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## The Impact of the Courts on Public Administration

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*United States Court of Appeals for the District of Columbia Circuit*

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# The Impact of the Courts on Public Administration

JUDGE DAVID L. BAZELON\*

"The *Impact* of the Courts. . . ." What a disruptive-sounding word, *impact*. It's obvious an administrator thought of that title. A judge would never speak of the "impact" of the courts. Terms like "the long and fruitful collaboration"<sup>1</sup> of courts and public administrators, or the "partnership"<sup>2</sup> between courts and public administrators are preferred. Some skeptics in the community might have still another perspective, like: "The *Conspiracy* of the Courts and Public Administrators." A person's views seem to depend on his vantage point.

Forty years ago, if anyone had asked what the impact of the judicial system was on public administration, many lawyers probably would have been a little puzzled, but soon would have responded that at least they were not aware of any real impact. Until ten or fifteen years ago, about the only public administrators regularly troubled with court review were regulatory agencies functioning in a structured system of advocacy considering primarily economic matters such as rate making. Nonetheless, the absence of court involvement in the day-to-day activities of public administrators for years does not necessarily indicate that agency processes ran so well that no review or restraints were necessary. The absence of a phenomenon does not tell you why that phenomenon is absent.

Even where courts have intervened in the administrative process over the last forty years, the impact was not universally viewed as constructive or positive. Those who were subject to the delays and burdens of court review would have been quite pleased to have eliminated the requirements of hearings, written opinions, evidence in the record and procedural due process — not to mention the second-guessing on the merits that sometimes occurred. However, until recently, many areas, such as prisons, were regarded by the courts as involving "mere housekeeping" matters and remained largely untouched by judicial review.<sup>3</sup>

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\*Chief Judge, United States Court of Appeals for the District of Columbia Circuit. An earlier version of this article was delivered as an address to the 1976 National Conference of the American Society for Public Administration.

I wish to express my gratitude for the assistance of my law clerk, Donald Elliott, in the preparation of this article.

<sup>1</sup>Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971) (Bazelon, C.J.).

<sup>2</sup>Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (Leventhal, J.), *cert. denied*, 403 U.S. 923 (1971).

<sup>3</sup>*See, e.g.,* Lee v. Tahash, 352 F.2d 970, 971 (8th Cir. 1965) (censorship and limitation on prisoners' correspondence held "inherent incidents in the conduct of penal institutions;" complaint dismissed); Childs v. Pegelow, 321 F.2d 487, 490 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964) (complaint by Muslim prisoners unable to abide by religion's dietary laws dismissed as non-justiciable; " . . . courts will not interfere with matters of routine prison

Even in criminal law — clearly a field of law that contemplates an active role for the judiciary — only a small part of the administrative process ever saw the light of a courtroom. Eighty-five percent of all federal defendants are still sentenced after plea bargaining without “judicial” determination of their allegedly criminal activities.<sup>4</sup> Scholars in the 1960’s rediscovered this wide discretion of the police, prosecution and prison officials, which had always affected the freedom of individuals.<sup>5</sup>

In the past fifteen years, significant changes have been made in the criminal justice system. The courts have looked beyond the first court appearance in requiring the observance of procedural safeguards.<sup>6</sup> The courts have also moved beyond the sentencing stage to look at post-conviction incarceration, whether in prison or mental institutions.<sup>7</sup> For example, a court in Alabama has now defined the psychiatrist-patient ratio which a state mental institution is required to maintain in order to be consistent with a Constitutional right to treatment.<sup>8</sup> In the District of Columbia a court reviewed a decision whether to release a convicted child molester who, although not completely recovered, was no longer deemed dangerous.<sup>9</sup> Moreover, the Supreme Court has determined the circumstances under which state prison officials may censor inmates’ mail<sup>10</sup> and

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administration . . . [and] [n]othing could be more routine than determining dining hours and practices.”); *Konigsberg v. Ciccone*, 285 F. Supp. 585, 597-600 (W.D. Mo. 1968), *aff’d*, 417 F.2d 161 (8th Cir. 1969), *cert. denied*, 397 U.S. 963 (1970) (prisoner’s complaints regarding thefts of personal property, insect-contaminated food, insufficient daily ration of water “do not rise to a sufficient status of ill treatment to authorize judicial interference.”).

<sup>4</sup>In fiscal 1975, a total of 37, 443 defendants were convicted and sentenced in the United States District Courts. Of them, 31, 816 (85%) pled guilty or *nolo contendere*. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANNUAL REPORT OF THE DIRECTOR A-58 (Table D 7).

<sup>5</sup>See, e.g., K. DAVIS, DISCRETIONARY JUSTICE (1969); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

<sup>6</sup>One of the primary procedural safeguards imposed by the courts is the requirement that an arrested person be given a prompt hearing before a magistrate to determine if probable cause exists to detain him. See *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957). Cf. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (fourteenth amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest). See also *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>7</sup>*Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966) (Bazelon, C.J.) (right to treatment for persons involuntarily committed to a mental hospital). Cf. *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (state may not constitutionally confine nondangerous persons capable of caring for themselves); *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam) (right to practice Buddhist faith in prison); *Johnson v. Avery*, 393 U.S. 483 (1969) (prison legal assistance).

<sup>8</sup>*Wyatt v. Stickney*, 344 F. Supp. 373, 383 (M.D. Ala. 1972), *supplementing*, 325 F. Supp. 781, *aff’d in part, remanded in part, and reserved on this point*, 503 F.2d 1305 (5th Cir. 1974). The district court said that some standards for mental health care were needed. The court then set standards. On appeal, the parties stipulated that the standards set by the district court were the minimum required, if standards were required at all. Therefore, the appellate court never reached the issue of the court’s standards.

<sup>9</sup>*United States v. McNeil*, 434 F.2d 502, 503 n.1 (D.C. Cir. 1970) (per curiam).

<sup>10</sup>*Procunier v. Martinez*, 416 U.S. 396 (1974).

the procedural guarantees which must accompany in-prison disciplinary proceedings.<sup>11</sup>

Had it stopped with the criminal justice system and related institutions, however, the reach of the courts still would have affected only a small percentage of administrators. Instead, the even more recent due process "explosion" has brought petitions for judicial review of allegedly illegal actions from schools, hospitals — indeed from all parts of the administrative process. The growth of public advocacy — by individuals, the legal services program and public interest law firms — has fueled this expansion of court activities, which is sometimes referred to as the "due process revolution."

Remember, judges do not have the power to intervene on their own in governmental affairs. A federal judge can't wake up one morning and simply decide to give a helpful little push to a school system, a mental hospital, or the local housing agency.<sup>12</sup> Courts become involved in the administrative process only when a party cares enough about the injustice he perceives has been done to him to expend the time and energy — as well as money — to petition for redress. If public administrators had no dissatisfied clients, judges would only get to see them at cocktail parties and conventions. The courts and the adversary process do not create adversity (in the sense of "conflict" or "opposition"); they merely provide the forum and the technique whereby already-existing conflicts are brought out into the open in an effort to reconcile and resolve them.

To understand the proper role for the courts and administrators in this process, it is necessary to define what courts can and cannot do, as well as to understand the impetus behind expanding judicial review. A fundamental limitation on the role of the courts — some believe honored more often in the breach than in the observance — is that courts may not substitute their own views for those of the administrators. While rate cases look simple compared to some of today's esoteric scientific issues, rate disputes were originally seen as complicated matters requiring the application of regulatory agency expertise.<sup>13</sup> The court's role was to assure simply that the agency functioned fairly and treated all interests with decency. Agencies were to proceed in a manner designed to ensure that the parties, the public, and the reviewing courts knew the basis of their decision and so that the courts could review their reasoning in light of the evidence. Therefore, the agency had to accord a hearing to all interested parties, to marshal a record, and to produce a written rationale for the decision.

Although these rules may seem fair, some people accuse courts of

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<sup>11</sup>Wolff v. McDonnell, 418 U.S. 539 (1974). See also Baxter v. Palmigiano, 452 U.S. 308 (1976).

<sup>12</sup>See U.S. CONST. art. III, § 2: "The judicial Power shall extend to . . . Cases [and] Controversies. . . ." See generally United States v. Richardson, 418 U.S. 166, 180, 188-97 (1974) (Powell, J., concurring).

<sup>13</sup>See FPC v. Hope Natural Gas Co., 320 U.S. 591, 602, 615-18 (1944).

manipulating these doctrines to set aside administrative decisions with which they do not agree.<sup>14</sup> Admittedly, this may occur, but the incidence is a good deal less frequent than many critics suppose. When a judge's experience gives him a particular familiarity with an area, he — like any other human being — may develop views of proper policy. When a court thinks the administrative process has resulted in a clearly "right" decision, the temptation is great not to waste time sending the case back to correct a minor procedural error. On the other hand, when the court does not feel comfortable trusting its own expertise with the subject matter, it is much more likely to insist on strict observance of procedural safeguards to fulfill its role of insuring proper administrative procedures.

Where courts prescribe remedies, they confront another set of limitations. Courts cannot appropriate money. Courts can order desegregation, but they cannot always make it happen. Courts can order a juvenile detention facility closed, but they cannot build a new one. For example, a federal court recently found that conditions in a New York City jail, aptly called the "Tombs", "manifestly violate the Constitution and would shock the conscience of any citizen who knew of them."<sup>15</sup> The judge ordered the city to submit a plan to correct the situation. When the city refused, citing its fiscal crisis, the judge ordered the hundred-year-old jail shut down, causing all of the prisoners to be transferred to another jail. The inmates of the second jail petitioned the court alleging that now *their* rights were being violated by the overcrowding at their jail.<sup>16</sup> As President Andrew Jackson so eloquently put it long ago: "John Marshall has made his decision. Now let him enforce it."<sup>17</sup>

Administrators are not always happy about judges meddling in their affairs; judges are not always happy with the administrative responses to

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<sup>14</sup>A sophisticated version of this skepticism about whether courts mean what they say when they reverse agencies on procedural points is found in Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1701-02 (1975). Professor Stewart responds to critics (such as Joseph Sax) who take the position that "the emphasis of the redemptive quality of procedural reform is about nine parts myth" by stating that that position goes too far. *Id.* In Stewart's view, procedural rules can be useful even though they do not affect outcomes in the first instance, since they provide the court with a device for forcing agency reconsideration of decisions with which the court does not agree on the merits:

A requirement that agencies articulate and consistently pursue policy choices may have only a modest effect on outcomes, but it can serve as a useful, *selective* judicial tool to force agency reconsideration of *questionable* decisions and to direct attention to factors that may have been disregarded.

*Id.* (emphasis added).

My dissenting colleagues have sometimes seen, in my own opinions, a substantive message wrapped in a procedural envelope. See *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm.*, No. 74-1385, slip op. at 6 n. 8 (D.C. Cir., July 21, 1976) (Tamm J., concurring).

<sup>15</sup>*Rhem v. Malcolm*, 371 F. Supp. 594, 636 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974).

<sup>16</sup>See *Rhem v. Malcolm*, 527 F.2d 1041, 1042-43 (2d Cir. 1975).

<sup>17</sup>S. MORRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 450 (1965).

their meddling. Under the circumstances, a certain amount of disappointment and frustration on both sides is entirely natural. As the Constitutional right to due process of law expands, more and more administrators will find themselves locked into involuntary partnerships with the courts. Therefore, efforts should be made to forge a better relationship between the partners.

Some new proposals have been suggested by Chief Justice Burger and others to keep some grievances out of the federal courts.<sup>18</sup> The value of these changes will depend on what kinds of grievances are involved and on what substitute forums are provided. Internal review procedures for processing grievances at the administrative level have long been favored by this author. Administrators may then correct their own mistakes, thereby minimizing the number of times they must defend, in court, a decision they really do not support. Moreover, if judicial review is requested for a grievance which has been fully ventilated in administrative proceedings, review may then be based solely on the written record of those proceedings without the need for a burdensome, time-consuming trial. One of the major objections to judicial review is thereby minimized.

Indeed, civil liberties and consumers groups have charged that in recent years the Supreme Court has been cutting back on a citizen's right of access to the federal courts.<sup>19</sup> There would seem to be something to these charges. These developments, though, have not as yet dismantled the "due process revolution." At the same time that the Supreme Court has been cutting back on the rights of consumers to bring class actions,<sup>20</sup> it has been expanding the rights of prisoners to challenge the conditions of their confinement.<sup>21</sup> At the same time the Court has been cutting back on the power of the federal courts to remedy police brutality,<sup>22</sup> it has been expanding their authority over school disciplinary proceedings.<sup>23</sup> One dares not attempt to predict precisely what future directions the Court may take.

Just as courts and administrators are beginning to dig out from under

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<sup>18</sup>See, e.g., *Burger Urges New Ways to Resolve Court Disputes*, N.Y. Times, April 8, 1976, at 27, col. 2.

<sup>19</sup>See, e.g., *Supreme Court Accused of 'Dangerous' Trends in Curbs on Judicial Protection*, N.Y. Times, April 7, 1976, at 11, col. 1. But see *High Court Record on Individual Rights Defended by Burger*, N.Y. Times, April 9, 1976, at 1, col. 8.

<sup>20</sup>See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (Fed. R. Civ. P. 23(c) (2) requires notice to identifiable class members at plaintiff's expense); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (each plaintiff in a class action under Fed. R. Civ. P. 23(b) (3) must independently satisfy the \$10,000 requirement for diversity jurisdiction).

<sup>21</sup>See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (state prisoners may challenge the conditions of their confinement under 42 U.S.C. § 1983 without exhausting state remedies; however, when prisoners seek early release, habeas corpus, which requires exhaustion, is the exclusive remedy).

<sup>22</sup>See *Rizzo v. Goode*, 423 U.S. 362 (1976) (requiring a comprehensive remedial plan for civil rights violations was held to be an impermissible judicial intrusion on the police power). See also *Paul v. Davis*, 424 U.S. 693 (1976).

<sup>23</sup>See *Goss v. Lopez*, 419 U.S. 565 (1975).

the upheaval created by the "due process explosion," another explosion strikes. Three revolutions have occurred during the lifetime of this author which have fundamentally altered man's view of himself and his world: the tele-communications revolution; the atomic or energy revolution; and one which is only now beginning, the biological revolution. In their wake, society is realizing that many "accidents of fate" — cancer, mental retardation, even crime, — are products of forces which may be subject to control. Society has responded by turning to government for protection from the forces which affect our lives but against which individuals are defenseless. The federal government now monitors the air we breathe,<sup>24</sup> the food we eat,<sup>25</sup> and the water we drink for traces of cancer-causing chemicals and other harmful substances;<sup>26</sup> it makes judgments on the safety of nuclear power plants<sup>27</sup> and drugs;<sup>28</sup> it even sets on-the-job standards for noise, to prevent deafness, and for light, to prevent blindness.<sup>29</sup> Since these decisions require scientific and technical expertise, the decisionmaking process has been delegated to administrators. As a check on administrative arbitrariness, Congress has mandated judicial review. To illustrate the increasing role of administrative procedures, compare Secretary Coleman's recent Concorde decision — made after an elaborate series of hearings — with Henry Ford's decision to mass-produce automobiles — made, for all we know, in the privacy of his boudoir.

The multitude of new statutes aimed at controlling technology are of particular concern to the United States Court of Appeals for the District of Columbia Circuit. At present over two-thirds of the D.C. Circuit's docket involves federal administrative action, far more than any other court in our country, and all signs point to a continuing increase.<sup>30</sup> These cases are increasingly involved with the frontiers of science and technology: What are the ecological effects of building a pipeline for badly-needed oil across the Alaskan tundra?<sup>31</sup> Does the public health require removal of lead additives from gasoline?<sup>32</sup> How can society manage radioactive wastes from nuclear reactors, wastes which remain toxic for centuries?<sup>33</sup> Shall we ban the Concorde SST<sup>34</sup> or Red Dye #2?<sup>35</sup> These and many, many more such

<sup>24</sup>See Clean Air Act Amendments of 1970, 42 U.S.C. § 1857 (1970).

<sup>25</sup>See Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 301-92 (1970).

<sup>26</sup>See Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f-300j (Supp. IV 1974).

<sup>27</sup>See Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1970).

<sup>28</sup>See Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 301-92 (1970).

<sup>29</sup>See Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1970).

<sup>30</sup>See Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 U.C.L.A. L. Rev. 432, 437 (1976).

<sup>31</sup>*Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973).

<sup>32</sup>*Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc), cert. denied, 96 S. Ct. 2663 (1976).

<sup>33</sup>*Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm.*, No. 74-1385 (D.C. Cir. July 21, 1976) (Tamm, J., concurring).

<sup>34</sup>*Environmental Defense Fund, Inc. v. Coleman*, No. 76-1105 (D.C. Cir. May 19, 1976) (unreported).

<sup>35</sup>*Certified Color Mfrs. Ass'n v. Mathews*, No. 76-1120 (D.C. Cir. July 6, 1976).

imponderables now come before that court, although not all cases involve such weighty issues. Indeed, one recent case involved the intricacies of potato chip manufacturing,<sup>36</sup> and another concerned a salve for cows with sore udders.<sup>37</sup>

Significant or not, decisions involving scientific or technical expertise present peculiar challenges for reviewing courts. The problem is not so much that judges will impose their own views on the merits. The question is whether they will even know what is happening. In one complicated case, this author wrote that "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."<sup>38</sup> At least when a judge goes too far into the merits of an ICC rate case or an FCC licensing proceeding, he may have a speaking familiarity with the material and is unlikely to do too much damage. Where the evidence is scientific or mathematical, most judges are in over their heads, whether they know it or not.

Recognizing these limitations, however, courts are not about to — nor should they — retreat entirely. Both in scientific and more traditional areas, what judges can do — and do well when conscious of their role and their limitations — is monitor the decisionmaking process. They can ensure that the decisional process is thorough, complete, and rational, and that it takes into account all relevant information and testimony. Judges may not exactly understand half-lives, deterioration factor adjustments and all the rest; but they can make sure that someone who does know has dealt with all the facts in a clear public way. In effect, they can guarantee that administrators "let it all hang out."

The pressures to cover up the real grounds for decisions are sometimes very potent. However, a democracy must resist those pressures at all costs. Particularly in scientific areas, where the courts are clearly not competent to evaluate the merits, the administrative process must provide for a system of peer review and public oversight to guide and correct governmental decisions. If this system is to operate, the basis for these decisions must be clearly disclosed and full opportunities for public participation provided. Then, other experts — in academia, government, and industry — may present new data or challenge the logic of the administrators' reasoning. This process of continued review and oversight does not come to a halt simply because a decision is reached. Administrative decisions should always be open to reconsideration if significant new information is discovered. Therefore, the record of all proceedings must set forth precisely

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<sup>36</sup>*American Frozen Food Inst. v. Train*, No. 74-1464 (D.C. Cir. May 11, 1976).

<sup>37</sup>*Masti-Kure Products Co. v. Mathews*, No. 75-1231 (D.C. Cir. Aug. 18, 1976) (unreported).

<sup>38</sup>*International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, C.J., concurring).



what data and conclusions were utilized so that the significance of new information will be readily apparent.

Effective peer and public oversight requires that administrative decisionmakers disclose not only what is but also what is not known: precisely where and why the experts disagree as well as concur; and where the information is sketchy as well as complete. For example, when DDT or cyclamates are banned on the basis of preliminary studies and theories which raise doubts about their safety, the decision must acknowledge that the administrators are acting before all the information is known. That awareness encourages a diligent search for better information which might demonstrate that the risk is less — or more — than originally estimated. The awareness also gives reason to hope that erroneous decisions will not be frozen in concrete.

This suggestion should not imply that decisions affecting the life and health of millions are the province of experts alone. While the experts can speak with particular authority on the scientific side — science is elitist — the facts alone are very rarely determinative.<sup>39</sup> Once society has a pretty good idea what the risks are, it must still decide whether those risks are worth taking in light of the anticipated benefits. New scientific and technological developments bring perils and promises. In a world where resources are scarce, choices between the alternatives usually come down to a matter of values. No expert has a greater stake in the risk/benefit sweepstakes than Mr. John Q. Public, the ultimate "guinea pig." Therefore, even society's most technical decisions must be ventilated in a public forum with public input and participation.

This kind of honesty is not comfortable. Ordinary mortals, unlike judges, are reluctant to confess a deficiency of omniscience, or to admit that their actions may be unnecessary or mistaken. Those administrators who have devoted a lifetime, with all the personal and professional commitments that entails, to the work of an institution will understandably find it

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<sup>39</sup>Dr. Philip Handler, President of the National Academy of Sciences, has recently had a very interesting exchange of views on this subject with Peter Barton Hutt, former General Counsel to the Food and Drug Administration. At a recent Academy forum entitled *The Citizen and the Expert*, Hutt put forward a plan for opening Academy committee meetings to public attendance and participation. That prompted an extemporaneous rejoinder from Handler in which he stated that the Academy is inherently an "elitist organization" whose only "special asset" is the technical expertise of its members. See *Handler Defends Academy Elitism*, 191 *SCIENCE* 543 (1976).

It is not necessary here to take a position in the Handler-Hutt debate concerning the conflict, if any, between the role of the National Academy of Sciences in providing scientific advice to the government and public participation — or for that matter, the possible conflict between that role and the *absence* of public participation. However, Dr. Handler is correct when he says that determinations of scientific fact are inherently "elitist" in the sense that they call for special skills. See generally Handler, *A Rebuttal: The Need for a Sufficient Scientific Base for Governmental Regulation*, 43 *GEO. WASH. L. REV.* 808 (1975), for an explanation of the important, but limited, role which determinations of scientific fact should play in public policy decisions.

<sup>40</sup>*Ehtyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc), *cert. denied*, 96 S. Ct. 2663 (1976).

threatening to re-examine the institution's usefulness and their role in it. In the long run, though, public confidence depends on such painful re-appraisal.

Recently in *Ethyl Corp. v. EPA*,<sup>40</sup> for example, the United States Court of Appeals for the District of Columbia Circuit upheld an Environmental Protection Agency decision to remove lead from all gasoline because it posed a health hazard. The issue for the administrator of the EPA was whether preliminary health data justified a ban on lead. A few studies suggested that the coordination and intelligence of children, particularly in ghettos, might be adversely affected by lead from automobile emissions.<sup>41</sup> On the other side, removing lead from gasoline would require an \$82 million one-time capital investment, increase the cost of gasoline at the pumps by approximately one-tenth of one cent per gallon, and increase the nation's consumption of crude oil by approximately four-tenths of one percent.<sup>42</sup> The administrator decided the risk to the children's health was not worth taking, and the court upheld him. The court ruled that Congress had delegated to the administrator a "legislative policy judgment"<sup>43</sup> in which Congress intended him to estimate risks and balance competing interests.

Imagine for a moment that the administrator in the *Ethyl Corp.* case had struck the "legislative policy" balance in the other direction. It is very unlikely that he would have stated publicly: "I have chosen not to act at this time because I do not believe the possibility that a few ghetto children may be slightly injured is worth the cost in dollars and cents to a larger group, the American driving public." He would probably have tried to hide behind the scientific evidence in a carefully-worded statement, for instance: "There is no *credible* evidence at *this time* indicating lead represents a *serious* hazard to anyone's health."

The motives of this hypothetical administrator would be anything but venal. He could in good faith rationalize that this cover-up is justified by the hard political "realities" — for instance, that the public is still too immature to accept the trade-offs between health and dollars which society makes all the time. The desire to avoid the short-term flak is understandable. In doing so, however, a critical opportunity is missed to inform and, thereby, raise the level of public understanding. If complex decisions are couched in terms designed primarily to "sell" the program, like selling soap, the public cannot be expected to develop greater sophistication.

Moreover, by giving in to the desire to avoid political criticism, administrators lift the full burden of responsibility for making value-laden choices onto their own narrow shoulders. Not only can this lead to paternalistic decisions dictated by institutional interests and elitist per-

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<sup>41</sup>38 Fed. Reg. 33,733, 33,735 (1973).

<sup>42</sup>38 Fed. Reg. 33,733, 33,739 (1973).

<sup>43</sup>*Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc), cert. denied, 96 S. Ct. 2663 (1976).

spectives, but it also opens administrators to charges of high-handedness, bad faith, and cover-up. When administrators frankly lay the competing considerations out on the table, they may receive guidance from the public reaction. In addition, by sharing responsibility and increasing understanding, recriminations and antagonisms may be muted.

Most important though, simple moral decency requires that the public be notified of the choices that are made in its name. As noted earlier, they are the ultimate "guinea pigs" who will have to live with the consequences of administrative choices. As Thomas Jefferson wrote:

I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion. . . .<sup>44</sup>

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<sup>44</sup>Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *reprinted in* 7 THE WRITINGS OF THOMAS JEFFERSON 177, 179 (H.A. Washington ed. 1855).