the issue was presented in a particularly amorphous and generalized form."); *see also* Warren, *supra* note 8, at 2625 (observing that sometimes Bazelon specified a specific procedure to be used on remand, but "[o]n other occasions, Bazelon required additional procedures without specifying which ones should be used, creating an even more bewildering dilemma for administrative agencies").

22. Natural Res. Def. Council v. Nuclear Regulatory Comm'n, 547 F.2d at 644.

23. *Id.* at 653.

24. *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-43, 52, 56-57 (1982) (holding that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance").

25. Natural Res. Def. Council v. Nuclear Regulatory Comm'n, 547 F.2d at 644.

26. *Id.*; *see also id.* at 653 ("We do not presume to intrude on the agency's province by dictating to it which, if any, of these devices it must adopt to flesh out the record.").

Although it is possible to require more procedure without specifying the additional procedure that an agency must provide,[27] doing so leaves an agency nearly at a complete loss as to how best to proceed on remand. As one author observed, "[t]his situation created serious confusion for agencies, which had to choose between adopting seriously inefficient procedures and foregoing such procedures only to risk a remand."[28] In contrast, a remand for additional process in the context of substantive "hard look" review requires an agency to address a particular issue, not to develop a better process for addressing the issue.

B. Judge Leventhal's "Hard Look" Alternative

Judge Harold Leventhal argued that the Administrative Procedure Act (APA) requires reviewing courts to consider the merits of an agency's action, with an eye toward the rationality or plausibility of the decision in light of the record before the agency. He observed that "ours is a judicial review, and not a technical or policy redetermination" and that this review "is channeled by a salutary restraint, and deference to the expertise of an agency that provides reasoned analysis."[29] Leventhal acknowledged the difficulty of this task: "It is with the utmost diffidence that we approach our assignment . . . [t]he legal issues are intermeshed with technical matters, and as yet judges have no scientific aides."[30] Under this approach:

> A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.[31]

In the end, "a court's role on judicial review embraces that of a constructive cooperation with the agency involved in furtherance of the public interest."[32]

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27. *See* Warren, *supra* note 8, at 2623-26 (noting that Judge Bazelon sometimes required specific procedures on remand, such as cross examination, but did not always specify particular procedures, or require the same procedures in all cases).

28. *Id.* at 2625.

29. Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 641 (D.C. Cir. 1973).

30. *Id.*

31. *Id.* at 648.

32. *Id.* at 647; *see also* Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511-12, 514 (1974) (describing "hard look" review and contending that such review involves an analysis of whether the agency has taken a "hard look" at all relevant facts); *cf. Int'l Harvester Co.*, 478 F.2d at 651 (Bazelon, C.J., concurring) (noting the Administrator's methodology was central to the decision and stating, "I do not have the technical know-how to agree or disagree with that evaluation—at least on the basis of the present record. My grounds for remanding the case rest upon the Administrator's failure to employ a reasonable decisionmaking process for so critical and complex a matter.").

Leventhal's conception of the relationship of the reviewing court to the agency is one of a constructive partnership.[33] The reviewing court's role is limited in scope, but must be undertaken with care.[34] This approach, which overtly requires a reviewing court to review complex scientific and technical data incident to hard look review, departs significantly in both theory and practice from Judge Bazelon's process-based approach.

Just as Judge Bazelon could not completely escape the task of considering the underlying substance of an agency's decision, so too Judge Leventhal did not entirely foreswear requiring additional procedures on remand. In *Portland Cement Ass'n*, for example, Judge Leventhal required that the Environmental Protection Agency (EPA), when relying on "scientific literature," identify the relevant portions of such literature.[35] Moreover, "[o]n remand, any findings in the literature that are relied on by EPA should be specifically indicated."[36] However, under the APA, in U.S.C. §§ 553 and 706, an agency need only produce a record that, considered as whole, establishes that the agency's action is not arbitrary and capricious. No provision of the APA or the organic act at issue requires particularized findings with respect to "scientific literature." Thus, Judge Leventhal engrafted a specific procedural obligation on the EPA to facilitate hard look review of the merits of the Agency's decisions.[37]

This approach was not unique to the specific case at bar. "Leventhal's pragmatism also . . . led him to impose nonstatutory procedural requirements on agencies when he believed that the procedures would aid the agency's decisionmaking process."[38] Although procedural improvements were not the focus of Leventhal's hard look review, "he did not hesitate to institute such procedures when he believed they were necessary,"[39] including ordering agencies to go beyond their obligations

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33. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973) (observing that "the court and agency are in a kind of partnership relationship for the purpose of effectuating the legislative mandate"), *cert. denied*, 417 U.S. 921 (1974).

34. *See id.* at 394 (holding that the agency "has a continuing duty to take a 'hard look' at the problems involved in its regulatory task, and that includes an obligation to comment on matters identified as potentially significant by the court order remanding for further presentation"); *id.* at 402 ("While we remain diffident in approaching problems of this technical complexity . . . the necessity to review agency decisions, if it is to be more than a meaningless exercise, requires enough steeping in technical matters to determine whether the agency has exercised a reasoned discretion.") (internal citations and quotations omitted).

35. *Id.* at 400.

36. *Id.*

37. *See* Leventhal, *supra* note 32, at 539 (observing that "[i]f the procedural minimum required by the APA is met, it may be that judicial concern with the adequacy of the agency's procedures could be satisfied by the course of remand used" and citing Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972), where the court required agency "findings even though no findings were required by statute"); *see also Kennecott Copper*, 462 F.2d at 850.

38. Warren, *supra* note 8, at 2614.

39. *Id.*

under the APA, for examply, by requiring hearings, cross-examinations, and oral presentations.[40] As Leventhal himself explained, "[c]ourts may require supplemental procedures in rulemaking over and above the APA minimum, particularly if matters of fact are involved which are crucial to the problem."[41]

Leventhal was sincere in suggesting "diffidence" with respect to a generalist judge's ability to master highly technical scientific or mathematical evidence. Because of his doubts about judicial capacity, he proposed the creation of a judicial aide who would serve

> as a kind of hybrid between a master and a scientific law clerk, a scientific expert who might be available, at the call of the appellate court, not to give evidence or resolve factual or technical issues, but to advise a court so that it could better understand the record.[42]

Leventhal complained that "surprisingly often in argument before a court that enjoys the services of an excellent bar, the judges' questions on technical matters are fended off rather than answered, even after whispered conferences with the [attorney's] assistant nearby."[43] Thus, Leventhal's objection to process-based judicial review of agency action did not reflect a fundamental disagreement with Bazelon's belief that judges face difficulties mastering technical and scientific materials, but rather Leventhal's own view that Congress mandated in the APA that judges engage in substantive review of action and that judges could not legitimately refuse to undertake these duties.[44]

C. Fuzzy Edges and Legal Pragmatism

The Bazelon/Leventhal debate illuminates a continuing problem associated with generalist judges analyzing highly technical data. By training and experience, most Article III judges lack much familiarity with scientific research and methodologies.[45] To the extent that hard look review requires judges, with limited help from law clerks and court staff, to

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40. *Id.* at 2614-15.
41. Leventhal, *supra* note 322, at 537.
42. *Id.* at 550.
43. *Id.* at 551.
44. *But cf.* Bazelon, *Coping With Technology*, *supra* note 166, at 823 ("What courts and judges can do, however—and do well when conscious of their role and limitations—is scrutinize and monitor the decisionmaking process to make sure that it is thorough, complete, and rational; that all relevant information has been considered; and that insofar as possible, those who will be affected by a decision have had an opportunity to participate in it.").
45. SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA 43 (1995) ("Most U.S. judges are still generalists, without any special schooling in the sciences, and practices such as random assignment of cases prevent judicial specialization in areas requiring technical knowledge.").

become sufficiently familiar with the intricacies of nuclear power plant construction or the best means of preserving an endangered run of salmon, it probably asks too much.

On the other hand, Congress plainly envisioned that judicial review of agency action would be merits-based, and not an opportunity for ad hoc revision of the APA. For a judge to disclaim any willingness to undertake such review—as Judge Bazelon repeatedly did in both published opinions and scholarly writings—reflects an approach difficult to square with basic principles of the separation of powers. As Judge J. Skelly Wright observed, setting the metes and bounds of agency procedure, outside the context of the procedural due process minima, is a task for Congress, not the federal courts.[46]

Even with this concession, however, it is quite impossible to disentangle process and substance in the context of judicial review of agency action.[47] For example, in enforcing the APA requirement than an agency provide a "concise general statement" of purpose and effect, a reviewing court must decide precisely how "concise" and how "general" such a statement may be without transgressing § 553.[48] Similarly, a variety of federal common law doctrines effectively mandate additional process. For example, under *Motor Vehicle Manufacturers Ass'n*, an agency must provide a "reasoned analysis" for an abrupt departure from consistent past agency practice.[49] Nothing in § 553 prescribes a special duty to explain changes in agency policy. Similarly, under *Mead Corp.*, the quality of process that an agency observes prefigures heavily on whether a reviewing court will afford *Chevron* deference to the agency's interpretation of ambiguous statutory text.[50]

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46. *See* J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 382 (1974) ("But if Congress remains silent [regarding proceedings under § 556 and § 557], the APA clearly contemplates that reviewing courts will insist on neither more nor less than section 553 requires."); *id.* at 384 (criticizing judicial imposition of additional procedures on agencies which "strike the court as being appropriate to the issues raised" and suggesting that "[t]his curious 'ad hoc' approach to procedural review is not authorized by the APA or by any other statute; nor should it become the law by judicial fiat").

47. *See* Scalia, *supra* note 5, at 391 ("Of course, it is not possible to maintain a complete dichotomy between the procedures used and the adequacy of evidentiary support.").

48. *See* Indep. U.S. Tankers Owners Comm. v. Dole, 809 F.2d 847, 852 (D.C. Cir. 1987); Indus. Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 337-38 (D.C. Cir. 1968); *see also* 5 U.S.C. § 553(c).

49. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-43, 56-57 (1983).

50. United States v. Mead Corp., 533 U.S. 218, 227-31 (2001).

In a word, process—and the quality of process—matters a great deal in judicial review of agency action. Although *Vermont Yankee* disallows the imposition of either specific additional procedures or a generalized duty to provide more process, it does not prevent or discourage remands that effectively mandate that an agency do something more than it did the first time around. Thus, even if Judge Bazelon lost the battle, perhaps he did not lose the war entirely.

II. ARTICLE III COURTS AND THE LIMITS OF GENERALIST JUDGES

Why should courts place so much importance on the quality of an agency's procedures? One possible explanation is that judges harbor serious doubts about their ability to review highly technical matters on the merits and are more willing to credit an agency work product that results from a reliable process. When a proceeding features careful attention to process values, the risk of error falls. When the risk of error falls, the need for careful judicial scrutiny of the underlying merits also falls.

To be sure, some judges dispute Bazelon's basic argument that generalist judges are incapable of mastering technical materials. Judge Wright, for example, argued that "[s]ubstantive review, properly understood, is too modest an enterprise to convert courts into superagencies, and the standard of substantive review itself incorporates Judge Bazelon's underlying, and correct, perception that courts can more competently assess the rationality of the rulemaking process than the merits of the resultant rules."[51] Moreover, Wright believed that "[r]eplacing substantive review with the ad hoc approach to procedural review would make sense only if adjudicatory formalities constituted both a necessary and a sufficient condition for the rulemaking process to be rational."[52] However, "[n]either branch of this proposition is sound."[53] Accordingly, Judge Wright urged that the federal courts "should learn to use these tools [hard look review of the merits under §§ 553 and 706] and give up playing arcane procedural games authorized by neither statute nor common sense."[54]

Some commentators share Judge Wright's confidence that generalist judges can do a good job of holding administrative agencies accountable.[55]

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51. Wright, *supra* note 466, at 393.
52. *Id.*
53. *Id.*
54. *Id.* at 397.
55. *See, e.g.*, Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 508-10, 543-47 (2002) (noting that "[p]sychological studies suggest that accountability, if properly structured, can significantly improve the quality of decisionmaking" by reducing reliance on "inappropriate decisionmaking rules" and "psychological biases," positing that judicial review of agency action enhances the quality of agency decisions simply by "provid[ing] an audience . . . for those engaged in formulating and defending the rule," and concluding that "judicial review

But these views are hardly universal. Judge Patricia Wald, for example, repeatedly has cautioned against assuming that Article III judges are capable of any task, however Herculean in scope.[56]

Responding to an argument by Dean Christopher Edley that judges should attempt to engage federal administrative agencies in an ongoing dialogue to promote "good governance," Judge Wald observed that:

> [a]sking judges to familiarize themselves enough with the policies and operations of the dozens of agencies that appear in hundreds of cases a year, and whose functions vary from labor to shipping to nuclear energy to gas regulation, so that we can participate as equals in their good governance, is asking a great deal.[57]

Even if the judiciary's "intent might be pure" the judiciary's "abilities would be highly suspect."[58] Judge Wald also has voiced concerns about the judiciary's ability to evaluate the overall effectiveness of particular agencies.[59] She cautions that "experience has taught this judge that once courts leave the moorings of the statute—its text, history, and enunciated purposes—and move into the sphere of good and bad regulatory policy, the bounds of their authority and discretion become decidedly murky."[60]

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provides an effective mechanism for enhancing the impact of accountability and discouraging the impact of directive leadership"); David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 629 (1970) (noting that due to "the breadth of the questions" and "the requirement of balancing opposing economic and social interests," courts are in a better position to adjudicate environmental issues than agencies).

56. *See* Patricia M. Wald, *The "New Administrative Law"—With the Same Old Judges in It?*, 1991 DUKE L.J. 647, 657-59, 662, 668 [hereinafter Wald, *The New Administrative Law*] (questioning the ability of federal judges to second guess general policy decisions of federal administrative agencies); Wald, *Judicial Review in Midpassage*, *supra* note 3, at 225-31, 235 (arguing that judicial review of highly complex technical matters is difficult and that agencies would facilitate judicial review by "focus[ing] more on the importance of basic communications skills, using simple English whenever possible to explain what the underlying dispute is (supplemented by graphs, charts, and pictures when helpful) and why they have acted as they have to resolve it").

57. Wald, *The New Administrative Law*, *supra* note 566, at 658-59; *see* Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 Duke L.J. 561, 596, 601-06 (arguing that judges should work as active partners with administrative agencies to improve the quality of agency decisionmaking).

58. Wald, *The New Administrative Law*, *supra* note 566, at 659.

59. *Id.* at 662 ("Although I hold suspicions or impressions about who is on top or at the bottom of the regulatory honor roll, I do not feel at all sanguine about concluding that OSHA has regulated toxic substances too strictly in some cases and too leniently in others, or that EPA has failed or succeeded as an air, water, or hazardous waste regulator."); *see* Sierra Club v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981) (noting plaintively that "[w]e reach our decision after interminable record searching (and considerable soul searching)," reporting that "[w]e have read the record with as hard a look as mortal judges can probably give its thousands of pages," and explaining that "[w]e are not engineers, computer modelers, economists or statisticians, although many of the documents in this record require such expertise and more"). To get a sense of the considerable real world demands of conscientious hard look review on federal appellate judges, consider that the opinion in *Sierra Club* runs for 112 pages and contains 540 footnotes, exclusive of the appendix.

60. Wald, *The New Administrative Law*, *supra* note 56, at 668.

To be sure, Judge Wald was commenting on particular proposals to expand the scope of judicial review beyond its existing limits. Her observations, however, have a general relevance that transcends the particular context in which she offered them.

In a more general context, Judge Wald has suggested that "on the whole, [judges] do relatively well in grasping the basic underlying issues [in judicial review cases] despite filtering them through the quite differently calibrated lens of opposing counsel and a mission-oriented agency."[61] Even so, she admits that judges "do occasionally get wrong the mechanics of what is actually going on in the real world transactions being regulated, and that kind of misunderstanding can lead to a badly skewed decision."[62] To improve judicial review of agency action, Judge Wald suggests that agencies work harder to write reports and orders that are clear and understandable. "Given the arcane subject matter of agency appeals in the D.C. Circuit—permissible amounts of hazardous chemicals in the air, required distances between broadcasting antennas, legitimate changes in utility rate base—the need for explanations and rationales in simple English is particularly acute."[63]

Judge Irving Kaufman, of the Second Circuit, was considerably less optimistic than Judge Wald about the ability of judges to review complex agency records. "[J]udges cannot possibly be as familiar as the administrative agency with the factual controversies or the specialized knowledge involved in many agency decisions."[64] He predicted that, when faced with a record encompassing "briefs, records and appendices . . . so bulky that . . . [his law clerk] has to haul them in relays," a rational judge will attempt to decide the case on legal, rather than factual, grounds.[65]

Having served as a law clerk to a judge facing a massive consolidated case[66] involving over 400 air quality standards, with a record that would fill a U-Haul truck, I can report that Judge Kaufman's prediction often can hold true. When presented with thousands of pages of briefs and appendices—to say nothing of a record comprised of thousands of pages of documents, studies, and transcripts—the typical federal judge is likely to find any plausible avenue of deciding the case on some ground other than a "hard look" at all of the agency's major factual premises. Simply put, an

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61. Wald, *Judicial Review in Midpassage*, *supra* note 3, at 235.
62. *Id.*
63. *Id.*
64. Irving R. Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U. L. REV. 201, 201 (1970).
65. *Id.* at 201-03.
66. For a discussion of consolidated administrative appeals, see Wald, *Judicial Review in Midpassage*, *supra* note 3, at 238-40.

appellate judge with a staff of three or four law clerks and one or two administrative assistants has neither the time nor the ability to engage in a meaningful review of such a record.

Judge Wald has observed that "the press of time and paper in these complex track cases creates a disincentive to dissenting; producing even a consensus opinion requires an ungodly amount of work."[67] In fact, she reports that "[i]n none of the complex track administrative law cases I remember over the past ten years has there been a full-fledged dissent."[68] So, in at least one subset of administrative review cases—consolidated multi-circuit appeals—the notion of judicial inability to engage in meaningful factual review of the record has particular salience.

Thus, the question of judicial competence that Judge Bazelon raised is hardly chimerical; it is real, pressing, and important. Even if one fundamentally agrees with *Vermont Yankee*'s resolution of the substance/process debate, one still might harbor misgivings about whether a model of substantive review of complex agency action is a realistic one.

Moreover, an alternative vision of administrative review exists. In France and Germany, specialized courts are charged with overseeing the rationality of agency work product.[69] If the goal of judicial review is to ensure that an agency's factual premises bear some reasonable relationship to reality, or make reasonable assumptions in light of the available scientific evidence, the use of specialized courts might be the right answer.[70] In other words, if Judge Bazelon and Judge Kaufman are correct in suggesting that generalist judges cannot undertake meaningful review of difficult or complex scientific or technical matters, the proper response might be to find judges who are comfortable dealing with such materials on a regular basis.

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67. *Id.* at 240.

68. *Id.*

69. *See* Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 Nw. U. L. Rev. 705, 713-16 (1988) (examining the structure of German courts with attention to Germany's use of specialized tribunals for review of administrative decisions); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 851-52 & 851 n.100 (1985) (discussing the use of specialized administrative courts in Germany); Michael J. Remington, *The* Tribunaux Administratifs*: Protectors of the French Citizen*, 51 TUL. L. REV. 33 (1976) (discussing review of administrative agency decisions in France); Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1289-1301 (1994) (discussing judicial review of administrative decisions in Germany, with particular attention to environmental law); Wald, *Judicial Review in Midpassage*, *supra* note 3, at 231 (discussing the role and function of the Conseil d'Etat in France in reviewing administrative actions).

70. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 55-81 (1993) (proposing the creation of a new specialized administrative group to bring uniformity and rationality to decisionmaking in highly technical areas).

Indeed, various proposals for a national "science court" have been put forward.[71] As Judge Wald explains, "[o]ver the years, for instance, there have been many proposals for the creation of specialized administrative courts patterned after the Federal Circuit, or for consolidating all major administrative cases in one court, usually the D.C. Circuit."[72]

Along similar lines, Judge Leventhal's proposal of a judicial "scientific assistant" leaves the decisions in the general federal courts, but expands the staff of federal judges to include persons with specialized scientific or technical training.[73] He explains that "[w]hile the issue is close, I think there is room, both in practical necessity and in the legal structure, for access by an appellate judge to a scientific assistant, with whom he could communicate in private, as with his law clerk, orally as well as in writing."[74] Leventhal argues that "[c]ertainly a system which enhances understanding by the judge is preferable to one in which the judge must grab, or stab, at a record that seems to be important but which incorporates confusing and extraneous impressions."[75]

Despite the existence of alternative models of judicial review of agency action and the alternative possibility of augmenting the staff of current generalist judges to facilitate better review of technical and scientific materials, the adoption of such changes does not seem very likely in either the short or long term. One obvious problem is the need to create multiple tribunals (or hire multiple technical aides). Judge Wald explains:

> I have serious doubts about the practicality and wisdom of this approach. In the first place, how specialized could any court be, given the hundreds of agencies that are currently reviewed? Certainly we could not tolerate a court for every one of them—yet what would be gained over the present system by concentrating administrative cases from all these agencies in one court?[76]

Thus, the problem of a relative lack of expertise in a particular subject matter cannot be solved completely without an entire duplication of the agencies themselves.

A second concern relates to the effect of specialization on judicial review. Judge Wald reports that "in my experience judges who come to the bench equipped with specialized prior knowledge in a field are apt to

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71. *See* Bazelon, *Coping With Technology, supra* note 166, at 826-28 (describing and critiquing proposals for the creation of a special tribunal to review federal administrative agency scientific determinations).

72. Wald, *Judicial Review in Midpassage*, *supra* note 3, at 230.

73. Leventhal, *supra* note 322, at 550-54.

74. *Id.* at 553.

75. *Id.*; *see also* 5 KENNETH CULP DAVIS, TREATISE ON ADMINISTRATIVE LAW § 27.44 (2d ed. 1978) (observing that the inability of courts to ascertain facts compromises the accuracy of judicial review of agency action).

76. Wald, *Judicial Review in Midpassage*, *supra* note 3, at 230.

dominate internal panel discussions, and in many cases definitely tilt toward their prize theories and even endeavor to get them translated into law."[77] In other words, with specialization comes an increased risk of bias.

Dean Richard Revesz has demonstrated persuasively that specialized benches are more subject to capture and bias than are generalist benches.[78] As he explains, "[t]here are structural reasons to expect that specialized courts not subject to review in the generalist court of appeals are likely to decrease the quality of the output of the judicial system."[79] Moreover, these negative effects "are independent of the relative abilities of specialized and generalist judges."[80]

Turning to specialized tribunals does not so much improve upon existing judicial review as it shifts the initial decisionmaker from the agency itself to the superagency/reviewing body. If the goal is to leave primary decisional responsibility with the agency—and not the body ostensibly reviewing the agency's decision—use of specialized tribunals might be a poor approach.[81]

A final possibility might be to abolish judicial review entirely, in favor of some sort of internal review within the Executive Branch. Judge Wald acknowledges this model, but objects that "even if this were politically feasible, the costs would far outweigh the benefits."[82] Wald persuasively argues that some sort of external review process is essential to keeping agencies honest:

> [It] seems hard to believe that agencies would be self-restrained enough—especially where impacts on important political constituencies are involved—to faithfully follow congressional intent in implementing a law of which they did not approve, or that, even if the agency stayed faithful, White House officials would not succumb to interpretive temptation.[83]

Judge Wald essentially argues that imperfect judicial review better serves good governance values than no judicial review at all—a position that strikes me as entirely persuasive.

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77. *Id.* at 230-31.

78. *See* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1127 n.68, 1130-38, 1148-53 (1990).

79. *Id.* at 1154.

80. *Id.*

81. *See id.* at 1154-70 (discussing the problem of selection bias, bias from the bench, and potential separation of powers problems resulting from overly aggressive review of initial agency decisions).

82. Wald, *Judicial Review in Midpassage*, *supra* note 3, at 231.

83. *Id.*

III. THE CONTINUING RELEVANCE OF PROCESS VALUES TO MEANINGFUL JUDICIAL REVIEW OF AGENCY ACTION

If judges are professionally ill-suited to undertake meaningful substantive review of the factual predicates for agency action, specialized tribunals are overly subject to capture and bias, and the abolition of judicial review would ill-serve important separation of powers values, what approach to judicial review presents the best model? An argument can be made in favor of the model that we enjoy presently: review that is formally substantive and considers whether the agency's conclusions are rationally related to its factual predicates, but in practice tends to use procedural concerns as means of policing agency behavior. Even if *Vermont Yankee* put to rest the overt use of procedural review of agency action, judges understand and appreciate procedure and reflexively analyze agency action through a procedural lens.

Accordingly, even if a reviewing court cannot formally engraft a particular procedure on a recalcitrant agency, a reviewing court can vacate and remand an agency decision for failing to provide a sufficient explanation, for failing to afford interested parties fair notice of the precise issues being considered in the proceeding,[84] or for failing to address material issues ventilated before the agency (whether in a rulemaking or an adjudication).[85] For example, even if a judge has no idea how much dioxin safely can be discharged into a river, he can ascertain whether an agency has addressed scientific studies suggesting that the amount of dioxin that the EPA seeks to permit still poses a significant health risk.

Thus, as Professor Stewart argues, "[t]he 'substantive' adequacy of a record cannot be entirely divorced from the procedures employed in generating it."[86] From this, Professor Stewart endorses the Bazelon theory of judicial review, suggesting that the "best approach is for courts to provide guidance for administrators and litigants by requiring the use of hybrid procedures likely in most cases to produce an adequate record for judicial review."[87] Of course, *Vermont Yankee* precludes a reviewing court from adopting this approach—something that Professor Stewart laments.[88]

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84. *See* Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1102-04 (4th Cir. 1985).
85. *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 150-53 (2d Cir. 1977).
86. Stewart, *supra* note 4, at 1818.
87. *Id.* at 1819.
88. *See id.* at 1820 ("*Vermont Yankee* is myopic in denying courts an adequate role in adjusting and updating the law, and instead leaving the entire responsibility to Congress and administrators."); *see also* DAVIS, *supra* note 75, § 29.27 (questioning whether the Supreme Court properly decided *Vermont Yankee*).

As Judge Bazelon and Professor Stewart both note, "the distinction between procedure and substance in this context is a tenuous one."[89] The problem with directly imposing new procedures on an ad hoc basis is self-evident and incontrovertible. Judge Wright explains that an administrator "[f]earing reversal of his substantive initiatives" would "clothe his agency's actions in the full wardrobe of adjudicatory procedure . . . [b]y demanding procedural refinements on an ad hoc basis, reviewing courts would inadvertently induce agencies to adopt maximum procedures in all cases."[90] A reviewing court therefore should abstain from forcing agencies to play a kind of perverse guessing game.

At the same time, however, the Supreme Court has not hesitated to impose de facto procedural burdens on agencies. As noted earlier, the requirement of a paper "record" for judicial review of informal agency actions effectively adds to the requirements of the APA. As Professor Stewart observes, "[t]his requirement of an evidentiary 'record' plainly goes beyond the APA, which provides for administrative creation of such a record only in cases of formal adjudication and rulemaking; the APA fails to require such a record in either notice and comment rulemaking or informal adjudication."[91]

In both the case of a record requirement in informal agency proceedings and a requirement for a substantive "concise general statement" in informal rulemakings, the reviewing court is imposing a procedural requirement to aid enforcement of the APA itself. The APA requires an agency to consider relevant materials called to its attention and afford interested parties a meaningful opportunity to comment on a proposed rule. The APA also requires the reviewing court to ascertain the rationality of the agency's

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89. Stewart, *supra* note 4, at 1806-07 n.6; *see also* Bazelon, *Impact of the Courts*, *supra* note 166, at 104 n.14 ("My dissenting colleagues have sometimes seen, in my own opinions, a substantive message wrapped in a procedural envelope.").

90. Wright, *supra* note 466, at 387-88. *Vermont Yankee v. Natural Res. Def. Council*, 435 U.S. 519, 546-47 (1978) further notes that:

> "[I]f courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the 'best' or 'correct' result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ the 'best' procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance."

91. Stewart, *supra* note 4, at 1816; *see* Camp v. Pitts, 411 U.S. 138, 140 (1973) (noting that the APA does not require the Comptroller of Currency to hold a hearing or to make formal findings on the hearing record when passing on applications for new banking authorities); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). Perhaps ironically, then-Justice Rehnquist references the judicially mandated requirement of a record for review of informal agency action in *Vermont Yankee* itself. *See Vermont Yankee*, 435 U.S. at 547-49.

course of conduct, with the burden of proof falling on the agency. Courts mandate new procedures not incident to a generalized procedural review, but incident to substantive "hard look" review of agency action. [92]

Thus, one plausibly could claim that Judge Bazelon lost the battle but won the war. Because his central observation that judges squirm at attempting to master difficult technical or scientific data holds true, judges will (as Judge Kaufman predicted) attempt to find statutory or procedural grounds for deciding administrative review cases.[93] Alternatively, a judge could reflexively defer when confronted with difficult technical or scientific issues.[94]

If agencies were certain that courts would defer, rather than attempt to decide cases on statutory or procedural grounds, they might have an incentive not to turn square corners. Precisely because a reviewing court that harbors uncertainties about the substantive merits might choose to find a procedural fault with the agency's efforts (e.g., failure to consider a particular alternative or failure to address some specific contrary evidence), an agency has an incentive to show its work. Judge Wald's suggestion that clarity of reasoning and explication would enhance, rather than reduce, agency success thus rings true.[95] If an agency fails to present its case in a fashion reasonably comprehensible to a reviewing court, it runs a risk that the judges' failure to comprehend will be morphed into a failure on the agency's part to establish that its decision is neither arbitrary nor capricious.

Remands for failure to address particular substantive points thus reflect the continuing legacy of the Bazelon process theory of judicial review. We might call it "weak form" process review; when incident to "hard look" review of the merits, a judge will remand if the process used leaves her with significant doubts about the correctness of the agency's chosen course of conduct. The reviewing court will not impose any particular procedure

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92. *See generally* Clark Byse, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1829-30 (1978) (addressing the argument that *Vermont Yankee* contradicts the approach taken in *Camp*, suggesting that "the question then is whether the holdings of those cases requiring a record should be extended to require that the agency employ specific procedures in compiling that record," and concluding that such an extension of the *Camp* principle is unwarranted).

93. *See, e.g.*, AFL-CIO v. OSHA, 965 F.2d 962, 968-73 (11th Cir. 1992) (vacating the Occupational Safety and Health Administration's air contaminants standard for 428 toxic substances on the grounds that the agency did not meet its statutorily imposed procedural requirements).

94. *See* JASANOFF, *supra* note 455, at 41-43 (suggesting that generalist judges often lack "special schooling in the sciences" necessary to evaluate data supporting agency factual conclusions).

95. *See* Wald, *Judicial Review in Midpassage*, *supra* note 3, at 235 (arguing that "agencies should focus more on the importance of basic communication skills" to "persuade judges [that they have] done right in a given case, to pacify their fears").

on the agency on remand, but will require the agency to do something to address and resolve the doubt. That "something" will entail some sort of process at the agency that will facilitate resolution of the issue.

The question that remains for consideration is how transparent the federal courts should be in telling agencies that the fate of agency action on judicial review has a great deal to do with the quality of the process the agency follows while considering the decision. The current regime is much more of a "wink-wink/nudge-nudge/know-what-I-mean" arrangement than might be optimal. If process values constitute an important general background consideration that significantly informs judicial review, perhaps the Supreme Court should say so more directly than it has to date.

To be clear, this suggestion does not present the question of imposing specific procedures on a particular agency; rather, the point is a more limited one. If process values significantly affect judicial deference, it might be useful for agencies to have a better sense of the cost/benefit implications associated with turning (or not turning) square corners. As a practical matter, however, it is likely that most agency general counsels realize that as the process values associated with an agency's consideration of a problem degrade, the probability of the agency action surviving judicial review declines as well.

CONCLUSION

Although it is true that the Supreme Court squarely rejected Judge Bazelon's process-based approach to judicial review, the theory retains importance and should be taught as part of the administrative law canon. The difficulties of asking generalist judges to review difficult scientific, mathematical, or technical materials are real ones that deserve continuing attention. Moreover, the response of reviewing courts to judicial limitations suggests that even though process values cannot serve as the principal focus of judicial review, process values nevertheless can, should, and do inform judicial review in important ways. Accordingly, just as it would be unthinkable to teach a basic administrative law course without giving some attention to *Vermont Yankee*, it should also be thought professionally unwise to omit discussion of the Bazelon process-based approach to judicial review.

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