THE CONTRIBUTION OF THE D.C. CIRCUIT TO ADMINISTRATIVE LAW*

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Mr. Bonfield: My name is Arthur Bonfield. I am Chair this year of the American Bar Association Section of Administrative Law.

I would like to welcome you to this program. It promises to be both stimulating and informative. We owe a great debt to Ernie Gellhorn, the program chair of this Fall Meeting. Unfortunately, unexpected last minute pressing business prevented his attendance. Because Ernie couldn’t be with us, Tom Susman, chair of the Meetings Committee of the Section of Administrative Law, will introduce the speakers and moderate the program.

Mr. Susman: The D.C. Circuit has for decades been at the center of a number of storms, and the present period is no exception. We are pleased to bring together this afternoon a number of authorities on the subject of administrative law and the role of the D.C. Circuit, to examine the special role and contribution the D.C. Circuit has made to the development of administrative law. This special role is not likely to diminish.

As the federal government becomes more active and more intrusive, and more authority is given to agencies and departments, the D.C. Circuit takes on increasing significance as court of last resort for most agency decisions.

Almost three-quarters of the D.C. Circuit’s cases come from federal agencies. Although the D.C. Circuit is the court of last resort for most cases, obviously, there is still appeal to the Supreme Court. However, even there the D.C. Circuit has had a great influence through the membership on that court of Chief Justice Burger and Justice Scalia. Chief Judge Wald has observed in the past that the Supreme Court takes more cases and reverses more cases from the D.C. Circuit than from other circuits, so the relationship is an uneasy one, as well as a special one, between the two courts.
Our commentators include former professor and dean, and now president of the College of William and Mary, Paul Verkuil. President Verkuil is an active member of the Administrative Law Section, formerly a member of its Council, and a well-known administrative law scholar.

We will also hear from Professor Jeremy Rabkin, assistant professor of political science at Cornell and contributing editor of Regulation magazine. Professor Rabkin has written extensively on the constitutional limits on government consent decrees.

Finally, we will hear from a private practitioner who has had a most distinguished career in government and in the private bar, the Honorable Lloyd Cutler. Mr. Cutler has been Counselor to the President, member of a number of presidential commissions and panels, leader of the ABA's task force to study regulation, and an outspoken commentator on administrative agencies and government regulation.

It is a special and personal pleasure to introduce Chief Judge Patricia Wald as keynote speaker. I was on the staff of the court. Having been able to contribute directly to the process of placing Chief Judge Wald on the federal bench is a source of immense personal pleasure.

Judge Wald is Chief Judge of the United States Court of Appeals for the District of Columbia Circuit. She has served on the court since 1979. She graduated from Connecticut College and the Yale Law School, clerked for Judge Frank on the Second Circuit, practiced law in Washington, raised a family, then came back into practice, where she worked in the public interest sector. Chief Judge Wald served as an Assistant Attorney General in the U.S. Department of Justice from 1977 to 1979 when she ascended to the bench.

Chief Judge Wald has written widely on the subject of administrative law and is widely recognized as an authority on the subject.

Chief Judge Wald: Thanks, Tom.

INTRODUCTION

My assigned topic is "The Distinctive Contribution of the D.C. Circuit to Administrative Law"—a daunting one to say the least. I am tempted to be somewhat irreverent and simply say, "Being There," from the Peter Sellers movie of the same name. For, indeed, much of our contribution has been the unavoidable by-product of having it happen on our watch.

In 1986, nearly 30 percent of the 3,180 appeals from agency decisions filed in the United States Circuit Courts came to us. No other circuit, except the Ninth with under 20 percent, came close. Broken down to raw numbers, we received 134 appeals from the Environmental Protection Agency, compared with 23 in the runner-
up Ninth Circuit; 181 appeals from the Federal Communications
Commission, compared with 8 in the Second Circuit; 220 appeals
from the Federal Energy Regulatory Commission, compared with 62
in the Fifth Circuit; 121 from the Interstate Commerce Commission,
compared with 9 in the Ninth Circuit; and 10 appeals from the
Nuclear Regulatory Commission, compared with 4 in the Third
Circuit. During the year, we terminated on the merits more than twice
as many direct appeals from federal agencies as any other circuit. The
disproportionate number of appeals we get from these agencies
assures that we will be the dominant judicial force in their
operations.¹

Whether we like it or not, our court is preoccupied with adminis­
trative law. In 1986, 48 percent of our filings came directly from
agencies, and another 25 percent were appeals from district court
cases involving government parties, mostly alphabet agencies. Every
other category of cases on our docket paled by comparison. We are
immersed in the stuff.

But it has not always been that way for the D.C. Circuit. We are, de
facto, an administrative law court not by grand design but by historical
accident, and a relatively recent one at that.

Before 1970, the D.C. Circuit was a hybrid federal-local court of
appeals. It had exclusive federal agency appeal jurisdiction in areas of
maritime and communications law but the bulk of its docket consisted
of discretionary appeals from local courts. The circuit’s high visibility
throughout the sixties was due to its landmark rulings in the fields of
criminal defendant rights and poor people’s law: it was, for example,
the D.C. Circuit and Judge Bazelon in particular who formulated the
so-called Durham² rule for insanity defenses, in later times to be
replaced by the somewhat stricter Model Penal Code standard.
Indeed, it is no secret that a major motivation for the 1970 District of
Columbia Court Reorganization Act [hereinafter Court Reorganiza­
tion Act]³ was the Nixon administration’s fierce opposition to many of
these rulings, although the reason formally asserted for the legislation
was the administration’s dismay at the serious backlog of criminal
cases in the federal district court.

The District of Columbia Court Reform and Criminal Procedure
Act [hereinafter Court Reform Act]⁴ eliminated the appellate juris­
diction of the D.C. Circuit over local law appeals. It transferred

¹The statistics in this address concerning the D.C. Circuit, where not otherwise
accounted for, generally appear in Administrative Office of the United States
jurisdiction over all civil and criminal cases involving purely local law from the federal courts to the two revamped and reinvigorated local courts.

The void left in the D.C. Circuit's docket coincided with a period of exponential growth in federal regulatory legislation. Between 1968 and 1978, Congress passed more regulatory statutes than it had in the nation's previous 179 years: the Occupational Safety and Health Act, the Consumer Product Safety Act, the National Traffic and Motor Vehicle Safety Act, the Child Protection and Toy Safety Act, the Federal Coal Mine Health and Safety Act, the Surface Mining Control and Reclamation Act, the Truth in Lending Act, the Age Discrimination Act, the Equal Employment Opportunity Act, the Clean Water Act, the Toxic Substances Control Act, and the Clean Air Amendments of 1970—to name only a few. Meanwhile, because the geographical boundaries of the circuit were confined to the Washington city limits, the number of private claims, diversity cases and federal crimes arising within the circuit remained static. It still is: In 1986 our circuit terminated on the merits only 39 criminal appeals and 154 private civil actions, compared to 222 administrative law cases. And we continue to receive only a trickle of the social security and habeas corpus cases that flood other circuits. In the seventies, administrative law cases started to surge; the largest number flowed toward our circuit.

There were three major reasons for this gravitational pull. First, the organic statutes of some agencies required that agency cases be brought within this circuit. Second, many actions were initiated by the


federal government, and since it resided in Washington, it generally preferred to litigate here. And third, for a long time, there was the perception that the D.C. Circuit provided an especially friendly forum for "public interest" or—in the view of some—"special interest" groups. Senator Orrin Hatch once complained of the D.C. Circuit's judgments affecting public lands in Western states as "the modus operandi by which a number of special interest groups have imposed extreme interpretations of the law on an unwilling majority of Americans." Now, Senator Hatch's opinions are constitutionally protected, but the statistics show that the vast majority of challenges to agency decisions or rules brought in the D.C. Circuit have been initiated not by public interest groups, but by industry. So the business world apparently has not viewed us as an implacable enemy and there is much public commentary these days to suggest that we are now viewed by business as a particularly friendly court.

One last observation about our evolution as an administrative law court: the radical change in the court's jurisdiction in the early seventies coincided with a time of unusual stability in the court's membership. From 1970 until 1979, when I joined the court, there were no changes in membership at all. (In the period since then, by contrast, there have been eight new appointments.) To put that great period in perspective, the last time the Supreme Court went nine years without a membership change was during the administration of James Monroe! In the seventies, the brilliant minds of David Bazelon, J. Skelly Wright, Carl McGowan, Spottswood Robinson, Ed Tamm, Harold Leventhal, George MacKinnon, Roger Robb, and Malcolm Wilkey turned, with rare agility, from issues primarily of local criminal law and procedure to issues of federal administrative law. Not one had been selected for his expertise in administrative law, although all had prior experience in government service; yet the skill with which they mastered and ultimately came to dominate this field was breathtaking.

That has, in fact, been something of a recurrent source of criticism about the makeup of our court. To the often-expressed consternation of the local bar, wherein so much administrative law expertise reposes, the judges of the D.C. Circuit have generally been chosen from around the country with only a few exceptions from inside the circuit. Moreover, only an occasional appointee, such as Judge (now Justice) Scalia, has come to the court with a matured expertise in administrative law. One can only wonder whether the court's work product would have been different—less varied, less yeasty, less controversial, more empathetic with agency procedures, if, as in so many specialized

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courts, our judges had been selected for their prior expertise in administrative law. As it was, the D.C. Circuit's judges in the seventies were new brooms, sweeping broadly across the neglected agency landscape, raising much dust, and many hackles.

Now, in 1987, if you'll forgive me for borrowing from Mayor Koch of New York—how are we doing?

The number of cases an administrative law court decides are, of course, only one barometer of its performance. What our statistical predominance does suggest, however, is that our court, as a rule, should be among the first to pick up and air the threshold issues in administrative law. We should also be expected, because of the greater frequency with which we review particular agencies, to detect questionable patterns of behavior that might go unnoticed in isolated cases. Confirmation that we are succeeding in doing the first appears from statistics that approximately half of the Supreme Court's last five terms' administrative law cases came up from our circuit, including the recent Holy Trinity of *Chevron, USA v. Natural Resources Defense Council, Inc.*, 18 *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 19 and *Heckler v. Chaney.* 20 Here I hasten to add—before someone else leaps to do so—that in many of these cases, the Supreme Court reversed us, at least in part, so I do not suggest that we are a kind of administrative law St. John the Baptist for the Supreme Court. Rather, our unique role is in identifying and framing the major issues for High Court resolution. We may not always be right but we usually are exhaustive. By the time the Supreme Court steps in, all sides of the issue are well-illuminated. 21

There are several reasons why the D.C. Circuit can so readily perform this framing and staging function for the Supreme Court. We have far fewer cases to sit on than other circuits: about 115 a year

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21 Time does not permit any extensive illustration of the monitoring function the court performs with respect to a particular agency's implementation of its statutory section. I will give only one example. The Federal Labor Relations Authority, which performs roughly the same function for federal government labor negotiations as the National Labor Relations Board does for the rest of industry and business, must, among other things, decide whether the bargaining proposals of government workers' unions are "negotiable" under 5 U.S.C. §§ 7101-35 (1982) (Federal Service Labor-Management Relations). Most controversies over negotiability center on the "management rights" provision, which prohibits certain management prerogatives from becoming the subject of collective bargaining. This one section, § 7106, alone has given rise to 26 published opinions of our court from Federal Labor Relations Authority determinations in the last two years. It would be fair to say that our court has first formulated several of the key statutory constructions on which the agency now operates. Because each case, however, is so fact-specific, it is unlikely that the Supreme Court will be tempted to review these determinations. The court becomes in such instances the watchdog of agency consistency and fidelity to statutory intent.
per judge, compared to a national average of 225. We publish far fewer opinions: last year our average per judge was twenty-eight majority opinions and six separate opinions; in other circuits of comparable size, each judge publishes between fifty and sixty opinions per year. Before you condemn us as delinquent, however, you undoubtedly recognize already that agency cases tend to have massive records; on average, five lawyers and five briefs per case; they are more likely than other types of cases to involve intervenors, amicus briefs, and protracted motion-filled post-disposition periods. And our judges do tend to dwell on each decision: a typical D.C. Circuit opinion can make Proust look like bedtime reading. In 1985, we produced in the administrative law area alone fifty-eight slip opinions over twenty pages long and eight over fifty pages. We've always held the record for the nation's longest opinions, and our lead is stretching. You will not be pleased to learn that our page-totals as a circuit so far in 1987 are running 80 percent longer than during the comparable period in 1986.

There's a final reason we may be especially well-equipped to play the role of Supreme Court agenda-setter on administrative law issues. We are located just down the avenue from Congress and just up the street from the White House. Several D.C. Circuit judges have been members of Congress, and most of us have held policymaking executive positions. Our daily newspapers are full of agency doings, and government doings are the talk of the town. Now it may be difficult to trace from casual conversation to published opinion a direct chain of awarenesses, sensitivities, general information or impressions, but I am confident the nexus is there. So, apparently, are some members of Congress who have, over the years, regularly sought to amend the laws governing our jurisdiction; for example, to relocate the venue of cases dealing with site-specific environmental disputes out of Washington and away from District of Columbia judges, on the grounds we have little understanding of and appreciation for local conditions elsewhere. As later-to-be Secretary of Interior James Watt once put it: "[W]e find that eastern judges (judges who are 'foreign' to many values of the West) are making decisions which control our destiny as a people and as a vital force in America's economy."22 "The thought that the District of Columbia Courts are better than the rest smacks of elitism and it is just not true."23 I would suggest—with some temerity—that the geographic disadvantage to which Mr. Watt referred may be balanced in part at least by the intensity with which the D.C. Circuit judges immerse themselves in those problems. Uniformly, they bring to their jobs a

22 Venue Statutes Hearing, supra note 17, at 33.
23 Id. at 31.
preoccupation with the workings of government that we hope assists us to get to the heart of administrative law issues with dispatch and perspicacity. In our opinions and at our oral arguments, there is constant preoccupation with and debate about how Congress and agencies actually work, and how much of legislative history is concocted or real. At argument, counsel typically encounter a stream of knowing asides from the bench about what the judges think is really going on in the bureaucracy. It's generally pretty hard to sneak a farfetched agency rationalization past our collective skepticism. In addition, we see government counsel often enough so that they, too, are acutely aware we suffer poorly off-the-wall arguments. The relationship between our court and government lawyers miniaturizes that between the Supreme Court and the Solicitor General's office, which, by and large, keeps the bench-bar dialogue within rational bounds. It has even been suggested by some Supreme Court Justices in recent years that the quality of advocacy in our court generally is a match for—or even better than—that in the Supreme Court.

So far I have focused on the more obvious factors that make the D.C. Circuit distinctive: our forced preoccupation with administrative law, judges who are both knowledgeable and savvy, the constant intellectual ferment in the nation's capital. What I now propose to do is to take you on a tour of our circuit in action: to explain from my perspective how we have played our pivotal role through the last twenty years, and to stop briefly at some critical way stations to show how our oversight of judicial agencies has evolved through three distinct historical chapters, which, more for convenience than strict accuracy, I will characterize as "burgeoning regulation," "deregulation," and "nonregulation." I'll follow by discussing a theme common to all regulatory eras: the proper scope of judicial review or, if you will, of judicial deference, and describe our most recent efforts to construct a coherent theory of those elusive limits.

CHAPTER I: BURGEONING REGULATION

The role of the D.C. Circuit in its first decade after the 1970 Court Reorganization Act was that of an active partner in a whirlwind era of expanded federal regulation. Congress and the Executive Branch were initiating an array of new regulatory programs in the areas of consumer protection, occupational safety, traffic standards, truth in lending, mine safety, age and gender discrimination, and environmental protection. The agencies charged with implementing Congress' edicts began simultaneously taking full advantage of the long dormant informal rulemaking provisions of the 1946 Administrative
Procedure Act and the issue became: What role, if any, should the courts play in monitoring this sudden surge of bureaucratic lawmaking?

The leading figures on our circuit at that time perceived the court's role as twofold: to insist upon rational and accountable agency decisionmaking in implementing these new statutes, and to ensure that interested and affected members of the public could participate in critical agency policymaking. This vision did not emerge at once, but rather piecemeal in a series of landmark administrative law cases. I am going to use our environmental law decisions during this period as a touchstone to illustrate my points.

The opening salvo in the environmental law revolution was the Clean Air Amendments Act of 1970. The Act readily accommodated—if, indeed, it did not actually envision—what Judge Leventhal later termed a "collaborative partnership" between Congress and the court of appeals; Congress later amended the Act to give the D.C. Circuit exclusive jurisdiction over most national scope EPA appeals. In the ensuing years, the court parlayed its special status into a dominant role in the development of EPA law and procedure under the Act.

The first major D.C. Circuit Clean Air Act case was *Kennecott Copper Corp.* v. *EPA*,24 in 1972. It was in *Kennecott* that Judge Leventhal announced the court's intention of becoming "in a real sense part of the total administrative process."25 The court showed little constraint in plunging into a maze of high technological complexity. It required the EPA to provide a detailed enough statement about the basis for its national secondary ambient air quality standards for sulfur dioxide so that the judges could decide for themselves whether the agency had made a reasoned decision. The court, in remanding the case to the agency, ordered this additional explanation despite a finding that the regulation had already satisfied the Administrative Procedure Act's (APA)26 requirement of a "concise general statement" of the basis and purpose of the regulation. What happened then was a precursor of the result in many succeeding procedural remands by the court: EPA discovered that it had misread important evidence and modified the sulfur dioxide standard it had originally promulgated. One of the agency's own counsel concluded in a law review that the overall effect on the agency of such detailed factual review by the court was decidedly beneficial, although I recognize that view is not a universal one.27

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25  Id. at 849 (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851–52, cert. denied, 403 U.S. 923 (1971).
In a second major Clean Air Act case the D.C. Circuit became an even more aggressive senior partner. The date was 1973; the case was *International Harvester Co. v. Ruckelshaus.* Three major automobile manufacturers challenged an EPA decision denying them a one-year suspension of emission standards scheduled to go into effect in 1975. The D.C. Circuit ruled for the manufacturers, again holding that the denial of the moratorium was not justified on the record before the court. Specifically, the court concluded that EPA's refusal to allow the companies to comment on the agency's technical methodology for measuring automobile emission standards detracted from "an informed decision-making process." The lasting imprint of the case was the relief granted: the parties were given an opportunity on remand to comment upon matters not previously put before them by the EPA and a chance to cross-examine agency officials as to both old and new testimony.

The third major Clean Air Act case was *Portland Cement Association v. Ruckelshaus* in 1973. There, Judge Leventhal announced the requirement that the agency not only give manufacturers the opportunity to see and comment upon actual evidence involving relevant test results and procedures on which the agency decision was based, but that it also respond specifically to any serious complaints parties to the rulemaking had about that test methodology.

The net result of this trilogy of environmental cases—*Kennecott, International Harvester,* and *Portland Cement*—was to impose an array of new procedural requirements on agencies seeking to fulfill their statutory mandates through rulemaking. Agencies were required to disclose their data and methodology, detail their reasoning, and respond to comments from aggrieved parties. Soon, Congress began incorporating these judicially-fashioned requirements into new regulatory acts, including the 1977 amendments to the Clean Air Act itself. As Professor Kenneth Davis has observed, during the period of active regulation, "the frontier [was] pushed out at times by judges and at times by legislators, . . . [each receiving] stimulus from the ideas of others . . . and searching for the best. . . ."

This era of burgeoning regulation also saw judges on the D.C. Circuit initiating a spirited debate over the proper scope and intensity of judicial review of agency actions. One school, identified with Judge Leventhal, called upon judges to "steep [themselves] in technical matters to determine whether the agency 'has exercised a reasoned

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29 Id. at 631.
discretion,’ " and has truly taken a “hard look” at the problem in front of them. Judge Bazelon, by contrast, distrusted the ability of what he called “technically illiterate” judges to make highly complex substantive evaluations; his solution, instead, was to adopt procedures, including those just noted, to ensure a rational decisionmaking process. He explained that philosophy like this:

Socrates said that wisdom is the recognition of how much one does not know. I may be wise if that is wisdom, because 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.33

Ultimately, of course, neither the Leventhal nor the Bazelon view fully prevailed. The Supreme Court rejected at least some of the proceduralism advocated by Judge Bazelon in its decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,34 holding that reviewing courts were not to order any procedural requirements such as cross-examination of key testimony above and beyond those already in the APA or in the relevant enabling statute. Yet, the rebuff was more formal than real; the bulk of the “procedural” requirements previously developed by the circuit in cases like Kennecott and International Harvester survived Vermont Yankee and continue today, either in statutory form or as part of the gloss the court has put on the “arbitrary and capricious” prohibitions of the APA. Our circuit’s insistence on these procedural requirements, in fact, led Judge Scalia, in a law review article shortly after Vermont Yankee, to liken the D.C. Circuit to a rebellious child who, despite a tongue-lashing from its parents, continued its “progressive evisceration of the APA” in favor of what he called an “‘evolving’ courtroom scheme” and an “ever-growing common law.”35 So, in fact, a good deal of the proceduralism of Judge Bazelon and a great deal of the “hard look” techniques of Judge Leventhal remain; and, I, for one at least, am unconvinced that they have “eviscerated” the APA; rather, in my view, they have succeeded in permanently injecting critical elements of fairness and regularity into administrative lawmaking. Our substantive “hard look” reviews may not be quite as “hard” today as Judge Leventhal wanted, particularly after Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc. (“Vermont Yankee II”),36 where the

33 478 F. 2d at 650-51.
Supreme Court pointedly reminded us that the resolution of “fundamental policy questions” should be left to Congress and the agencies. But a glance at our opinions in any recent year should immediately reassure fans that the doctrine is alive and in reasonably good health.

The era of heightened regulation also saw the D.C. Circuit leave its mark on the doctrine of standing in the administrative law area. During the early seventies, the D.C. Circuit led the march for expanded judicial review for disgruntled victims of agency policymaking, and the liberalized standing doctrines ultimately adopted by the Supreme Court reflected its influence. The circuit’s move towards broader standing actually began in 1966, with the case of Office of Communication of the United Church of Christ v. FCC, in an opinion written by then Circuit Judge Warren E. Burger. Judge Burger wrote that “such community organizations as civic associations, professional societies, unions, churches and educational institutions” could challenge an FCC license renewal—despite the fact that they suffered no economic injury. In environmental law, the circuit in 1970 became the first to recognize “biological harm to man and other living things” as injury sufficient to grant standing to challenge agency inaction. That determination came in Environmental Defense Fund, Inc., v. Hardin, a case which the Supreme Court later cited with approval in its landmark SCRAP decision. The circuit’s decision in the 1970 case of Scanwell Laboratories, Inc. v. Schaffer, also anticipated the Supreme Court’s recognition in Association of Data Processing Service Organizations, Inc. v. Camp, of aggrievement under the APA as a sufficient basis for Article III standing to challenge agency action.

On the basis of this acknowledgedly small sample, let me sum up what I consider to be the D.C. Circuit’s distinctive contributions to this

37During the same period, the circuit was also groping towards developing a coherent doctrine regarding ex parte contacts during informal rulemaking. The court’s internal differences of opinion on this issue were legend. One panel fashioned one rule: a very strict code prohibiting most such contacts, a rule that came to be known as the “Home Box Office” rule, after the case which sparked it. The same year, 1977, saw a different panel develop a less intrusive rule in Action for Children’s Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977), a case that, while technically distinguishable, pointedly questioned the teachings of Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1971), cert. denied, 434 U.S. 829 (1977). It took four years more and an external report by the Administrative Conference for our court to finally settle on a single, less rigid rule for ex parte contacts in rulemaking. See Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

38359 F.2d 994 (D.C. Cir. 1966).

39Id. at 1005.

40428 F.2d 1093 (D.C. Cir. 1970).


42424 F.2d 859 (D.C. Cir. 1970).

early stage of modern administrative law. In a time of rapid change and tumultuous growth in regulatory activity, the court saw its primary job in reviewing agency action as insisting on fairness, regularity and reasonableness in agency rulemaking. The quasi-procedural requirements crafted in the environmental area, the "hard look" concept, and the new rules of standing were all designed with those ideals in mind and most remain firmly fixed in our jurisprudence today. Judge Bazelon's vision of "a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts" was not far off the mark. Our procedural innovations, largely built upon the APA's skeletal provisions, expanded access to our courts for affected litigants while insuring that once in court parties were guaranteed a reasonable decisionmaking process aimed at the goal of reasonable results.

CHAPTER II: DEREGULATION

The role of the D.C. Circuit, like that of all courts dealing with administrative law cases, changed markedly in 1980. President Reagan's election closed the era of aggressive regulation, and ushered in an era of unabashed deregulation. Laissez-faire economics and efficient markets became the basic tenets of political faith for the Executive Branch. Federal agencies were placed in the charge of new appointees, firmly, sometimes evangelically, committed to an anti-regulatory philosophy. As their agency decisions reached the court, the old issue of the court's proper role on review presented itself in a new guise: How aggressive should the courts be in insisting that an agency, whose leaders avowedly seek deregulation, remain faithful to a statutory mandate formulated in a pro-regulatory era?

Judge Edwards best summarized our predicament. "We recognize," he wrote,

that a new administration may try to effectuate new philosophies that have been implicitly endorsed by the democratic process. Nonetheless, it is axiomatic that the leaders of every administration are required to adhere to the dictates of statutes that are also products of democratic decisionmaking. Unless officials of the Executive Branch can convince Congress to change the statutes they find objectionable, their duty is to implement the statutory mandates in a rational manner.45

The D.C. Circuit's first attempt to develop a jurisprudence of deregulation came just a year into the new administration, in State

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Farm Mutual Automobile Insurance Co. v. Department of Transportation, the much-litigated “airbags case.” The case arose after the Department of Transportation rescinded the rule of the previous administration requiring the progressive installation of passive restraints in new car models.

For our court, the immediate issue was how deferential or aggressive our review should be. The Department of Transportation argued for virtual total deference: it likened an agency’s decision to rescind to an agency’s decision not to act in the first place, a decision traditionally subject to minimal, or no, judicial scrutiny. Others in the case urged on the court the ordinary level of scrutiny applied to a newly promulgated regulation. Judge Mikva, writing for the panel, ruled that because the agency had so abruptly changed course, as opposed to merely moving from stasis, the court must take a particularly “searching and careful review” of the decision to rescind. “[S]udden and profound alterations in an agency’s policy,” he wrote, “constitute ‘danger signals’ that the will of Congress is being ignored.”

The court ended up striking down the airbags rescission as arbitrary and capricious, because the agency had failed to consider other less drastic alternatives more consistent with congressional intent. The court remanded the case to the agency for reconsideration: either to find better reasons for its rescission or to implement the original rule.

In the Supreme Court the Justices faced the same classification problem that we had: is deregulation more like regulation or nonregulation, or is it a breed entirely unto itself? The Court decided, like the circuit, that deregulation was more akin to regulation than to nonregulation, and thus that the airbag rescission warranted “normal” scrutiny under the APA, a pitch of review a tone lighter than the D.C. Circuit’s, but one that nevertheless produced an identical result: the Supreme Court agreed the rescission rule had to be remanded to the agency.

An interesting sidelight of State Farm was the manner in which the Supreme Court chose to characterize “normal” scrutiny. For the first time, the High Court itself referred approvingly to “hard look” scrutiny, thereby validating that term of judicial art, and its underlying philosophy of intensive review, pioneered by the D.C. Circuit.

Since the airbags case, our mission as a circuit in deregulation cases has been to make sure that agencies seeking to roll back their

47 Id. at 219 n. 17 (quoting City of Chicago v. FPC, 458 F. 2d 731, 744 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972)).
48 Id. at 221.
regulations remain true to the intent of the Congress that created and defined their duties in the relevant areas. One case where we held Congress' intent brazenly ignored was the 1983 case of International Ladies' Garment Workers' Union v. Donovan. There we threw out the attempts of the Labor Department to rescind 40-year-old regulations restricting the home employment of workers in the knitted outerwear industry. Again we concluded that the Department had put forth no credible explanation for why it had not considered lesser alternatives to rescinding those time-honored rules.

Similarly, in Farmers Union Central Exchange v. FERC, a 1984 case, we held that FERC had acted arbitrarily and capriciously in failing to examine or consider any steps short of total deregulation of oil pipeline rates. Not only did we find FERC to have violated the APA, but we also found it to have contravened its own statutory mandate that it ensure that pipeline rates are “just and reasonable.” That, I admit, is an awfully fuzzy statutory mandate, but in the court’s view the rates FERC would have allowed under the guise of deregulation were so extortionate that they could in no sense be considered “reasonable,” or demonstrably controllable by market forces alone.

In the cases I have cited, the court checked what it found to be excessive and unjustifiable deregulatory zeal. But lest you think that all we did during the deregulation era was to impede agency initiatives, let me assure you that in the great majority of cases we upheld the administration’s deregulatory action. Thus, in Office of Communication of the United Church of Christ v. FCC, a 1983 case, our circuit upheld most of a sweeping deregulation of the commercial radio industry, even after imposing “hard look” review. We found that the FCC’s free-market rationale, which was, in essence, that increased diversity and competition among radio stations had lessened the need for FCC control of the market, was sound. But this did not signal total FCC immunity from judicial scrutiny: just this summer, in the case of Action for Children’s Television v. FCC, we insisted the FCC provide some explanation for its sudden switch from a former reluctance to depend on market forces alone to control excesses in the commercialization of children’s television.

In discussing earlier the era of burgeoning regulation, I observed that a primary role of the D.C. Circuit was to put in place procedural requirements that assured all interested parties would be heard. In the era of deregulation, one key party was regularly absent: the Congress that passed the legislation that the agency was now deregulating. The D.C. Circuit’s role therefore became one of ensuring the

50 722 F.2d 795 (D.C. Cir. 1983).
52 707 F.2d 1413 (D.C. Cir. 1983).
53 821 F.2d 741 (D.C. Cir. 1987).
agency's fidelity to the intent of that absent party. We were, if you will, a trustee for the ghosts of Congresses past. It is, I must say, not an easy role for courts to play: brandishing the intent of a Congress that left power decades ago over the agents of a newly elected and popular president. But our firmness in holding the line against unauthorized or unjustified deregulation served an essential purpose: it bolstered the critical constitutional principle that only the legislature makes laws, and that it is the job of the executive to enforce—not rewrite—them.

Although, in our deregulatory decisions, our "hard look" review took on a more substantive gloss—we were more worried now than in the earlier era about whether the agencies' results accorded with their statutory mandate than whether there were procedural flaws in the process—the experience of the eighties also cemented the continuing role of reviewing courts, whatever the current political climate, in insuring that fair agency procedures and tenets for reasoned decisionmaking remain in place.

CHAPTER III: NONREGULATION

Within the past few years, the D.C. Circuit has entered a third period which I will—controversially, no doubt—characterize as the era of "nonregulation." Typical cases in this current period involve challenges of an agency's decision not to respond to certain problems within its jurisdiction or to respond in ways that allegedly fall short of fulfilling the regulatory intent of the statute, challenges of an agency's failure to enforce existing rules, or of its failure to promulgate rules where the statute appears to contemplate rules. In this setting, the burning issues for the circuit have become: To what extent are judges permitted to review agency inaction? To what degree—if at all—can we force agencies to take action when we find they are defaulting on their statutory enforcement obligations?

Now some commentators have observed, not illogically I think, that to prevent judges from reviewing agency inaction while allowing "hard look" review of agency action smacks a little of the old distinction between an "act" and an "omission," a distinction discredited back when I was in law school. If an agency is outrageously dragging its feet or ignoring its statutory mandate from Congress, why shouldn't that behavior be just as reviewable as, say, the decision of an agency to flout its mandate and repeal existing rules in the name of deregulation? Nevertheless, there is a strong counterargument that judges are not capable of reviewing agency inaction involving, as it often does, allocation of discrete sources and policy priorities, at least where the relevant statute provides no standards by which to evaluate the agency's decision not to act. And, indeed, three years ago, in
Heckler v. Chaney, the Supreme Court agreed that in certain circumstances agency decisions not to act should be presumptively unreviewable.

Chaney arose after a number of prison inmates sentenced to be executed by lethal drug injections asked the court to order the FDA to ban states from using the drugs since they had not been approved as "safe and effective" for that purpose. The FDA Commissioner decided that such action was not the best use of his discretionary enforcement authority, the prisoners appealed, and our circuit, over a strong dissent by Judge Scalia, ruled that the Commissioner had erred. The Supreme Court on certiorari reversed, holding that the FDA's refusal to make that particular enforcement call was unreviewable under the APA. The Court analogized the agency's decision whether to initiate enforcement action to traditional prosecutorial discretion and decided that the APA precluded judicial review of such action because it was committed to agency discretion by law.

Since Chaney came down, debate has raged within our circuit about how far the doctrine of unreviewability of agency inaction should extend. We have decided over thirty Chaney cases, and they continue to keep coming in. Chaney progeny incidentally illustrate another function the circuit often performs: to sketch out the contours and limits of a Supreme Court decision; to define, refine, and differentiate its application in a variety of situations. We all seem to agree, for example, that Chaney makes presumptively unreviewable agency decisions not to enforce, that share the three classic characteristics identified by the Supreme Court: (1) there are no judicially manageable standards limiting an agency's discretion; (2) the agency is a better qualified decisionmaker on the issue; and (3) the decision not to act closely resembles the historically protected exercise of prosecutorial discretion. Thus, in Community Nutrition Institute v. Young, our circuit held that the failure of the FDA to initiate enforcement proceedings against certain blended corn products was wholly in its discretion under Chaney. And in UAW v. Brock, we held that Chaney precluded judicial review of the Secretary of Labor's decision not to bring civil actions against an employer and its labor relations consultants for allegedly failing to comply with the reporting and disclosure provisions of the Labor-Management Reporting and Disclosure Act (LMRDA).

Nevertheless, the farther afield cases have strayed from such classic nonenforcement decisions, the more skeptically at least some mem-

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55 818 F.2d 943 (D.C. Cir. 1987).
56 783 F.2d 237 (D.C. Cir. 1986).
bers of the D.C. Circuit have viewed claims that Chaney precludes judicial review. In the same Brock case where Chaney was held to preclude review of Labor's decision not to sue under the LMRDA, we held that the Department could not minimize its new interpretation of that Act from judicial review by containing it in a nonenforcement policy guideline. And, in Robbins v. Reagan, we rejected a claim by the Department of Health and Human Services that its decision to close a federally owned building that for more than a year had served as a shelter for the homeless was unreviewable under Chaney. In a per curiam decision in which Judge Robinson and I concurred, the court observed that the Department of Health and Human Services' action "shares virtually none of the characteristics that led the Court in Chaney to apply a presumption of unreviewability instead of the normal presumption that agency action is reviewable." The agency had acted; its action affected individual liberty; and it in no way resembled traditional prosecutorial discretion. Judge Bork dissented in part; he argued that Chaney preclusion could and did apply with force outside the nonenforcement context.

In fact, though, on at least two occasions, our circuit has applied Chaney outside the nonenforcement context. The first such case was Falkowski v. EEOC, where the panel held that the Justice Department's decision not to provide an employee being sued for official actions with private counsel was unreviewable. The second was Schering Corp. v. Heckler, where the panel held that Chaney prohibited judicial review of a settlement agreement that terminated a lawsuit between a drug manufacturer and the FDA as to whether a new drug fell within a statutory marketing ban of "new animal drugs" not yet approved by the FDA. There is, however, in my view a danger in reading Chaney too broadly to forbid review of too many discretionary decisions of an agency, and thereby prevent review of substantive legal issues decided by an agency in the format of "enforcement decisions." When Chaney is embraced over-aggressively to foreclose judicial review, it is not the regulated industry, but rather the intended beneficiaries of government regulation which usually suffer. Too expansive a reading of Chaney creates a one-way ratchet, in which industry can seek review of agency overregulation, but no one can challenge the most egregious forms of underregulation.

Another discernible, and to some, ominous, trend in the circuit has been to dispose of more cases at the threshold without ever reaching their merits. The jurisdictional barriers of standing and ripeness have

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58780 F.2d 37 (D.C. Cir. 1985).
59Id. at 46.
61779 F.2d 683 (D.C. Cir.1985).
grown measurably higher during the past several years. Many of our judges sincerely believe that the federal courts are overcrowded, and that the standing and ripeness limitations embedded in Article III of the Constitution and codified in the APA were meant to have more bite than previous interpretations had allowed. In the 1960s and 1970s, the D.C. Circuit was instrumental in broadening the category of litigants who were permitted to challenge agency action. Today, it seems, our circuit is tightening up those same standards. Indeed it is not at all uncommon for our judges to raise standing and ripeness issues *sua sponte* even where the government has not argued them.

How far is the court prepared to extend this new stricture? In *Hotel & Restaurant Employees Union, Local 25 v. Attorney General*, a union challenged the procedures used by the INS to determine whether an illegal alien was eligible for political asylum. The union alleged that many of its members were illegal Salvadoran aliens and thus that it had standing to challenge the INS procedures both for itself and for its members. INS responded that for the union to have a valid claim of associational standing, it must identify particular members who had been injured by its procedures—in other words, the union must come forward with names of Salvadoran members who had applied for and been denied asylum. The union countered that its members were afraid to apply for asylum for fear of identifying themselves as illegal aliens subject to deportation, and thus that as a practical matter a suit by the union as the representative of its members was the only realistic way the aliens could get their day in court. A panel of our court originally found standing for the union, but the ruling was vacated and the case reheard by the entire court sitting en banc. That decision, along with a companion standing case, also en banc, *Center for Auto Safety v. Thomas*, may provide some clues.

But a series of cases handed down in the past year suggest tighter rules for associational standing in general. In *American Library Association v. Odom*, a panel of the court held that a library association had no standing to prevent the National Security Agency from impeding public access to the previously accessible documents of a noted cryptologist housed in a Virginia library. In *American Legal Foundation v. FCC*, a panel of the court held that a nonprofit nonmembership
foundation playing a watchdog role to ensure media accuracy had no standing to seek judicial review of the FCC’s failure to investigate broadcasts concerning the CIA aired by the television networks. And in *Wilderness Society v. Griles*, a panel of the court held that an environmental group whose members camped on federally owned lands throughout Alaska could not challenge the Bureau of Land Management’s recalculation of land grants owed to specified state and native groups unless it could show that its members used the specific lands likely to be transferred.

Our circuit’s new “hard look” of standing extends as well to third-party standing. In *Haitian Refugee Center v. Gracey*, Judge Bork required an organization claiming that its right to counsel refugees was injured by government actions taken to keep these refugees out of the country to demonstrate not merely that it had been injured but also that such an injury was purposefully inflicted on it by the government. The Supreme Court’s decision last term in *Meese v. Keene*, might be read, however, to be at odds with that extra requirement.

Tighter rules on associational standing, like aggressive extensions of *Chaney*, obviously impact most directly organizations representing consumer, environmental, and other “public interest” constituencies. And an increasingly narrow view of causation and redressability in third-party standing cases restricts even more the ability of such groups to challenge agency decisions.

In cases where the doctrine of ripeness can be invoked, the D.C. Circuit may also be moving—albeit more slowly—towards building a sort of judicial Berlin Wall, with a few of us left doggedly to man Checkpoint Charlie. The traditional rule of ripeness was fashioned by the Supreme Court in *Abbott Laboratories v. Gardner* to require a party who seeks review of an agency action that has not yet been directly applied to him—for example, an action for pre-enforcement review of an agency rule or policy statement—to show that he will suffer sufficient hardship if review is denied to outweigh any institutional interests the court or agency may have in postponing review.

In the past year, however, some members of our court have suggested that even in enforcement cases the ripeness doctrine may require an independent showing of hardship beyond the injury required for standing. Under this approach, a party who indisputably has a valid cause of action and who satisfies the jurisdictional

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66 824 F.2d 4 (D.C. Cir. 1987).
67 809 F.2d 794 (D.C. Cir. 1987).
requirements for standing may nonetheless be barred from obtaining judicial review of an enforcement proceeding for lack of a showing of some extra increment of hardship. This higher standard was endorsed by Judge D. H. Ginsburg, in his dissent in *Consolidation Coal Co. v. Federal Mine Safety and Health Review Comm'n.*\(^{70}\) If such a notion gains momentum, it could raise a third major barrier—a companion to *Chaney* preclusions and restrictions on standing—to bringing suit in our circuit.

In the present nonregulation era, then, our court's contributions have been mainly in the area of insulating agency inaction from judicial challenge through the imposition of tougher rules on standing, ripeness and reviewability. We have even been reversed a few times by the Supreme Court for being too stingy.\(^{71}\) In an era that celebrates "judicial restraint" (however variously defined by its advocates), it is probably inevitable that the D.C. Circuit has taken the first cut at reducing the extent to which parties can use the traditional tools of administrative law to prod agencies into action. Yet, a few of us unrepentants continue to believe that too restrictive access rulings, even when billed as exercises of judicial restraint, are in reality deviations from Congress' intent to grant broad access to judicial review for aggrieved groups. Our circuit—this will come as no surprise—is hardly a monolith, the lines of contest are well-drawn, and the stage is set for resolution by a higher authority.

**CHAPTER IV**

Let me wrap up with some brief thoughts about the D.C. Circuit's ongoing contributions towards resolving the ultimate administrative law issue of our time, indeed, of any time: how to derive a universal rule, applicable in all circumstances, that will determine with exquisite certitude just how far—and no farther—the courts should defer to agency decisions. In this brief and impressionistic sketch of three phases of the modern history of the D.C. Circuit, we have seen the court wrestle time and again with this dilemma.

We witnessed the debate first in the early seventies, when Judge Leventhal counseled judicial "diffidence." In time, the lyrics changed, the term "diffidence" gave way to "deference," but the underlying melody remained the same. In the era of burgeoning regulation, the debate over deference spawned the aggressive proceduralism of

\(^{70}\) 824 F.2d 1071 (D.C. Cir. 1987). *But see* Payne Enterprises, Inc. v. United States, 837 F.2d 486 (D.C. Cir. 1988); *id.* at 495 (Ginsburg, J., concurring).

Judge Bazelon, and the hard-nosed substantive review of Judge Leventhal. In the era of deregulation, as exemplified by the airbags case, the debate hovered over the level of scrutiny to be given agency actions to see if they comported with congressional intent. In the current period of nonregulation, the battleground has shifted to a debate over how high the barriers to court review will be drawn, and how absolute is Chaney's presumption of unreviewability. The judges of the eighties who read Chaney expansively to confer almost total deference to agency discretion, may well be the philosophical descendants of the judges in the early seventies who disdained "hard look" review for a more deferential "soft glance" at agency action.

What will our contributions be to the debate in the coming years? One, I am satisfied, will be continued adherence to the "hard look" doctrine. Aside from marginal questions, there is no concerted sentiment I am aware of in our circuit for deviance from that enduring staple, once we reach the merits of a case. We still apply the doctrine fairly regularly to assure that the agency has examined all relevant evidence, that it has explained its decision in detail, that it has justified departures from past precedent, and that it has considered reasonable alternatives. The "hard look" doctrine is a proud contribution of our circuit, ratified by the Supreme Court, and with that Court's guidance we will continue to refine it.

The most intriguing development in "hard look" doctrine, however, has been the frequency with which our court now applies it not to tell an agency that its methodology or procedures were wrong—so, "go back and start again"—as in the days of Judges Leventhal and Bazelon, but rather to tell an agency that it has not sufficiently explained why it chose the course it did—in short, "go back and rewrite your reasons." Indeed, in just under a third of the direct agency appeal opinions this past year (April 1987–April 1988) in which we reversed or remanded (58 reversals or remands out of a total of 159 opinions), we did so on the basis that the agency's rationale was inadequate. The most common deficiency we find is the agency's failure to explain "departure from prior precedent."

An aside here: As case law proliferates, it gets harder and harder to keep precedents uniform and consistent, not just in the agencies but in our own court as well. Our en banc process—designed for that purpose—has not proved up to the job. The Supreme Court has often had to review and reverse a D.C. Circuit case which was itself inconsistent with other circuit precedent, and thus logically should have been but was not dealt with by our internal court en banc procedures. Judge Bazelon's promise in the 1970 Court Reform Act
Hearings of a “unified and consistent jurisprudence in Federal agency matters” was inspirational but never quite attainable.

But back to the agency’s problems: Remand on the basis of “inadequate agency rationale” provides a kind of nice comity among different branches of government. It says “No” to the agency, yet gives it a second chance with the court’s guidance to reach the result it thinks proper. And it should help to silence the more raucous charges that the courts are usurping agency policymaking prerogatives. There is no question that this technique engenders some delay, but in pioneering and popularizing a more subdued approach to judicial oversight of agency policymaking, the D.C. Circuit has tried to contain the ever-present tension between agency independence and judicial review of agency compliance with legislative intent.

Finally, some thoughts on the D.C. Circuit’s contributions to deference in statutory interpretation. The common wisdom in our court, and others, used to be that on matters of statutory interpretation, courts generally had the last word. There were exceptions, to be sure: for instance, in National Wildlife Federation v. Gorsuch, back in 1982, we had counseled deference to agency interpretations when an act’s language and history lent support to neither side’s interpretation. But generally the assumption was that agencies’ special preserve was facts, courts’ was law, and that each was entitled to great deference in its area of expertise. Then came Chevron, the Supreme Court’s reversal of the D.C. Circuit’s refusal to accept EPA’s bubble theory, and its admonition that in cases of statutory ambiguity, the court must defer to the agency’s reasonable construction. Chevron at first seemed to create a curious inversion of the traditional roles of courts and agencies: While courts could take a “hard look” at agency policy determinations, they were forced to defer in close cases to agency legal interpretations. And while Chevron itself left many questions unanswered—for instance, whether all ambiguities, of whatever kind or degree, must be left to agency resolution—our circuit initially took a fairly rigid approach to the case, deferring to agencies in a wide array of situations. This highly deferential approach peaked in the case of National Fuel Gas Supply Corp. v. FERC, where the court held that Chevron deference applied not only to agency statutory constructions, but even to an agency’s interpretation of private contracts involving “‘pure’ questions of law.”

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72 Legislative History: D.C. Court Reform and Criminal Procedure Act of 1970 at 1182 (Senate hearings).
73 693 F.2d 156 (D.C. Cir. 1982).
76 Id. at 1569–70.
Today, however, our court seems to be inching back towards a more balanced stance, allowing greater space for judicial legal interpretations and moving away from complete deference to the agency.\textsuperscript{77} In part we are emboldened by the Supreme Court's decision last term in \textit{INS v. Cardoza-Fonseca},\textsuperscript{78} which held that the court should decide for itself the "pure question of statutory construction"\textsuperscript{79} involved in the decidedly ambiguous situation of whether two provisions governing eligibility for asylum in the same refugee act were meant to encode the same standard. That holding clearly invited greater judicial flexibility than did our initial, strict interpretation of \textit{Chevron}. Interestingly, in moving toward a narrower, less sweeping view of \textit{Chevron} we were not playing our customary role as flagship among the circuits. The Fifth Circuit had earlier viewed \textit{Chevron} not as laying down an all-or-nothing rule of deference in the absence of clear congressional intent, but rather as directing a close examination of a number of factors, including the primacy of agency expertise, the thoroughness of the agency's deliberation, and, most important, the indicia of congressional intent to reserve the decision to the agency. That is the direction, it appears, in which our circuit is now moving. There is, parenthetically, a lesson in humility here for our circuit. We may be the flagship, but even flagships sometimes go off course. It is a sign of the system's health when on those occasions others swing past or take the lead.

You may have discerned that I am a movie addict, so I'll close, as I began, with a movie reference: Some of you may recall the scene at the end of "The Candidate" where an exhausted Robert Redford, having against all odds won his long-shot race for the United States Senate, turns bewildered to an aide and asks, "Now what do I do?" There are moments, not infrequently I might say, when judges on the D.C. Circuit feel the same way: having literally drained themselves dry to resolve some vital issue of the day, they wonder whether it scarcely can matter, for it is likely the Supreme Court will hear the case and as likely reverse as affirm. It is then that we have to remind ourselves, as all circuit judges must, that our job goes far beyond previewing the Supreme Court's ultimate judgment. It is our unique task to frame the difficult issues, to ventilate the big and small ideas, to bring to bear our special, immensely diverse knowledge and viewpoints, and above all, to strive always for fairness to litigants and faithfulness to the legislature and the law. \textit{That} is our job; our distinctive contribution to administrative law. I like to think we do it reasonably well.

\textsuperscript{77}See, e.g., UAW v. Brock, 816 F.2d 761 (D.C. Cir. 1987).
\textsuperscript{79}Id. at 1221.
Thank you very much.

MR. SUSMAN: Thank you very much, Judge Wald. We have heard three chapters about burgeoning regulation, deregulation, and non-regulation; perhaps we should book Judge Wald to return in a few years to tell us whether chapter four is going to be reregulation or chaos.

President Verkuil will lead off our commentators.

PRESIDENT VERKUIL: Thank you, Tom. Chief Judge Wald, members of the panel, members of the Section, and ladies and gentlemen. It is a pleasure to have this opportunity to talk about the distinctive role of the D.C. Circuit, because I think especially those of you in the academic community share with me the feeling that without the D.C. Circuit, we would be in real trouble indeed. We might well be out of work, so we all have a special place in our heart for the court.

When the question is asked, "What is the distinctive contribution," you cannot help but think about several factors—some of which, of course, the Judge has mentioned, and others come to you as you mull it over.

Obviously, as the Judge said, "being there" is important. My approach is to remember the words of the real estate broker who says, "What are the most important things when you buy a house: location, location, location." That is what the D.C. Circuit has, and that is where you begin. The facts are that this is Washington, and what we are talking about is the federal government in action, and the D.C. Circuit is bound to be at the center of activity.

But the court certainly has much more than location going for it. While the D.C. Circuit has in a sense had greatness thrust upon it in administrative law, it has also done a lot to earn its reputation.

Over the years, this court has been the logical center of administrative activity. You go back to the famous Walter Logan bill that never quite became law. It was provided in that bill, in order to protect against the allegedly runaway agencies of the New Deal, that anyone substantially interested in the effects of an administrative rule, which was a very broad standing requirement indeed, could ask the D.C. Circuit to determine whether the rule was constitutional or in conflict with a statute, and they could do that at any time they wanted.

Louis Jaffe said that this bill had the effect of moving the seat of government to the D.C. Circuit, and that is about as high a compliment as one could make, I suppose. More recently, the Bumpers Amendment advocated an active judicial review of agency actions on questions of law. It also placed greater emphasis on centering appeals in this circuit. There have been countervailing pressures over time, as the Judge mentioned, when particular judges on the court aggravated members of the Congress. However, basically, government action has
always revolved around this circuit. Venue statutes establish that fact and injunction actions commenced in the district courts confirm it.

Now, why are these judges different? I start first with the observation that the District of Columbia is different because it is not a state, and since it is not a state, it does not have to worry about senators and something known as senatorial courtesy. Over the years, in terms of the appointment process, presidents have been able to name judges on the D.C. Circuit with much greater freedom than they can in the other circuits. What you get is a tendency, I believe, to pull together people from all over the country who have expertise, talent and knowledge, but may not have the necessary political ties to be appointed from their states. These nationally selected judges come together in an exciting, “hot” circuit, and spend their lives defining the law. That possibility for creative judicial selection simply does not exist in any other circuit: indeed, it can be found only in the United States Supreme Court.

There have been situations when senators have played a role in the D.C. Circuit selection process. One notable example was in 1962, when Senator Eastland told John Kennedy, in effect, that if he ever wanted to confirm another judge before his committee, he’d better get Skelly Wright out of Louisiana. So, in 1962, Judge Wright was promoted to the D.C. Circuit. With that act, Senator Eastland assured this court of the tenure of one of its most dominant members over the last thirty-five years.

But how do we prove distinctiveness in roles of circuit courts? I started to count up the cases in the administrative law case books that involve the D.C. Circuit; after a while that got to be a pointless activity, since there were so many. So, I hope you will take it on faith that something like half the opinions in most of the major casebooks and treatises derive from this court. Its influence is profound for that reason alone.

In addition, the judges on this court are remarkably prolific as writers outside of the judicial context. I surveyed the writings of all of the judges on this court for the last twenty years. Of something like twenty-eight judges during that period, almost half have written, during their tenure as judges, legal articles and academic books that would put most academics to shame. One must conclude that they are not only working on opinions, but they are working on shaping the law intellectually as well. I take that as a positive commentary upon their commitment to law. Only a handful of judges in other circuits demonstrate that kind of productivity. This productivity indicates a longstanding commitment to and full intellectual involvement in the major legal questions of our time.

In 1970, when the Court Reorganization Act eliminated the review function over the D.C. Court of Appeals, its docket changed dramatically. Some of the cases we remember well from law school, such as
Judge Bazelon’s Durham decision and Judge Wright’s Walker-Thomas Furniture case were a product of this court’s unique general jurisdiction responsibilities. This no longer being the kind of thing the court does, has meant that all of the creativity expressed in those cases had to be turned to administrative law alone, which sometime could not bear up under the pressure.

The influence of Judges Wright and Bazelon is worth noting on this point. I credit Judge Bazelon with thirty-five articles over his career, and Judge Wright with thirty-six. That is pretty good competition right there. They did much during this period of stability that Judge Wald mentioned to define the role of the D.C. Circuit in many ways.

In addition to Judges Bazelon and Wright, other judges of that period, such as Harold Leventhal and Carl McGowan, contributed enormously to the quality of thinking that goes on in the law schools and, themselves, set examples as jurists of the first order. Judge Leventhal, for this writer as a newcomer to the field, had a particularly strong influence, and I think his loss to the court at such a young age was a great setback. I remember so well an observation by Judge Leventhal during a discussion of EPA cases. He said, “You know, complexity has a bright future.” I often recall how prescient, as well as felicitous, that expression was. The court has changed over the years and, by and large, the new judges have come on and done very well; they have kept up the standards.

There is something, also, to be said for the national stature of the court, in terms of how it operates, how the counsel are treated, and how they respond. It is our only national bench, other than the Supreme Court of the United States, because, as I have suggested, the judges who are selected for this court are not bound by geographical limitations in the same way that the judges of virtually every other circuit are, and so you get this interesting mix.

In addition, you have this bar in the District of Columbia, which is committed to the administrative law field in a way few other bars are in their respective circuits. It is as close as we come, really, to having something like the English system, where a select group of lawyers appear frequently before the court, deal with recurring problems, get to know each other, and gain real confidence in and respect for each other. As a result, as Judge Wald said, counsel take outrageous stands reluctantly, because they know they have to return.

This sustained interaction is a very important reason why this circuit is distinctive, why its opinions are unusually rich and influential. Because of this relationship, it is not surprising that some have said oral arguments in the D.C. Circuit are as good as in the Supreme

Court. I suppose you might even argue that the D.C. Circuit arguments are stronger, simply because you do not have what might be called the “grandchild factor” that operates on counsel who appear in the Supreme Court; namely, “I have to tell my grandchildren I argued in the Supreme Court in the United States.” Assuming that notoriety does not extend to the D.C. Circuit, you get fewer counsel who are there as tourists as well as advocates.

The Court Reform Act certainly intensified the focus on administrative action. Something like 85 percent of the docket deals with administrative action. That makes this a de facto administrative law court, and commits the judges to a longstanding working out of particular problems. Over the years, up through the mid-seventies, the court really was the hero in all of this business about the relationship with the agencies. In the New Deal period, of course, the courts were seen as a way to protect against the excesses of administrative agencies; and, through the fifties, sixties, and seventies that same kind of notion still motivated counsel, though perhaps not as strongly.

Something did happen to the court in the late seventies, the role it played in terms of supervising agency action began to be questioned. The eagerness, the thoroughness with which the court explored regulatory activities, was itself put under scrutiny. The case, of course, that brought it all to a head was the Vermont Yankee decision, the implications of which are still being worked out. Vermont Yankee, basically, was the Supreme Court’s way of saying to the D.C. Circuit, “Let’s take it easy, you have gone very far, you have expected a lot of the agencies, they have done what they can and, at some point, things have to move on, and something less than perfection might be demanded of the administrative process.” The focus of concern was process and procedures, but the substantive review standard also came into question. The “hard look” doctrine survived scrutiny; that is, the Leventhal view prevailed over the Bazel on view, to refer back to the famous debate in the Ethyl\textsuperscript{81} case. “Hard look” review is still around and it has a role to play, but the focus changed a little bit. People have begun to think that maybe judicial review is not the only way to solve some of the basic problems of regulation. The D.C. Circuit has really been somewhat on the defensive since 1978. The faith in judicial review is no longer absolute, but it is far from dead.

Today, the appointments to the court have pointed in what seems to be two directions, and so it is a little bit hard to know what the D.C. Circuit represents, unless you know what panel sat on a case. That contention has provided energetic debate, which is fine for the

\textsuperscript{81}Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976).
classroom, although it must be slightly frustrating for counsel trying to predict outcomes.

It seems, though, that if everyone is working together and committed to the field, then most of these problems will be worked out. *Vermont Yankee* is an important precedent, but it should not be overread. After it, some of the judges backed off a little bit, and I believe Judge Wald has it right in saying that some cases had gone too far. Certain cases in her paper today strike me as very interesting. First of all, *Chaney*, and the business of whether prosecutorial discretion can be reviewed. That really was a foolish case, on the facts, and I do not think it is wise to make too much of it. To have to find a drug safe and effective for lethal injections was not a proposition that one thought would have received serious attention. Indeed, it did not, and then Judge Scalia’s dissent in that case helped make his reputation. How far you want to take a proposition, based on those facts, toward a general standard of nonreviewability is questionable. I find it difficult to believe that the *Chaney* case can be all that its proponents want it to be, simply because of the context in which it arose.

Another case that might disappoint its proponents is the standing case Judge Wald mentioned, *Block v. Community Nutrition Inst.* The case was a Judge Scalia dissent as well, which became the law in the Supreme Court. *Block*, you recall, is the case where standing was denied to a consumer who challenged milk pricing under the Agricultural Marketing Agreement Act.

Basically, the case dealt with the zone of interest protected by the statute. As a practical matter in milk pricing, we all know that the purpose of the legislation was not to protect the consumer, but to exploit the consumer. So, therefore, it is a little silly to think that they ought to have standing to determine whether they should be exploited. In this sense, I think the context is also limiting, much like the prosecutorial discretion context was in *Chaney*.

In *Clarke v. Securities Industry Ass’n*, where standing was granted and the comptroller’s decision was upheld—reversing the D.C. Circuit’s position—you get a feeling that maybe *Block* is being rethought. In Section II of the *Clarke* opinion (in which three Justices refused to join), there is a very broad—based standing discussion which endorses the zone of interest test in a big way. Justice Scalia did not participate in that case but, if we can assume that the three Justices who refused to go along were uneasy about expanding the standing test back to the earlier zone of interest standard, I think we might see a shift here,
with a majority of the Court now saying, through Justice White, that the test of standing is not meant to be especially demanding. It may be that even in an environment where litigation avoiding devices are more popular, the Supreme Court is going to draw some lines and stop moving in that direction. It will be interesting to see this proposition play out.

Well, I cannot close without questioning one of the Judge’s comments about the value of rationality review, wherein she does say that we really cannot argue as long as the court is talking about trying to understand what the agency did. On the surface, that sounds like a more or less neutral position, that the court is just trying to understand, and it really does not commit the agency to a course of action, because the agency is entirely free on remand to go back to its prior decision. If you press that proposition too far, you end up with a situation where you are affecting outcomes. There is an opportunity cost to remand that has to be considered: what about the lost time, money, and regulatory activities that are stymied in the interim? The failure to regulate is an important public interest matter, as well as the nature of the regulation delayed.

It is not fair to view rationality review and remand with the innocent assumption that judges are just trying to understand the case. The questions, if you will, are: How dense are our judges, and how much do they have to understand to be able to accept an agency decision as satisfactory for purposes of moving the case on? That proposition is always there, and it is a very hard one to measure. I do not believe it is one that you can articulate a successful way around. It is a question of what the judges feel, how far they think they need to go. The issue is, even if they are not satisfied with counsel’s argument, or if they are not satisfied with the way that the case was written up by the agency, nonetheless, assessing the regulatory context, it is better to move on than it is to go back. It may be unarticulated in decisions, but that has to be part of the calculation or, otherwise, we are really working in a world where we can do considerable damage to the regulatory process without even realizing it.

If the D.C. Circuit is now a court which, if not pulling in two directions, is at least working with strongly different views on some basic issues, it still has many of the characteristics we have long admired. The quality of appointments remains unusually high, which has something to do with the way appointments are still made. It strikes me that we owe the D.C. Circuit and its judges an awful lot for developing a field of law that we labor over.

Distinctive it is, and valuable it is, and we thank the judges for keeping all of us on the academic side fully occupied.

Thank you.
MR. SUSMAN: Thank you, President Verkuil. The next speaker, as I indicated in the introductions, is not from Washington and not a lawyer. That should be a special pleasure and perspective for all of us, I am sure.

Professor Rabkin.

PROFESSOR RABKIN: Thank you for that introduction. That is a difficult billing to live up to, but I will try to speak to you, indeed, as an outsider.

President Verkuil said that academics are particularly grateful to the D.C. Circuit, because they would be out of a job if the D.C. Circuit were not quite so prolific. He used the phrase "academics," but I thing he must surely have meant academic scholars of administrative law. People who study politics would still have some things to study, at least, even if the D.C. Circuit did go out of business.

Like everyone else here, I found Judge Wald's paper extremely interesting and unusual. I guess one of the things that an outsider can claim as a comparative advantage is that if you are outside of Washington, you read papers by judges more carefully, because you have fewer chances to talk with them and hear gossip about them. And, speaking as an outsider, Judge Wald's paper struck me as an unusually straightforward and candid statement from a judge.

Still there were two things about it that did seem to me rather strange, strange in the sense of formalistic, other-worldly, not quite real.

First, in a very long paper about the work of the D.C. Circuit, we did not hear anything about who the litigants are. It was all about assuring regularity and assuring fairness, and assuring various other things, and we were never told on whose behalf these assurances were being delivered. Who is benefiting from this? Who are we doing this for?

The second thing that seemed to me rather strangely formalistic about it was that the D.C. Circuit's reasons for acting kept coming back to "the law." The D.C. Circuit has to ensure that the law is upheld, the paper keeps saying. At one point Judge Wald even says the D.C. Circuit is a trustee for the ghosts of Congresses past. I always thought the ghosts of Congresses past became committee chairmen or lobbyists, but that in any case they were perfectly well able to look after whatever interests they had and did not need judges to be their trustees. That is one thing that struck me as a little strange about the general claim that what is being done here is just enforcing the will of Congresses past.

Another thing that struck me as a little strange about this claim is that it does not quite seem to jibe with the opinions that I have read, or the treatment of some of these opinions on appeal, where the Supreme Court says, "No, that is not what Congress intended, you
have got that wrong." It seems to me the D.C. Circuit often gets Congress' intent wrong, and that is notable for a court that claims to be grounding all of its decisions on its obligation to fulfill the will of those ghosts of the past.

Judge Wald, herself, says at one point in the paper, "I am unconcerned that the court has eviscerated the APA." What about the will of the Congress that enacted the APA? The ghosts of 1946, what about them? Do they not deserve to have their will upheld?

To come to my most serious concern, however, this view of the court's role just does not sound right to me. It does not sound commonsensical, and common sense is about all you have to rely on when you are outside of Washington. Anyway, it does not sound like common sense to me to say that because Congress has passed a law, we have got to see that the will of Congress is fully and perpetually upheld. It seems to me there are all kinds of laws that we are happy not to have enforced. I did not hear anybody complaining that the antisodomy law in Georgia was not being rigorously enforced. In all the controversy we have heard recently about the Griswold\textsuperscript{85} case, I didn't hear anyone complain that Connecticut wasn't enforcing its law against the use of contraceptives.

There are lots of laws which, at least in retrospect, come to be thought a little bit silly, and some are thought quite silly. There are lots of stages in between but, in general, it seems to me it is not our normal assumption that every law must be enforced to the full extent.

Dean Calabresi of the Yale Law School has written a very interesting book, \textit{A Common Law for the Age of Statutes},\textsuperscript{86} in which he talks about this as a general problem, that statutes become obsolete.

A number of people have said in defense of decisions like Griswold, that it is the special job of the courts to clean out the statute books, to get rid of obsolete statutes that no one is willing to have enforced any more, but which some ornery minority group prevents the legislature from repealing. I do not know how you would find out if a law had become obsolete or had outlived itself, however, unless the executive had some discretion not to enforce it, to underenforce it, to reflect that the community does not have as much enthusiasm for this measure as it once did.

It seems to me that Judge Wald's argument, at least regarding the need for the D.C. Circuit to be vigilant in preventing too much deregulation, or preventing too much nonregulation, assumes that any time a law is enacted, it has got to be enforced to the full and the D.C. Circuit has the distinctive responsibility of seeing that that is done. That really does not make sense to me.

\textsuperscript{85}381 U.S. 479 (1965).
\textsuperscript{86}G. CALABRESI, \textit{A Common Law for the Age of Statutes} (1982).
To be fair, the paper does talk about several D.C. Circuit decisions which suggest that, well, you cannot take this demand for unchanging enforcement literally; of course, you have to allow some room for changing views and changing circumstances. But when you are allowed to take these realistic considerations into account is a little puzzling from the cases. It is a little puzzling even from the cases that are mentioned in Judge Wald’s paper.

In the *State Farm* case, for example, the D.C. Circuit said, “You cannot repeal the airbags rule, because that rule was just promulgated by the previous administration, and if you make a change so abruptly as that, it is highly suspicious and questionable. You certainly should not be making changes abruptly.”

On the following page, Judge Wald mentions the Vermont home knitters case where the D.C. Circuit said, “This rule has been on the books now for forty years. After forty years, you cannot just overturn the rule.” It seems that you are allowed to make a change, but it has got to be somewhere in the middle period between one or two years and forty years. Maybe you can change a Nixon era rule during the Carter administration, or you can make changes after seven or eight years when the political planets are in just the right order. But it is puzzling for the ordinary person to figure out how this political or astrological formula really works.

The underlying reason for doing this, as Judge Wald says, is that if we do not allow people to bring these cases complaining about deregulation or nonregulation, or any questionable change in policy, then we will have a one-way ratchet, by which industry is allowed to challenge over-regulation, but there is no challenge possible to under-regulation, even, as she put it, “egregious” under-regulation.

It seems to me that lack of symmetry is in life. I mean that lack of symmetry is not a mere consequence of judicial doctrines that might as easily be otherwise. Start with the Supreme Court’s decision in the *Chaney* case, which may be a peculiar context for illustrating the point, but it seems to me to involve an important principle, namely the principle of prosecutorial discretion. We do not allow people to come forward and say, “That person, he is trouble, prosecute him, and I want to sue the prosecutor to make sure that that person is sent to jail.” Everyone feels very uncomfortable about allowing courts to order prosecutions in individual cases, and everyone accepts at some level that there is something important about prosecutorial discretion. It seems to me that most of the subsequent cases trying to interpret *Chaney* and decide how far to extend it really turn on the question of

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whether some other matter is or is not like prosecutorial discretion, is or is not like trying to force the prosecutor's hand in an individual case.

Surely, there is an underlying asymmetry there. The victim of a prosecution, the defendant, can always challenge the prosecution. He can always challenge it, even though there is only one person involved, and the reason this is okay is that the one person is himself. He is defending himself. If you have your own rights at stake, of course, you are allowed to assert them.

The people who are bringing cases like *Chaney* are saying, "We have a right to some general public policy," and the doctrine since *Chaney*—which, I think, is broadly consistent with what it has been in recent decades, the general doctrine is you can lay a claim on the general policy. You can complain about egregious deregulation or nonregulation. You just cannot do it in any particular case.

There is that asymmetry because in the one case people are admittedly being selfish. They are admittedly saying "It is my property, it is my company, it is my right, leave me alone." You are allowed to be selfish in that situation because you are dealing with your own affairs.

In the other case, people are coming forward and saying, "Public authority should be exercised on my behalf. A lot of other people out there should be regulated, controlled, affected, and that should be done on my behalf." You do not want to do that in an excessively selfish way, so you want to do that in a somewhat more vague and general way. Still, it seems to me when you look at these cases, there are particular interest groups coming forward saying, "We were promised something by Congress and now we want to get it, and now it should be delivered." I think there is no entirely satisfying way of deciding when people should get what they think they were promised by Congress, even though a lot of time may have passed, even though circumstances may be different, even though other people may sense that right from the beginning there was a bad promise or a bad bargain involved in the relevant congressional measure.

In her paper Judge Wald says it is unfair for people to say that the D.C. Circuit is particularly partial to public interest groups. And I agree the court is not particularly partial to public interest groups. I think it is particularly partial to all kinds of special interest groups that think they have won some benefit in the administrative process or the legislative process. A lot of those people are businessmen. In fact, most of them are businessmen.

If you look, for example, at that Vermont home knitters case, it is a very curious case. The Labor Department for forty years has had a rule on the books saying you may not work at home. There are perfectly nice housewives in Vermont who want to make ski caps at
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home, and the International Ladies’ Garment Workers’ Union says, “No, that will be bad, that will undermine our union workers who want to do this in factories, and we should not allow competition by people doing this at home.”

If you look at this case, yes, it is essentially the union which has its stake, its economic stake, and gets the D.C. Court of Appeals to say, “You should get your benefit from the government, and too bad for the housewives who find it convenient to work at home.” But, look at it again, it is not just the union. If you want to be sentimental about unions, fine. But it is not just the union, after all; it is the manufacturers, too, who want the Labor Department to squash their competitors, if the competitors employ non-union home workers. There are lots of business groups that come in seeking special benefits from the government. They often get them. It is a little bit strange to think that the D.C. Court of Appeals should be there as a sort of general monitor to see that everyone gets whatever benefit they were able to wring out of the government at some point in the past.

Perhaps fifty years ago many people sincerely believed in the New Deal philosophy: “Let every interest group come forward, let every interest group seek some special benefit from the government, and the government will be able to work this all out into a coherent and harmonious package where everyone will get what they want and it will all be for the best.” I do not think there are a lot of people who believe this anymore, however, which is one of the reasons why there has been a movement for deregulation. I think it is hard today to deny that a lot of these bargains should be changed, will have to be changed, inevitably are going to be changed. It is hard in this context, I think, very, very hard, for any court, even with the best will in the world, to decide whose bargain should be enforced and whose should not.

I do not mean to point the finger in all of this and say, “The D.C. Circuit is the culprit.” In the end it is certainly true that the Supreme Court has endorsed this general approach, as illustrated by the standing cases that Judge Wald talks about. Instead, the most important cases in establishing this view of the judicial role are the Supreme Court standing cases.

I think it is not surprising that there is division on the D.C. Circuit, as Judge Wald notes, and that this division turns out to be, at this point, a pretty partisan division. The issues that are at stake, at least in many of these cases, are pretty straight-out partisan issues. You either are very sympathetic to government protection for particular special interest groups, or you are not.

Let me, in concluding, try to put this in a larger perspective. I think a lot of the divisions on the D.C. Circuit right now represent divisions between those judges on the one side, who are most concerned to see
that particular interest groups get what they "deserve" (meaning whatever they may have wrung out of legislative or administrative bargaining in the past), and on the other side, those judges who are more sympathetic to executive power. And, of course, this has something to do with Democrats and Republicans: judges who are more sympathetic to executive power tend to be those who favor the current, Republican executive.

I think it is not altogether irrelevant, however, and not altogether partisan, to point out that this struggle, between people who are sympathetic to executive power and people who think there is a special need to protect particular interest groups, was one of the struggles put to the voters in the last presidential election. In the immediate aftermath, when Mondale seemed so utterly repudiated, many analysts said that he had the stigma of being too soft or too compliant with, too serviceable towards, too many special interest groups; President Reagan, it was said, had more appeal to the broader public. Well, now it seems that the interest groups have had their revenge in the way they have trounced President Reagan's most recent judicial nominee, Robert Bork. Perhaps, however, to return to the point I began with, this simply shows that interest groups continue to have lots of friends in Congress. And perhaps this should make us all question again whether these interest groups really need the D.C. Circuit to provide them with additional help in pursuing their policy goals in Washington.

MR. SUSMAN: Thank you, Professor Rabkin.

We have talked a lot about conflict between the Court of Appeals and the Supreme Court. I think we do need to remind ourselves that there is recognition to be given to district courts and district court judges, too.

It is said that it is the lot of district court judges to decide cases wisely, fairly, and rationally. That is not to say that court of appeals judges should decide cases unwisely, unfairly, or irrationally, for to do so would be to usurp the role of the Supreme Court.

Our final commentator is Mr. Lloyd Cutler, whom we will now hear from. Then we will give Judge Wald a brief time for reply and, after that, go immediately into a discussion with the panel. Lloyd.

MR. CUTLER: I think one thing to be said in favor of Washington lawyers is that at least some of us foresaw the shortage of white rats. I remember when the FDA decided that in a case of what I think are called teratological drugs, I cannot pronounce it right, there had to be testing through seven generations to make sure that no deformities would result. Some of us decided we ought to go into the white rat business, and it might have proved to turn out even better than trying cases before the D.C. Circuit.
I join in the general praise of the D.C. Circuit and of the Chief Judge in particular. I want to make clear that there is room in my judicial church for differing and, so long as they are provocative, philosophies, and that when some future Democratic president appoints Pat Wald to the Supreme Court, I am going to ask if I can testify on her behalf.

I think it is healthy for all of us to listen to a political scientist. After all, their branch of—you would not call it science I am sure—bears just as much responsibility as the lawyers and law professors do for the invention of the administrative agency. While we wrestle with the devil of judicial restraint, they wrestle with the devil of the art of politics and interest group balancing, which has at least as much to do with the problem we are talking about, I think, as judicial restraint.

This particular circuit does have, always has had, a unique influence. Being there may be part of the reason, quality may be part of the reason. George Ball used to say about the special influence of White House staffs—compared to State Departments and Defense Departments—that nothing propinques like propinquity, and that is certainly true of the D.C. Circuit. You are there.

I am going to start out on the judicial restraint side, and then move over to the political side.

One of the most interesting aspects is the irony that is inherent in the switching of sides on the issue of deference. It certainly was true that when agencies were overregulating, what Pat called the burgeoning period of regulation, it was the proponents of regulation who were urging judicial deference, and it was the opponents who were urging strict scrutiny. But when the agencies began to deregulate or nonregulate, when the present era of what some might think of as underregulation came along, it is the proponents of regulation who are urging strict scrutiny, and it is the opponents who are urging deference.

I think Pat’s remarks show that to a certain extent both proponents and opponents of regulation, or at least those who view it benignly and those who view it with fear, exist on the court of appeals, as well as among us, whether advocates for industry or for public interest groups.

It may be, as Justice Stevens says about this three-tiered level of scrutiny in equal protection cases that we have heard so much about, that the distinctions, these nice distinctions in level of scrutiny, are really rather silly and that in all of these cases it is much more important to focus on reasonableness.

One good example, I think, of what happens in judicial review of overregulation is the present situation. This is obviously not a time of overregulation today, but let’s take the airbag problem of which State Farm was only an episode in a twenty-year saga. Maybe I am the only
one here old enough to remember that the first airbag regulation came out at the end of the Johnson administration in 1968. It got set aside by the Sixth Circuit a couple of years later, in 1972, for lack of an objective standard; essentially, you were supposed to build a dummy conforming to a so-called SAE—Society of Automotive Engineers—standard and run it in an actual crash into a barrier and measure the impact on the dummy’s head when it hit the windshield. There was no way of building dummies so that you could get a repeatable result. The regulation came, this technology-forcing regulation, before satisfactory replicable dummies could be built, and that is why the court struck it down.

In 1976, Bill Coleman, as the Secretary of Transportation, came up with what you would have to call, I guess, a nonregulation idea: an experimental idea, in lieu of regulation and with the force of regulation behind it if the companies did not agree. He negotiated the auto companies into agreeing to build, I think it was, hundreds of thousands of vehicles with airbags that would be offered to the public with a commitment that the price for the airbag would not exceed a stated amount, so that the public could get accustomed to airbags, and so that some of the fears about whether the airbag would not work at the moment it was supposed to could be tested over time on a very large scale.

That was the regulation that Brock Adams set aside. The deal was made, the companies were ready to go ahead and build those airbags early in 1977. That is what Brock Adams set aside with his regulation, which, in turn, because it had to allow lead times of four and more years for the airbags to be installed, was reversed again by the Reagan administration. And, it was the Reagan administration deregulation, in effect, which went back in favor, essentially, of seat belts again, at least for the time being. That was set aside in *State Farm,* and that happened—by the time the Supreme Court was finished with it—in 1983. We are still waiting for regulatory airbags to be installed in all new cars and we have had twenty years of trying to solve this admittedly difficult problem, the problem being not that seat belts are inadequate, but that although they are in all cars, people will not use them. We have been twenty years trying to resolve it by regulation. The courts have set aside the regulations twice. The innovative experiment was set aside not by a court, although it might have been, but by a new regulator, and here we are twenty years later, not much further along the road of forcing the development of new technology.

Steve Breyer, as many of you know, who conceived his theories about regulation and deregulation as a Democrat working for Senator Kennedy and as a Harvard Law School professor—who is now also a circuit judge like Pat—had a theory that regulation was really a weapon of last resort, that it is so clumsy and so difficult to administer,
particularly under the “eagle reviewing eye” of courts, that while in some cases it is absolutely essential, because the market will not solve the problem in any other way, you ought to try virtually everything else first before you turn to regulation.

When we do resort to regulation—and there are some cases, of course, where you have to do it, I think—that [using regulation as a weapon of last resort] is essential, as Chief Judge Wald recognized in what I think is her finest moment in administrative law—one she did not mention in her paper—and that is *Sierra Club v. Costle*. She recognized that regulation, in essence, is a political function. It is, certainly, in its rulemaking phase a lawmaking function. That is why *Humphrey’s Executor* came out the way it did, because the Federal Trade Commission was held to be exercising primarily a quasi-legislative function, along with its incidental executive function. Pat approved, in the *Sierra Club* case, on-the-record intervention of the President—the White House—in agency decisionmaking by an executive branch agency, in that case the EPA.

That permitted what is an essential ingredient of political lawmaking, even the interstitial kind of lawmaking that agencies are delegated to do, and that [ingredient] is the element of balance necessary to check the single-interest zeal of an agency assigned one of the myriad governmental missions like expanding the economy, insuring safety, regulating the environment, guaranteeing social justice, *et cetera*. All those concerns have to be balanced together into a policy of some sort that elected politicians can stand behind. It has always seemed somewhat illogical to me to hold an agency to procedural standards, or to standards of logical reasoning and choice among options, and especially consideration of other alternatives. These are standards we require of a lower court judge, but do not require of a legislature.

Congress had to delegate to the agency in the first place because it could not possibly make all the rules and regulations. Congress does not have the time most of the time, except in an egregious case, to oversee what the agency is doing. The one method we had for dealing with congressional review of agency regulation, namely the legislative veto, went by the boards as unconstitutional, and I think quite properly so from a constitutional point of view. We only have the court, and the court necessarily has to go by some sort of what I would call just a “smell test.” It just does not smell right. It does not smell reasonable. Now, that does not fit comfortably with notions of judicial restraint or carrying out the legislative intent. But that is essentially, at least as I have seen it as a practitioner before the court, and as someone watching and reading their cases, that is essentially what

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they are doing. They are applying a smell test, a sense of reasonableness, and they are performing their essential function of being the legitimating authority over a body which exercises delegated power, whether it is the entire government under the Constitution or whether it is a regulatory agency acting under a statute. There must be some authority who is trusted to legitimate what is done, and that is the function the courts perform. That is the unique function of courts in our administrative system, as it is in our entire constitutional system. To legitimate you have to declare something illegitimate every now and then just to keep the review process honest.

But the critical point is, if you overexercise that review power, you are going to stifle the capacity for innovation, or experimentation, or trying something new that caused us to invent the regulatory, administrative agency in the first place. I would submit to you that when the agency loses its capacity to innovate, it starts doing more harm than good.

Mr. Susman: Well, we have had the “look” test of the Supreme Court—you know, “I know it when I see it”—for pornography; now, the “smell” test for administrative review. The Supreme Court might have used the occasion of a milk marketing order review to initiate a “taste” test, or something like that.

Judge Wald, you have an opportunity for comment.

Judge Wald: I am going to be extremely brief, because I know it would be much more interesting to hear what your audience has to say.

Needless to say, one of the great benefits of these kind of seminars is their interdisciplinarian aspects. Naturally, I found the Professor's comments most—again, to use an overused word—provocative. I think many of the points he made were valid.

But I think it would be the wildest kind of judicial activism, with which I would not associate myself, if the courts were to take on the job of deciding which statutes we think ought to be enforced and which statutes we think ought not to be enforced. I do not think any of you out there in the audience would like us to take on that job. So I do not know what kind of structure, what kind of framework, we can put ourselves in, other than the one that the separation of powers has put us in, basically. That is, Congress passes the laws, the executive enforces them, and the courts insure the executive does enforce them. I agree with Lloyd: what happens in reality is Congress delegates away a lot of the lawmaking power, and the executive has to behave like a mini-legislature. But even given that, when we on the courts perform our legitimizing function, I do not know any structure or basic tenet we could adopt other than to say we are looking to see whether or not the executive has gone beyond the bounds that Congress meant them to do in enforcing that law. And, if we were to say, “Well, it is an old
law and it is a lousy law, and we are having none of it,” that would be a very radical transformation of our process.

On a minor point, I do not think I said that I was “unconcerned” with whether the APA had been eviscerated. I just looked on page 16 of my paper; I said I was “unconvinced” that it had been eviscerated. I would be concerned if it had been eviscerated.

The last point is, I have not done a scientific survey on D.C. Circuit opinions, but my impressionistic view is that we on the court do not fall quite that neatly into “those of us who like special interest groups and those who do not,” or who are perceived as favoring them and consistently voting for them as against the state.

I think you will not find that kind of line drawn neatly between judges who always vote for or against the government versus the so-called special interest groups. If you looked at our last two en banc decisions, *Jersey Central*89 and *Northern Natural Gas*,90 you would find that some of the Carter appointees, myself included, were dissenting on the side of upholding the government. We were saying, “Yes, agency, we are for what you did,” and it was our newer colleagues that were saying, “No, no, we think the agency went way beyond what it could do.” Now, you may differ all over the place on the merits of those two cases. My only point here is to point out that it is not the perceived supporters of special interest groups who are aligning themselves against the agency decisions. I think you would have a hard time making up a neat little player chart in that regard.

I also thought that I recognized a little bit of the law and economics view of legislation as an interest swapping process in Professor Rabkin’s remarks. Whether or not that view is accurate in the real world, it does not give courts enough to deal with. We cannot simply say, “Well, we know it is just a big interest swapping process, so, therefore, we are not going to give any of you the benefit of what eventually emerged as a statute.” Maybe they swapped a lot of different interests, but the point is still that we have to operate by process and Congress passed the law, and in it Congress said, “We want certain groups to have certain rights, and we also want judicial review to make sure that they get those rights.” We have citizen suits as an indication that Congress wanted people other than those that were regulated to be able to challenge underregulation. At least for the present I think I will have to put myself firmly in the conservative group, which would say that if that is what Congress wanted, that is what we are going to try to do.

I think I will end there.

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90 *Northern Natural Gas Co. v. FERC*, 827 F.2d 779 (D.C. Cir. 1987).
Mr. Susman: Let's continue with the panel for a while. Professor Bonfield, why don't you participate with us at this point.

Professor Bonfield: Paul Verkuil's quote from Harold Leventhal—"complexity has a bright future"—intrigues me. I wonder about the sense in which Judge Leventhal intended that statement. He may have meant that complexity has a bright future in the particular kind of administrative law made by the D.C. Court of Appeals. In light of the Leventhal statement quoted by Paul, I wonder whether there are any lessons to be learned from the concentration of administrative law cases in one particular court, and the fact that such a concentration necessarily makes that court an expert in such law. As it becomes an expert in administrative law, the administrative law it makes from time to time may necessarily become more complex than the administrative law made by other courts of appeals that do not specialize in that subject.

When a court is more expert, as is the D.C. Circuit, it can better understand such complexity; but it also may lose sight of the costs and benefits of such complexity and, particularly, the great problems caused by complexity. Perhaps it is not necessarily so that the law made by a specialist administrative law court will be more complex than the law made by a nonspecialist court, but it is at least possible to think about the administrative lawmaking product of the D.C. Circuit in that way. Does anyone wish to comment on that issue?

Professor Rabkin: It occurs to me that the D.C. Circuit has, according to Judge Wald, fewer cases to decide per judge than any other circuit and writes longer opinions, so, I conclude two things. One is that the old aphorism that it takes longer to write a short letter is not true in the D.C. Circuit and, two, that Parkinson's Law is at work in the D.C. Circuit.

Will that get a comment out of the Judge?

Judge Wald: Well, the only thing I can say is that in the eight years—in the eight-and-a-half years—that I have been on the court, we have gone up and down in terms of the rush of cases and filings. Sometimes we have been overwhelmed with work, and other times it has tapered off, and, although I noted recently we have gone up in page length, I think that in no time during that eight-and-a-half years did I see any real quantitative or qualitative difference in the complexity which emerged from our opinions.

I do not know. I suppose if we had 400 cases apiece we probably would be writing shorter opinions. And, I must admit, I simply am not able to say whether that would be better or worse in the long run.

It seems to me that in a lot of the less visible cases—I have one footnote here which I did not bother to read, but I thought it was interesting—sometimes I think we serve a good function in that there are little cases, or one clause in a particular statute that we get cases on
again and again and again, and we finally do work out all of the problems in the clause. The example I had was that we had twenty-nine cases in the last year-and-a-half alone dealing with what are management rights under the Federal Labor Relations Authority, the “NLRB of the Federal Government.” I think none of those have gone up to the Supreme Court, but I think we really have worked out, like the old common law judges did, a real body of law as to that particular clause.

Yes, I think that sometimes our opinions are too long. I, in turn, might say that that could be attributable to the fact we have so many academics on the court, but since mine are also long, that theory does not necessarily hold true.

Sometimes, when I compare a particular issue that we have treated with an issue—this is not snobbism or elitism—which has been treated by a couple of other courts around the country, I think we have taken too long to say it. But I think that we probably have explored the issue or brought out all of its facets in a more thorough way. I simply cannot say whether, over the long haul, that is a good or a bad thing.

Mr. Cutler: It seems to me the right measure of comparison is the regulations, the Federal Register, and the size of those awful records, and the results of requiring an agency to consider all other alternatives, and then your having to consider whether the agency considered each one properly. You are just a mole hill on top of that mountain in the Federal Register.

Judge Wald: Well, if you start to write one of these opinions, generally, to get the facts and the proceedings down you are on page 21 before you get to the discussion aspect of it.

Mr. Cutler: It is seventeen years later.

Professor Bonfield: The discussion has focused on the length of court opinions in cases involving the review of agency action. I am not concerned, particularly, with the length of the court opinions, but I am concerned about the complexity of the requirements they impose because of the great costs of understanding and applying those requirements. Complex procedures are not necessarily bad procedures, but special costs and benefits flow from the imposition of complex procedural requirements. I think it would be interesting to contrast in some way the complexity of the required administrative procedures imposed by expert courts, regardless of the length of their judicial opinions imposing those procedures, with the complexity of the procedures imposed by inexpert courts on the same kinds of cases, because the costs of understanding and applying complex procedural requirements may fall unequally on different groups. And their value may be appreciated differently by judges who are experts in administrative law and judges who are not specially sophisticated about administrative law. That is the issue I was seeking to raise. That is the question right here.
Judge Wald: Yes. I have got your question. Let me just point out you might take a look for comparison at the Federal Circuit. The Federal Circuit is here in Washington. It has a specialized jurisdiction of patent and customs law, and also of Merit Systems Protection Board cases. My notion is they do not get involved in quite the degree of complexity we do in their requirements for a rationale that will survive. On the other hand, they handle many more cases than we do. But I have got to admit, I have heard pros and cons from the lawyers as to whether they would prefer to argue before our circuit or the Federal Circuit. I will not try to draw the conclusion there, but my point is that there you have a specialized court which does not appear for whatever reason to have gone the route that we have.

Mr. Susman: Professor.

Professor Rabkin: I want to, if I could, first just respond to a few things that Judge Wald said. Start at the end. I do know a lot of people who do law and economics. It has always seemed to me that it has certainly a high reputation, just because it came as such a shock to people in law schools to discover that there were a lot of politics in the making of statutes.

I do not think you have to subscribe to all of their libertarian premises, or all of their economistic reasonings about human motivation. I just think that there is an awful lot of funny politics going on in the world.

That is one thing. Now, the next thing is, does it matter if—or, how do you handle this difficulty that the statute is on the books and it belies the law? I think that is why we have an executive branch. I was never suggesting that the courts should say, “Well, this one is old, so let’s get rid of it.” I mean, I myself think there is something troublesome about Dean Calabresi’s suggestion there. But it seems to me perfectly reasonable for the executive branch to say, “Well, we do not think this law rates a very high priority.” They have all kinds of euphemisms that they can use. I suppose this administration is better than most in developing euphemistic explanations, and why could we not just leave it at that.

Just to give you an example: in one of your opinions which I thought was particularly fascinating (one of those 162 cases against the Federal Energy Regulatory Commission), you go on at extraordinary length talking about what really was the intent of the Congress that passed the Hepburn Act91 in 1906.

People make fun of Judge Bork and they say, “Whoever could know what the original intent was in 1787?” I think when you go back to the Hepburn Act you are getting pretty close to what Judge Bork is

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accused of doing. That decision goes on for several pages with a perfectly straight face about “Well, Senator Henry Cabot Lodge said frumph, frumph, frumph, and Senator John Sherman said frumph, frumph.” I mean, it is like the founding fathers talking through the D.C. Court of Appeals. That just seems to be, with all respect, really absurd and there is a very easy way around it. There is a very easy way around it, which is just to tell this farm coalition that was complaining “We need tighter regulation pipe—oil pipeline rates,” just tell them, “you do not have standing, it is nothing to you, there is no case here.” That would have been real easy.

MR. SUSMAN: Before we move to questions from the audience, I do want to inject a question that comes from afar. Ernie Gellhorn could not be here today, but I told him I would let him lead off the questions anyway. He was interested in the panel’s views on the role of “normative ideological views” in deciding administrative law questions: “Recent decisions by the court on judicial review, standing, exhaustion, and ripeness seem to reflect a distinctive liberal versus conservative division.” That issue has been raised, of course, during the session. “Is there a politization of the court on administrative law, or is this just a result of maturation and sophistication, or something else.” And this raises the obvious issue of whether this kind of politization is desirable.

Could we have some comments?

PROFESSOR RABKIN: I think the answer is clearly “yes” to that.

MR. SUSMAN: Can we have some other observations?

JUDGE WALD: I would say that a court is always made up of people that come from different administrations. I think we would all be blinking if we did not suggest Presidents made appointments and Senates confirmed them, knowing that people had particular viewpoints, had particular ideologies.

The hope has always been that once you go on the court, you do not feel that you must necessarily either advocate, advance, or even refuse to change some of those viewpoints. We have a court that has had an unusual amount of turnover in a very short period of time. I would not be the Chief Judge after eight-and-a-half years, the most senior active person except for Judge Robinson on the court, if we had not seen an immense amount of turnover.

It is hard to think that people who come on the court, from whatever administration, do not come on with some viewpoints about issues in administrative law, as well as about fundamental issues of standing and ripeness, since, basically, standing and ripeness are devices for a more basic notion about what a judge thinks courts should be doing—whether or not he or she thinks the court should be hearing certain kinds of cases, and whether it ought to be difficult or easy to get access. I will say that I think all of our judges, of whatever
political background, conscientiously try to stay within the bounds of Supreme Court doctrine, which has not always been lucidly clear on some of these issues. You have two distinct lines of standing cases coming down from the Supreme Court, one of them being SCRAP and its progeny, the other starting with Simon.\textsuperscript{92} Then you have zigzags, you have two cases which President Verkuil pointed out where the Supreme Court has reversed the D.C. Circuit for being too strict on standing within the last year. It is almost like what Harold Leventhal used to say about citing legislative history: "looking out over a crowd and picking out your friends." To a certain degree that is true when you deal with Supreme Court doctrine.

But in the last year the different factions of the court have begun to come together. We had our public fuss on en bancs; one of the Reagan appointees changed his vote to say, "No, I do not think we really ought to go and en banc [sic] all of these cases. I do not think it is necessary to keep the law of the circuit consistent." I think when we have all had more time on the court, it will not seem as "political" as it may seem to some people now. I would also suggest, if you are a faithful daily reader of our opinions, rather than a reader of the cases that the newspaper decides are important enough to be given high visibility, you will find in a great number of cases—about 90 percent—that we are all in agreement. And, furthermore, you will not find that all the Carter appointments vote for the special interest groups and for standing, and all of the Reagan appointments vote for the current administration. It simply does not work that way, but yes, we do have differences on the court.

MR. SUSMAN: Mr. Cutler.

MR. CUTLER: Well, I will try to be as provocative as Professor Gellhorn. I do not think it has anything to do with ideology, and I do not think it has anything to do with results. I think most doctrines of standing, or ripeness, strict scrutiny, rationality, levels of tests, are rationalizations after the fact. I have yet to see the judge who could not come out at the same place under a strict scrutiny test as he does under a rationality or reasonableness test. That is equally true in equal protection cases. I have yet to see the judge who let a standing or ripeness issue get in the way of a case he really wanted to hear and decide.

PROFESSOR RABKIN: Yes, but I think the question is not whether these doctrines are binding, but whether currently stated differences about these doctrines do not reflect larger ideological differences. And, on that point, with all the qualifications that Judge Wald made, it seems to me indisputable that the general view of the Reagan appointees

is what reigns in the courts, and that contrasts with some of the Carter appointees. Do you agree?

Mr. Cutler: Well, do not forget that certainly in the agency field the sides have shifted. These same doctrines that were used to uphold what some thought was an excessive regulation are now being used to uphold what some think is excessive deregulation or nonregulation.

Professor Rabkin: Yes, let me just add one thing to this. It strikes me that there is more simply than whether you are for regulation or for deregulation, or whether you are a market-oriented conservative or a regulation-oriented liberal, that some of this probably has to do with people who are loyal to the things which they were involved in and try to protect what they feel they created. I do not say any of this from personal experience. However, it is my impression, looking at the Supreme Court, that many of the, let’s call them, “older” Justices are particularly attached to doctrines which they developed. It makes sense to me that people on the D.C. Circuit would divide in generational terms. There is your generation of the court, even if there were not these underlying political differences between the administrations that appointed them. The seventies really were a different era in national life. It was a different era in legal scholarship. It was a different era in terms of many, many other things that shaped people’s formative expectations—if that is when they joined the D.C. Circuit.

Judge Wald: We are all from one generation right now on the D.C. Circuit. Judge Mikva and I came in 1979. The Reagan appointments came soon thereafter, beginning with Judge Bork in 1981, and continuing right up to this year. We are talking about a difference of six years. We all went through the seventies together. Not on the same side of everything, I am aware of that, but there really is not a generation gap there now.

Professor Bonfield: Of course, judges are human, and nobody can entirely leave their own personal prejudices out of what they do. But I want to speak in favor of most judges who think they have a serious job to do, and try, as much as they can, to suppress their private prejudices in the work they perform as judges, even though they cannot entirely eliminate the effect of those views. The assumption that most judges simply come to a result they like, and then justify their decision by manipulation of the legal doctrine, seems to me to be unwarranted. Surely that happens, on occasion, but that is clearly not the desirable or proper way to approach the job of judging and I do not think most judges do that in practice.

I would remind you of the debate between then-Judge and now-Justice Scalia and Professor Richard Epstein on the question of the proper standards to be applied by courts as a matter of substantive due process in the economic regulation area. Justice Scalia, who was
not then on the Supreme Court, took his usual principled position: even though the composition of the federal courts has changed, as have the personal economic predilections of many of their members, the traditional position of hands-off, maximum deference in reviewing such matters ought to be continued, though he personally had serious doubts about the wisdom of a great deal of such legislation. Epstein, on the other hand, argued that since the judges on those courts have changed, courts should now become activist for a different purpose—they should strike down a great deal of the economic regulation they believe to be dysfunctional or distasteful as a matter of policy. That debate demonstrates that you cannot simply divide judges, in terms of their activism or passivism on the court, on the basis of their personal political or economic views. Other factors enter into their judicial positions on such matters. One can recall that Oliver Wendell Holmes repeatedly refused to enforce his personal Boston Brahmin views on decisions of the Supreme Court reviewing legislation that he and members of his class thought absolutely abhorrent.

Mr. Susman: I would like to ask whether “justice” has any role in the administrative law cases. Rather than politics or ideology, does it help for a judge to have an innate sense of fairness or justice outside of conservatism or liberalism? Professor Rabkin.

Professor Rabkin: A lot of people have a lot of strange ideas to begin with about justice. It has been my observation, from reading the more celebrated decisions, that a lot of people’s ideas about justice get even stranger when they get on the bench.

When you say justice, I think too many people think justice as opposed to policy, justice as opposed to consequence, justice as opposed to reasonableness, justice as opposed to circumstances, exigency, and—

Mr. Susman: How about as opposed to injustice?

Professor Rabkin: Well, you know, I think particularly in the context of regulation, but I think, more largely, most of these cases are not “as opposed to injustice.” They are competing notions about policy, and who is going to get what, and I really would hesitate to talk about that in terms of justice. I think the just thing probably would be to have very little regulation at all. That is my view of justice for what it is worth. I mean, I am very uncomfortable with the idea that justice will decide exactly how much of what should be distributed to whom when the government is ladling things forth.

Mr. Susman: A question.

Professor Sunstein: Microphone is working. I am Cass Sunstein, and I teach law as well as political science. Many political scientists do not agree with Professor Rabkin.

As I understand Professor Rabkin’s view, if automobile manufacturers want to challenge a law forbidding certain carcinogens or
discrimination on the basis of race or gender, they are allowed to do so because their own rights are at stake.

If the workers want to challenge a regulation on the ground that it has inadequately regulated carcinogens or discrimination, they are not permitted to because it is a general issue of public policy.

That distinction cannot be sustained. The notion that one's own rights are at stake, in that formulation, is being decided by reference to a kind of conception of property rights that Congress has itself repudiated in the Administrative Procedure Act and in the relevant organic statutes. The Administrative Procedure Act tells courts they can compel agency inaction, agency action unlawfully withheld or unreasonably delayed. It defines agency action to include failure to act.

Under many organic statutes, Congress has explicitly said that there are deadlines to be judicially enforced. Professor Rabkin's quarrel, I think, is not with the D.C. Circuit. It may be with judicial review. It is certainly with the Congress.

Professor Rabkin: It is with the Congress, I admit that. That is to say, Congress among others. This is a very convenient thing for Congress.

I would say, though, to Professor Sunstein, it is not, I think, quite fair to point to the Administrative Procedure Act and say, "There, that settles it, Congress has allotted this function to the APA since 1946."

Agency action unlawfully withheld could involve lots of things that Justice Holmes and the public in 1912 would have recognized as perfectly reasonable occasions for judicial review. For example, there are certain kinds of permit or licensing circumstances in which people routinely need to get a permit to do something. They apply for it, and it is denied, withheld, or stalled. They are generally understood to have rights to do that something. There are some exceptional government control situations, but sure, in a case like that you could say they have a right to receive this permit or license, and that should be understood as agency action unlawfully withheld or unreasonably delayed.

I still think there is a very fundamental difference between that and people stepping forward and saying "We would like to see a different regulatory pattern in the world."

It did not persuade me, because you said it was untenable, that the way people looked at these things until about 1969, they suddenly now become totally unthinkable. We have learned some lessons about how far clocks can be turned back, but it seems to me it should not be impossible to reconsider the good sense of an earlier era that is only, you know, basically ten or fifteen years removed from us.

Mr. Susman: Yes, sir.
Mr. Cox: My name is Michael Cox. I teach at a law school, also, and I have a question for Judge Wald and other members of the panel. You indicated that standing and ripeness were doctrines that were being used to exclude persons, so to say, from getting issues litigated, but in the Block case, Justice O'Connor watered down the “clear and convincing” test to a fairly discernible test for implied preclusion, which to me is getting very close to standing. Would you include implied preclusion as a doctrine which might increase in its use to keep issues from being decided by the courts?

Judge Wald: Well, sure. Let me clarify one thing. I am not saying that any standing case that denies standing is wrong. I, myself, have written some of those cases denying standing which are in the paper. All I am pointing out is that as we move forward along that line, it seems to me we might keep in mind some of the possibilities, the ramifications of getting overzealous, or setting up what are too rigid lines of causation and redressability.

Remember, especially when you get into Article III case or controversy standing, once a court says you do not have Article III case or controversy standing, there is nothing Congress can do about it. I mean, it is not like APA aggrievement-type standing, and I see some danger in erecting too-high barriers of causation and redressability, which are judge-made standards. You can go to the Constitution and it just says “case or controversy.” I am sure those people back in 1787, when you said case or controversy, were thinking in very noncomplex terms—not in terms of injury in fact, causation, and redressability. Those are judicially made doctrines.

Now, having got that off my chest, yes, obviously, an overly rigid look at when a statute precludes judicial review—just as not reading into a statute private rights of actions—all of those things can combine with Chaney unreivewability, with standing, with ripeness, and with finality to mount high barriers to access. That does not mean that they are unnecessary barriers. The doctrines are, I think, good ones if they are applied with some sense of both the congressional intent, as to whether or not Congress wanted beneficiaries to be able to litigate underregulation, and with a general reasonableness doctrine, such as Lloyd has expressed. But sure, implied preclusion is definitely one of these access barriers.

Mr. Levin: I am Ron Levin, also a professor, and I have one or two comments about Heckler v. Chaney. It seems to me that if we are going to say that the prisoners who are trying to keep themselves from being executed with unsafe drugs did not have enough of a legal stake in the outcome, we are going to have to rethink our notion of injury in fact at a pretty basic level.

My more significant—or at least more extended—comment is that I think that although it did have a bizarre fact pattern, it is
not—should not—be very surprising at all that Heckler v. Chaney has stirred up a great deal of controversy and has had many progeny in the D.C. Circuit, as well as everywhere else where administrative action is reviewed.

It seemed to me that it was a phenomenon waiting to happen, in terms of how the courts were going to come to grips with this very difficult matter of reviewing agency inaction. There are a good number of cases still authoritative in the D.C. Circuit saying that certain types of inaction, for example, refusal to commence rulemaking, are reviewable. Chaney just does not apply, but the scope of review is very narrow.

I have read probably most of those cases, if not all of them. I have yet to see any respect, whatever, in which the review that goes on there is any narrower than what goes on in administrative cases generally. That may be good, but to the extent that some people think that it is not good for types of inaction to be reviewed closely, I think it is not at all surprising that there is a great deal of pressure or impetus to classify these types of actions and other delicate administrative actions into the realm of unreviewability, so that the usual hard look that the courts have figured out how to perform will not be performed there. Whenever we have this large crop of cases classified as “unreviewable,” people expect there is going to be a somewhat more lenient type of review.

That does not settle the problem by any means, though, because Judge Wald and others have participated in building up a very complex, very detailed body of law that tries to specify just what Chaney means. It seems to signify a sort of partial unreviewability. Various types of contentions are reviewable. Various ones are not. I think it is entirely appropriate that about thirty-five cases or so have come from the D.C. Circuit on this point, and I hope that the court will not try to settle the matters too quickly.

Judge Wald: No chance.

Mr. Levin: I am glad there is no chance, because I think this is the scope of review dialogue of the 1980s, a large area where there simply has to be further development of something that cannot be readily satisfied.

Professor Rabkin: I do not think that the relevant issue here is action versus inaction. I do not think the important issue here is should you give standing to people who are directly affected, indirectly affected, not at all affected. It seems to me that the issue is one that you could frame pretty precisely. Do people have a right to what they claim or do they not? Now, that sounds kind of formalistic, but I think it means something because it is saying you are really entitled to this result. You are not in there just because you would benefit if things were arranged differently, but because you in particular are entitled to this
result. That helps you to organize the world. You cannot actually give out particular entitlements to everything, to everybody. Property is something that one can own privately and individually. Regulatory benefits cannot be owned that way. I think that is a good sign that you cannot be given a personal right to it.

I do not think there is any question that once you get in the habit of saying, "Well, they do not actually have to have a direct right to it, it does not have to be explicit, it is just a matter of are they affected somewhat to some extent," you have cases like—one that is mentioned in the paper—this very peculiar case in which somebody named Robbins sued President Reagan. I cannot tell you who this Robbins is, because they just failed to mention that in the D.C. Circuit's opinion, but Robbins seems to be somehow connected with the Committee for Creative Nonviolence, which wants to have the government maintain a home for people who are homeless. That is a very worthwhile enterprise, I am sure. President Reagan seems to have said that he personally promised that they would do this, and then it did not happen. Now there is a suit about something where there is not even a statute. I mean, we do not know who this Robbins is, we do not know what statute gives them the right to have this home for the homeless. It is altogether up in the air. The question is how much unbounded creativity are you going to allow to judges, and you are allowing, in many cases I think, a remarkably unbounded discretion to judges who sometimes do rather peculiar things in the name of their view of justice. I think that is something you can object to and be concerned about without being, you know, a heartless—or somebody who has a wildly formalistic view of how the law is supposed to work.

*Judge Wald:* Could I just add one thing on *Robbins v. Reagan*? I do not know if it was Robbins, but at least one of the people suing was a person, a homeless person, who was currently inhabiting the Mitch Snyder Shelter put up by the Committee for Creative Nonviolence, and who, as of the date that the administration had said they were going to close the shelter, would be on the streets. At that time there were no alternative facilities in the community, so that he did stand to suffer a very tangible injury, namely the loss of the bed that he was sleeping on and the roof over his head. That should be enough as far as standing goes.

Now, the second thing is that in that case we ultimately came down, if you recall, upholding the agency and saying that it could, in fact, go ahead and take down that shelter. The only debate among Judge Bork and Judge Robinson and myself was whether we could even get to review anything in the case, or was all review thrown out by *Chaney*. Now, we simply did not see the resemblance between the prosecutorial discretion-type decision involved in *Chaney*, and whether or not they
could close down this shelter because Snyder had not kept whatever his part in the bargain with the government was. Even Judge Bork did not raise any standing issue there.

Professor Rabkin: He should have.

Mr. Susman: Last question.

Mr. Cudahy: I am Dick Cudahy. I am a member of the Seventh Circuit, which is one of those courts out there beyond the Beltway. We are extremely nonideological and certainly extremely nonexpert, but I just wanted to commend Chief Judge Wald and the panel, and I think it has been an extremely stimulating discussion—one that I am going to take home and try to apply. I never realized the profound wisdom of James Watt before coming to hear this presentation, but it has been excellent.

Aside from the administrative law questions, the real question I would like to get the answer to is how you keep your docket so low? I think that is a real achievement.

Judge Wald: By keeping our boundaries—

Mr. Cudahy: High standing.

Mr. Susman: Thank you, Judge. That brings this part of our afternoon to a close. I want to start by thanking our panelists, President Verkuil, Professor Rabkin, Mr. Cutler. Their comments and presentations contributed mightily to our understanding and enjoyment of administrative law. Judge Wald has provided us with a scholarly paper, but also refreshing humor and some perceptive comments which will assist us in understanding the issues, in sensitizing us to the role of the court and the problems that the court faces, and, certainly, in enhancing our respect for its work and its decisions.

I was looking through some materials in preparation for today; Jeff Lubbers, a member of our section, sent me an interview that he had with Judge Wald that appeared in the Federal Bar Journal shortly after she became Chief Judge. The last question was, although this was in advance of any thought of retirement, “What would you like to be remembered by after you retire from the bench?” Judge Wald answered, “Oh, the usual, that she worked very hard, that she was a reasonably good administrator, she was a thoughtful and fair judge, and she made some small contributions towards pushing the law forward as an effective means of solving human and social problems.”

Judge Wald, I think you do not need to have to wait until history books are written to attain well-earned recognition for achieving these goals that you set out for yourself.