

# ARTICLES

## TWO PROBLEMS IN ADMINISTRATIVE LAW: POLITICAL POLARITY ON THE DISTRICT OF COLUMBIA CIRCUIT AND JUDICIAL DETERRENCE OF AGENCY RULEMAKING

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In a refreshingly candid article, Chief Judge Wald of the D.C. Circuit noted in 1986: "The flow of membership in the D.C. Circuit . . . is more like what one would expect in Congress with elections every few years, or in the Executive, shifting its key policymakers with each administration."<sup>1</sup> Eleven of the twelve D.C. Circuit judges were appointed by President Reagan or President Carter within the last nine years. Most served previously in policymaking positions in either the legislative or executive branches of government. Based on their record of decision-making with respect to judicial review of agency actions, the new members of the D.C. Circuit seem to be experiencing a difficult, and as yet incomplete, transition from their prior active role in the partisan political process.

Two problems have emerged in the D.C. Circuit's review of agency decisions. First, the democratic and republican judges on the D.C. Circuit see agency policy decisions through dramatically different prisms. Deeply ingrained differences in political perspective become particularly apparent when the D.C. Circuit reviews agency policy decisions with significant ideological implications: the fate of a major agency policy decision reviewed by the D.C. Circuit will vary with the composition of the panel that reviews the agency action.<sup>2</sup>

Second, policymaking through agency rulemaking has declined significantly at some agencies during the past decade.<sup>3</sup> While other factors

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1. Wald, *Rebel Angel in Flight*, *DISTRICT LAW.*, July/August 1986, at 30, 32.

2. "In our court right now, the result in close or controversial cases can turn on the composition of the panel." *Id.* at 32.

3. T. MCGARITY & S. SHAPIRO, *REPORT TO THE ADMINISTRATIVE CONFERENCE ON OSHA RULEMAKING* (1987); S. MELNICK, *REGULATION AND THE COURTS* (1983); Mashaw & Harfst,

have contributed to this trend,<sup>4</sup> the approach taken by appellate courts when they review agency rules dominates the list of explanatory factors.<sup>5</sup> The present D.C. Circuit is less deferential to the political branches of government than its predecessors. It affirms agency actions far less frequently than did its predecessors. In reversing agency policies adopted through the rulemaking process, the D.C. Circuit frequently substitutes its own interpretations for agency interpretations of ambiguous statutory provisions<sup>6</sup> and imposes rigorous requirements that agencies support each element of a policy decision with detailed discussion of factual predicates and comprehensive reasoning from factual premises to policy conclusions.<sup>7</sup> In contrast, courts are less demanding when they review agency policymaking undertaken through ad hoc adjudication of specific cases.<sup>8</sup> As a result, some agencies are abandoning systematic approaches to policymaking in favor of ad hoc policymaking.

These two phenomena are closely related in their functional effects on agencies. When an agency begins the process of policymaking through rulemaking, or considers initiation of that process in an important context, it knows that it must be prepared to satisfy the rigorous requirements of some court of appeals at the end of the process. If the agency does not discuss in detail each of the hundreds of issues raised by participants in the rulemaking and each of the many studies submitted in the proceeding, it risks judicial reversal and remand of its policy. Thus, to avoid a holding that its policy is arbitrary and capricious, the agency must prepare a "concise general" statement of basis of purpose that consists of hundreds of pages of detailed discussion of every conceivable issue raised by its policy initiative.<sup>9</sup> In this judicial environment, an

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*Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. REG. 257, 263-68 (1987); Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 35 (1982).

4. The Reagan Administration's minimalist attitude toward government intervention probably has contributed to the reduced level of rulemaking. Congressional requirements that some agencies permit cross-examination in rulemaking proceedings undoubtedly has contributed to the trend in those agencies. *E.g.*, 15 U.S.C. § 2058(d)(2) (1982); 29 C.F.R. § 1911.15(3) (1987); see McGarity, *OSHA's Generic Carcinogen Policy: Rulemaking Under Scientific and Legal Uncertainty*, in LAW AND SCIENCE IN COLLABORATION (J. Nyhard & M. Carrow eds. 1983); Schwartz, *supra* note 3.

5. Mashaw & Harfst, *supra* note 3, at 276-99.

6. *E.g.*, *Union of Concerned Scientists v. NRC*, 824 F.2d 108 (D.C. Cir. 1987); *Jersey Central Power & Light v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987); *Middle South Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984), *cert. dismissed*, 473 U.S. 930 (1985).

7. *E.g.*, *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511 (D.C. Cir. 1984); *International Ladies Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); *Chrysler Corp. v. Department of Transp.*, 472 F.2d 659 (6th Cir. 1972).

8. See Mashaw & Harfst, *supra* note 3, at 299-302.

9. The Administrative Procedure Act requires only that an agency accompany rules with "a concise general statement of their basis and purpose." 5 U.S.C. § 553(e) (1982). Courts have re-

agency realistically must conclude that making an important policy decision through the rulemaking process will require it to commit a significant proportion of its scarce resources to that process for as much as a decade.<sup>10</sup>

An agency must also be aware that a reviewing court may not allow it to implement its policy even after a lengthy and costly rulemaking process. In some circumstances, the agency knows from the outset that its rule will be reviewed by the D.C. Circuit.<sup>11</sup> In most circumstances the agency at least knows that there is a high probability of D.C. Circuit review.<sup>12</sup> The D.C. Circuit reverses or remands over sixty percent of all agency actions it reviews.<sup>13</sup> The agency cannot know the composition of the D.C. Circuit panel that will review the product of its rulemaking, but it can predict that the likelihood of reversal will depend in part on whether the panel includes a majority of democrats or a majority of republicans. In cases with significant ideological implications—most major agency rulemakings—democratic D.C. Circuit judges are more likely to reverse agency policies at the behest of individuals, and republican D.C. Circuit judges are more likely to reverse agency policies challenged by business interests. Thus, the agency must conclude that the risk of reversal of a major policy decision is high and depends in part on a variable that can neither be predicted nor controlled by the agency whose policy decision is subject to review—the composition of the panel that reviews the policy.

The combined effect of the demanding attitude of circuit courts generally toward agency policymaking through rulemaking, and the increasing political polarity of the members of the D.C. Circuit on any issue with significant ideological implications, is threefold. First, the time required to make policy through rulemaking has been stretched to nearly a decade. Second, the cost to the agency of making policy through rulemaking has increased significantly. Finally, assessing the likelihood of success in making policy through rulemaking increasingly resembles the process of predicting the results of a lottery. If these two problems persist, more agencies will react either by declining to make policy deci-

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fused, however, to give meaning to the adjectives "concise" and "general." See *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

10. See *Mashaw & Harfst*, *supra* note 3, at 284-89.

11. A few statutes confer exclusive jurisdiction on the D.C. Circuit. *E.g.*, 42 U.S.C. § 7607(b)(1) (1982).

12. Over one quarter of all agency actions were appealed to the D.C. Circuit in 1986. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 101 (1986).

13. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 155 (1987) [hereinafter 1987 ANNUAL REPORT].

sions at all, or by disguising policy decisions as resolutions of specific, narrow disputes.

In part I, I describe the dimensions of the two related problems.<sup>14</sup> In part II, I propose solutions to the problems.<sup>15</sup> The solutions to the two problems are the same, and each is supported by recent decisions of the Supreme Court and of the D.C. Circuit. Those decisions hold that, in a variety of contexts, judges should defer to policy decisions made by politically accountable agencies. Thus, at the most basic level, judges can solve the problems of political polarity on the D.C. Circuit and judicial deterrence of agency rulemaking simply by applying precedents in a consistent manner.

## I. THE DIMENSIONS OF THE PROBLEM

### A. *Ideology in the D.C. Circuit.*

The ideology of members of the D.C. Circuit has long been a major factor in the court's review of agency actions. Professor (now Justice) Scalia engaged in a biting attack on the D.C. Circuit in 1978. He indicted the D.C. Circuit for substituting its own view of proper policy for the views of the politically accountable branches of government, thereby ignoring Supreme Court precedent to the contrary. He cited numerous examples of cases in which the D.C. Circuit continued to base its administrative law decisions on its own ideology notwithstanding consistent pointed rebukes from the Supreme Court.<sup>16</sup>

The *New York University Law Review's* careful study of the D.C. Circuit's record in the Supreme Court during the period 1980-1983 documented a continuation—indeed an increase—in the D.C. Circuit's tendency to play a major role in the nation's policymaking process, and of that circuit's problems in the Supreme Court.<sup>17</sup> During that four year period, the Supreme Court granted petitions for certiorari from the D.C. Circuit nearly three times as often as from other circuits.<sup>18</sup> The Court affirmed the D.C. Circuit only 10.4 percent of the time—one-fourth the affirmance rate of other circuits.<sup>19</sup>

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14. See *infra* notes 16-83 and accompanying text.

15. See *infra* notes 84-156 and accompanying text.

16. Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345; see also Verkuil, *Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418 (1981).

17. Note, *Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and Its Implications for a National Court of Appeals*, 59 N.Y.U. L. REV. 1048 (1984). But see Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619 (1985).

18. Note, *supra* note 17, at 1063.

19. *Id.* at 1050.

NYU evaluated several possible explanations for the D.C. Circuit's record in the Supreme Court and rejected all but one—the Supreme Court and the D.C. Circuit are ideologically incompatible.<sup>20</sup> The NYU study found that the D.C. Circuit and the Supreme Court were in disagreement over three fundamental issues: (1) the D.C. Circuit sees net social benefits in judicial supervision of government activity in a wider range of circumstances than does the Supreme Court; (2) the Supreme Court is more willing to defer to the politically accountable branches of government than is the D.C. Circuit; and (3) the D.C. Circuit is more protective of the rights of individuals against the government than is the Supreme Court.<sup>21</sup> In short, the D.C. Circuit consistently expanded the role of the judiciary in policymaking, while the Supreme Court attempted to force the D.C. Circuit to assume a less expansive role in government policymaking. The Supreme Court's efforts to date have not been successful. Indeed, in a 1988 article Chief Judge Wald characterized the D.C. Circuit's role as that of an "aggressive senior partner" in the administrative process.<sup>22</sup>

From 1983 through 1986, the political composition of the D.C. Circuit changed significantly as a result of President Reagan's appointment of seven republican judges.<sup>23</sup> This change had the potential to decrease the ideological differences between the Supreme Court and the D.C. Circuit by reducing the tendency of the D.C. Circuit to assume a dominant role in government policymaking. After all, President Reagan and former Attorney General Meese regularly extol the virtues of judicial restraint and deference to the politically accountable branches of government. Presumably, the Reagan administration's appointees would share this philosophy. Moreover, there was evidence that the historic tendency toward judicial activism on the D.C. Circuit and the ideological incompatibility of the D.C. Circuit and the Supreme Court were rooted in the democratic members of the Circuit. Indeed, during the period 1980-1983, the Supreme Court reversed the D.C. Circuit in every case in which it granted review of a D.C. Circuit opinion written by one of the four judges appointed by President Carter.<sup>24</sup>

This potential has not been realized. The D.C. Circuit has become more conservative politically, but it has not become more deferential to the politically accountable branches of government. The D.C. Circuit's

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20. *Id.* at 1050, 1060-63.

21. *Id.* at 1051-59.

22. Wald, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. — (forthcoming, fall 1988).

23. One of the seven, Justice Scalia, subsequently was elevated to the Supreme Court.

24. Note, *supra* note 17, at 1066 n.95.

rate of affirmance of agency actions has shrunk dramatically to less than thirty percent, compared with an agency affirmance rate of seventy-four percent for all other circuits<sup>25</sup>—scarcely a sign of increased deference to the politically accountable institutions of government. I cannot identify all of the many factors that undoubtedly have contributed to this phenomenon, but one is apparent. The new republican members of the court are more sympathetic than their democratic colleagues when representatives of business interests claim that an agency has unlawfully harmed a business interest. Two decisions reversing actions taken by the Federal Energy Regulatory Commission (FERC) illustrate the combination of political conservatism and judicial activism that is sometimes shown by the republican judges on the D.C. Circuit.

In *Middle South Energy v. Federal Energy Regulatory Commission*,<sup>26</sup> the agency had interpreted the Federal Power Act (FPA) to empower it to suspend, pending investigation, an initial rate filing. The agency based its interpretation on a 1978 Supreme Court decision affirming an identical interpretation of the Interstate Commerce Act (ICA),<sup>27</sup> after which the FPA was modeled.<sup>28</sup> The republican majority of the D.C. Circuit panel reversed the agency, distinguishing on subtle grounds the arguably controlling Supreme Court opinion.<sup>29</sup> The dissenting judge (a democrat) chided the majority for failing even to discuss the deference due an agency's interpretation of the provisions of its organic act under the Supreme Court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>30</sup>

In *Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission*,<sup>31</sup> the agency had allowed an electric utility to recover in its rates all of its investment in a cancelled generating plant but had disallowed any return on that investment. The agency's action was based on a unanimous 1938 Supreme Court decision, *Denver Union Stock Yard Co. v. United States*.<sup>32</sup> *Denver Union* announced a doctrine that the D.C. Circuit had in turn characterized as "a bedrock principle of utility rate regulation" only two years before its decision in *Jersey Central*.<sup>33</sup> In-

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25. 1987 ANNUAL REPORT, *supra* note 13, at 155.

26. 747 F.2d 763 (D.C. Cir. 1984).

27. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978).

28. 747 F.2d at 767.

29. *Id.* at 768-69.

30. 467 U.S. 837 (1984); *Middle South Energy*, 747 F.2d at 774 (R. Ginsburg, J., dissenting).

31. 810 F.2d 1168 (D.C. Cir. 1987).

32. 304 U.S. 470 (1938).

33. *Kentucky Utils. Co. v. FERC*, 760 F.2d 1321, 1324 n.4 (D.C. Cir. 1985). See generally Hoecker, "Used and Useful": *Autopsy of a Ratemaking Policy*, 8 ENERGY L.J. 303 (1987) (discussing evolution and applications of the "used and useful" concept).

deed, FERC's policy on cancelled plants was far more generous to electric utilities than the policies of the majority of states,<sup>34</sup> and the D.C. Circuit had affirmed a less generous policy adopted by FERC in the context of gas utilities only two years prior to the *Jersey Central* decision.<sup>35</sup> Yet, four republican members of the court (joined by one democrat) reversed the agency policy at issue in *Jersey Central*. Over a vigorous dissent by four democrats who urged deference to the politically accountable branches of government,<sup>36</sup> the republican majority held that a utility has a right to earn a return on an investment even if the investment never provides benefits to consumers if the utility can show that it otherwise will experience financial difficulties.

The D.C. Circuit is divided between political liberals and political conservatives, but the court's basic ideology remains one of judicial activism. Indeed, Judge Wald has noted that, notwithstanding their sharp differences of opinion on many issues, the judges of the D.C. Circuit agree on the importance of "hard look" review of the agency policymaking process.<sup>37</sup> Thus, the ideological incompatibility of the D.C. Circuit and the Supreme Court, documented by Justice Scalia in 1978 and by NYU in 1985, persists in 1988. Moreover, agencies have more reason than ever to fear reversal of their policy decisions by the D.C. Circuit. The court affirms agencies far less frequently than in the past, and it reverses or remands agency actions at the behest of a wider range of parties than was its practice when the court was dominated by democrats.

The lottery characteristic of the D.C. Circuit will be difficult to eliminate. Most members of the court seem to have little regard for stare decisis, and en banc proceedings do not provide a promising vehicle for reconciling the stark differences in political perspective that now pervade the court's decisionmaking.<sup>38</sup> The court can accommodate only about six en banc proceedings per year.<sup>39</sup> Moreover, the government often declines to seek rehearing en banc when a panel reverses an agency policy that displeased a significant constituency of the administration.<sup>40</sup>

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34. See Pierce, *The Regulatory Treatment of Mistakes in Retrospect: Cancelled Plants and Excess Capacity*, 132 U. PA. L. REV. 497, 517-20 (1984) (citing examples of state regulatory commissions denying return on investment for cancelled plants).

35. *Natural Gas Pipeline Co. of Am. v. FERC*, 765 F.2d 1155, 1163-64 (D.C. Cir. 1985), cert. denied, 474 U.S. 1056 (1986).

36. 810 F.2d at 1202 (Mikva, J., dissenting).

37. Wald, *supra* note 22.

38. "In a court with strong ideological differences, some panels display outwardly their animus to past precedent in the circuit . . ." Wald, *supra* note 1, at 34.

39. *Id.* at 33.

40. *Id.* at 32.

The D.C. Circuit's 1987 en banc decision in *Bartlett v. Bowen* illustrates both the degree of political polarity on the court and the difficulty of attempting to obtain intracircuit consistency through en banc proceedings.<sup>41</sup> *Bartlett* involved three unrelated cases previously decided by panels that included a majority of democrats. The facts and issues of the three cases are not important for present purposes. In *Bartlett*, a six-judge majority consisting of five democrats and one republican reversed sua sponte orders previously granting rehearing en banc in the three cases. Five republican judges wrote a scathing joint statement of dissent. The democrats characterized the panel decisions written by democrats as "routine" and "run-of-the mill,"<sup>42</sup> while the dissenting republicans characterized the issues as of "exceptional importance" and the decisions of the democratic panels as "clearly wrong."<sup>43</sup> Each group accused the other of attempting to engage in "sweeping and revolutionary" changes in the law.<sup>44</sup>

After reading the opinions of the court en banc in *Bartlett*, and a representative sample of panel opinions in other cases with significant political implications, an agency administrator is likely to conclude that the fate of any major policy the agency attempts to implement is largely dependent on the composition of the D.C. Circuit panel assigned to review the policy. That realization alone will make agencies reluctant to make policy decisions. Alternatively, it might lead them to disguise their policy decisions as ad hoc adjudications of specific disputes.

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41. 824 F.2d 1240 (D.C. Cir. 1987); see also *Center for Auto Safety v. Thomas*, 847 F.2d 843, 844, 863 (D.C. Cir. 1988) (en banc) (5 democratic judges would hold that public interest groups have standing; 5 republican judges would hold the opposite); *Hammon v. Barry*, 841 F.2d 426, 427 (D.C. Cir. 1988) (en banc) (7 republican judges vote to vacate order granting rehearing en banc; 5 democratic judges dissent, saying "it is hard to recall an instance where leading precedents of the Supreme Court have been given shorter shrift by this court"); *Wolfe v. Department of Health & Human Servs.*, 839 F.2d 768, 769, 776, 779 (D.C. Cir. 1988) (en banc) (7 republican judges vote to reverse panel decision; 5 democratic judges dissent); *Durns v. Bureau of Prisons*, 806 F.2d 1122 (D.C. Cir. 1986) (en banc) (6 republican judges vote against rehearing en banc; 5 democratic judges dissent); *Telecommunications Research & Action Center v. FCC*, 806 F.2d 1115 (D.C. Cir. 1986) (en banc) (four republican judges vote against rehearing en banc; four democratic judges and one republican judge dissent). Political polarity is also evident in the decisions of panels. I identified 34 cases reported in volumes 804 through 831 of the *Federal Reporter, Second Series* in which members of panels differed concerning the validity of agency actions. In 26 of those cases, 76%, the differences were between democrats and republicans. In only five cases, two republicans disagreed. In only three cases, two democrats disagreed. A computer analysis of all non-unanimous panel decisions during 1987 demonstrates even more starkly the extreme degree of political polarity on the D.C. Circuit. Of the eleven judges who participated in decisionmaking during that period, a group of eight, consisting of four republicans and four democrats, divided on purely partisan lines in virtually all cases. *Karpay, Bork or No Bork, GOP Bloc a Force on D.C. Circuit*, *Legal Times*, Jan. 18, 1988, at 10-12.

42. 824 F.2d at 1242.

43. *Id.* at 1247 (Bork, Starr, Buckley, Williams & D.H. Ginsburg, JJ., dissenting).

44. *Id.* at 1243, 1248.

### B. *Judicial Deterrence of Agency Rulemaking.*

Judges and academics long ago reached rare consensus on the desirability of agency policymaking through the process of informal rulemaking.<sup>45</sup> Justices Harlan and Douglas attempted to convince a majority of their colleagues to compel agencies to make policy decisions exclusively through the rulemaking process.<sup>46</sup> The Supreme Court wisely abandoned that effort in recognition that it is impossible for agencies to make *all* policy decisions generically in advance, and that agencies are best positioned to determine the circumstances in which the many advantages of rulemaking must be sacrificed for the flexibility of ad hoc policymaking through adjudication.<sup>47</sup>

Still, courts consistently recognize the advantages of rulemaking and frequently strive to encourage agencies to make policy primarily through the rulemaking process. Many of the landmark decisions in administrative law are explicable in part by reference to the nearly unanimous judicial preference for policymaking through rulemaking.<sup>48</sup> Judges and scholars have identified eight significant advantages inherent in the rulemaking process as a means of making policy decisions.<sup>49</sup>

Rulemaking yields higher-quality policy decisions than adjudication because it invites broad participation in the policymaking process by all affected entities and groups, and because it encourages the agency to focus on the broad effects of its policy rather than the often idiosyncratic adjudicative facts of a specific dispute. Rulemaking enhances efficiency in three ways. It avoids the needless cost and delay of finding legislative facts through trial-type procedures; it eliminates the need to relitigate policy issues in the context of disputes with no material differences in adjudicative facts; and, it yields much clearer "rules" than can be extracted from a decision resolving a specific dispute. Rulemaking also provides greater fairness in three ways. It provides affected parties with clearer notice of what conduct is permissible and impermissible; it avoids the widely disparate temporal impact of agency policy decisions made

45. See generally 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.38 (2d ed. 1978); J. MASHAW & P. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 273-316, 385-413 (2d ed. 1985); R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 6.4.1 (1985); Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 *YALE L.J.* 571 (1970); Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78 *HARV. L. REV.* 921 (1965).

46. See, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777-78 (1969) (Douglas, J., dissenting); *id.* at 781-82 (Harlan, J., dissenting); *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 376-77 (1965) (Harlan, J., dissenting).

47. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974); see also *SEC v. Chenery Corp.*, 332 U.S. 194, 199-204 (1947).

48. See R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 45, §§ 6.4.1a, 6.4.1c, 6.4.7.

49. See *supra* note 45 and sources cited therein.

and implemented through ad hoc adjudication; and, it allows all potentially affected segments of the public to participate in the process of determining the rules that will govern their conduct and affect their lives.

Notwithstanding the near-universal recognition that rulemaking is a superior vehicle for agency policymaking, the courts inadvertently have created several powerful deterrents to the use of that vehicle over the last twenty years. This problem is not unique to the D.C. Circuit; all circuits, and even the Supreme Court, have contributed to the problem in some measure.<sup>50</sup> Some agencies do not even attempt to make policy through rulemaking any more.<sup>51</sup> When they do, the process of promulgating a rule that is likely to be affirmed by a reviewing court now approaches a decade in many cases.<sup>52</sup>

The Administrative Procedure Act (APA) requires a court to affirm an agency rule unless it is arbitrary and capricious.<sup>53</sup> A court determines whether an agency rule satisfies that standard by evaluating the "concise general" statement of basis and purpose that must accompany the rule.<sup>54</sup> Over the past twenty years, the appellate courts have applied the arbitrary and capricious test to agency rulemaking in a way that has replaced the statutory adjectives "concise" and "general" with the judicial adjectives "encyclopedic" and "detailed."<sup>55</sup>

To avoid reversal and remand of a rule, an agency must consider explicitly the consistency of its rule with each of the many inherently inconsistent goals Congress typically requires the agency to pursue.<sup>56</sup> The agency also must consider explicitly the issues and arguments raised in comments submitted by potentially affected members of the public.<sup>57</sup> In the case of a rulemaking to resolve a major policy issue, those comments typically encompass tens of thousands of pages, include numerous studies commissioned by interested parties, and raise hundreds of issues.<sup>58</sup> In order to avoid reversal and remand, the agency's discussion

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50. See, e.g., *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 40-44 (1983) (reviewing court should take "hard look" at agency reasoning process); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 642-46 (1980) (OSHA must make threshold finding that toxic substance poses significant risk before it can regulate substance).

51. Mashaw & Harfst, *supra* note 3, at 263-68, 309-12.

52. *Id.* at 284-89.

53. 5 U.S.C. § 706(2)(A) (1982).

54. 5 U.S.C. § 553(c) (1982).

55. See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968); see also Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 393 (1986); Wald, *supra* note 22.

56. Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1186-88 (1981).

57. *Id.* at 1190-92.

58. See Breyer, *supra* note 55, at 393; see also Costle, *Brave New Chemical: The Future Regulatory History of Phlogiston*, 33 ADMIN. L. REV. 195, 199 (1981).

must demonstrate that it has "given full consideration" to each issue<sup>59</sup> and that it has balanced "objectively" each decisional factor.<sup>60</sup>

Professors Mashaw and Harfst's study of rulemaking by the National Highway Traffic Safety Administration (NHTSA) illustrates both the extreme scope of the obligations imposed on agency rulemaking and the effects of those obligations.<sup>61</sup> In 1966, Congress enacted a statute that required NHTSA to promulgate rules that enhance automobile passenger safety.<sup>62</sup> In 1971, NHTSA promulgated its most important rule by far under the statute, a rule requiring installation of passive restraints on all new motor vehicles. In 1972, the Sixth Circuit reversed and remanded that rule in *Chrysler Corp. v. Department of Transportation*.<sup>63</sup> The court based its reversal on its conclusion that the rule did not meet the statutory requirement that it specify "objective performance criteria" because NHTSA's criteria for test dummies were incomplete.<sup>64</sup>

Reviewing courts often say that an agency is required to address only "significant" or "important" issues in its statement of basis and purpose accompanying a rule.<sup>65</sup> *Chrysler* illustrates, however, that any issue can be considered so significant that failure to address it "adequately" and "objectively" will yield judicial reversal and remand of a rule. The "dummy criteria" issue on which the *Chrysler* court predicated its reversal was considered trivial to the NHTSA proceeding—until the court issued its decision.<sup>66</sup> Considered in the typical context of tens of thousands of comments and studies in which well-financed parties hostile to the agency's proposed policy raise hundreds of issues, the *Chrysler* opinion, read together with analogous opinions of other circuits,<sup>67</sup> sends agencies a clear message. In order to survive judicial review, an agency's "concise general" statement of basis and purpose must deal comprehensively and in detail with each issue raised in comments, no matter how trivial that issue appears to the agency.

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59. *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 612 (2d Cir. 1965), *cert. denied*, 394 U.S. 941 (1966).

60. *Mobil Oil Co. v. Department of Energy*, 610 F.2d 796, 801 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980).

61. Mashaw & Harfst, *supra* note 3.

62. 15 U.S.C. §§ 1381-1431 (1982).

63. 472 F.2d 659 (6th Cir. 1972).

64. Mashaw & Harfst, *supra* note 3, at 282-83.

65. See Breyer, *supra* note 55, at 393.

66. Mashaw & Harfst, *supra* note 3, at 283.

67. See, e.g., *PACCAR, Inc. v. NHTSA*, 573 F.2d 632 (9th Cir. 1978), *cert. denied*, 439 U.S. 862 (1979); *National Tire Dealers & Retreaders Ass'n v. Brinegar*, 491 F.2d 31 (D.C. Cir. 1974); *H&H Tire Co. v. Department of Transp.*, 471 F.2d 350 (7th Cir. 1972); *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965).

NHTSA understood and acted upon that message. The agency required seven years from the date of the remand in *Chrysler* to devise a new passive restraint policy that would survive judicial review.<sup>68</sup> Moreover, NHTSA has abandoned almost completely its efforts to establish policy through rulemaking; it opts instead to use the ad hoc approach of recalling vehicles for "defects," because courts are more tolerant of agency attempts to make policy in the context of specific cases.<sup>69</sup> Other agencies have had similar experiences, with the same result—systematic policymaking through rulemaking is being replaced either by policy paralysis or by ad hoc policymaking through adjudication.<sup>70</sup>

Courts also have diminished agency interest in systematic policymaking by imposing requirements that agencies "find" unfindable facts and support those findings with unattainable evidence. The D.C. Circuit's opinion in *International Ladies Garment Workers' Union v. Donovan*<sup>71</sup> is one of many illustrations. The Department of Labor (DOL) promulgated a rule that permitted employees subject to the minimum wage law to perform some functions at home.<sup>72</sup> The International Ladies Garment Workers' Union (ILGWU) claimed in comments that DOL would not be able to enforce the minimum wage law in the homework context.<sup>73</sup> DOL responded by referring to two studies that reached a contrary conclusion and by expressing its own opinion, as the agency charged with responsibility to enforce the statute, that it could enforce the minimum wage law in the homework context.<sup>74</sup> The court reversed the rule on the basis that DOL's finding of enforceability was not supported by substantial evidence.<sup>75</sup> Yet, it is difficult to conceive of any more persuasive evidence the agency could amass with respect to a purely predictive judgment like the enforceability of a new policy.

The members of the *ILGWU* panel, like many appellate judges, seem not to realize that the bulk of agency policymaking consists of risk management under conditions of uncertainty. Very few government policies can be supported by reference to clear, objective factual predicates, because many of the critical facts are unknown and unknowable at the time an agency must make a policy decision. Moreover, as Judge Breyer has demonstrated, there is no such thing as not making a policy decision,

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68. Mashaw & Harfst, *supra* note 3, at 295.

69. *Id.* at 299-302.

70. *Id.* at 276-302; T. MCGARITY & S. SHAPIRO, *supra* note 3; S. MELNICK, *supra* note 3.

71. 722 F.2d 795 (D.C. Cir. 1983).

72. *Id.* at 799.

73. *Id.* at 819-20.

74. *Id.* at 818-19, 825.

75. *Id.* at 825.

or even deferring a policy decision.<sup>76</sup> When an agency declines to make a decision in favor of one policy, or a court reverses an agency decision to adopt a particular policy, the agency or the court necessarily is adopting an alternative policy. Thus, most policy decisions must be based on highly imperfect data.

The D.C. Circuit has interpreted a 1987 Supreme Court decision in a manner that deals an additional powerful blow to agency rulemaking. In its much-cited 1984 opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>77</sup> the Supreme Court held that a reviewing court must defer to an agency's interpretation of an ambiguous provision of a statute that the agency is required to implement. In *Union of Concerned Scientists v. Nuclear Regulatory Commission*,<sup>78</sup> a majority of a panel of the D.C. Circuit interpreted the Supreme Court's 1987 decision in *Immigration & Naturalization Service v. Cardoza-Fonseca*<sup>79</sup> as limiting the scope of the *Chevron* doctrine to agency adjudicatory proceedings.

*Cardoza-Fonseca* involved interpretation of the statutory term "well founded fear of persecution." In applying the term to *Cardoza-Fonseca*, INS interpreted it to require an alien to prove that she was "more likely than not" to be persecuted if she were returned to her country of origin.<sup>80</sup> Six Justices voted to reverse the agency's decision to require *Cardoza-Fonseca* to return to Nicaragua based on their conclusion that the agency's interpretation of its statute was inconsistent with "the plain language" of the statute.<sup>81</sup> The opinion for a five-Justice majority then proceeded in dicta to discuss the applicability of the *Chevron* test. The majority stated that the deference to be accorded an agency's interpretation of its statute under *Chevron* is limited to cases in which the agency gives "concrete meaning" to a statutory term "through a process of case-by-case adjudication."<sup>82</sup>

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76. Breyer, Vermont Yankee and the Court's Role in the Nuclear Energy Controversy, 91 HARV. L. REV. 1804 (1978).

77. 467 U.S. 837 (1984).

78. 824 F.2d 108, 113 (D.C. Cir. 1987). For additional evidence of appellate court confusion concerning the scope and meaning of *Chevron*, see *NLRB v. FLRA*, 834 F.2d 191 (D.C. Cir. 1987).

79. 107 S. Ct. 1207 (1987).

80. *Id.* at 1210.

81. *Id.* at 1213 n.12, 1223, 1224.

82. *Id.* at 1221. The Court addressed the question of the scope and interpretation of *Chevron* again in *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413 (1987). The opinion for the entire Court affirms an agency interpretation of a statutory provision, citing both *Chevron* and *Cardoza-Fonseca*. In a brief concurring opinion, four Justices "write separately only to note that [the Court's] decision illustrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron*." *Id.* at 426 (Rehnquist, C.J. & White, O'Connor & Scalia, JJ., concurring). The concurring opinion continues by characterizing the D.C. Circuit opinion in *Union of Concerned Scientists* as "mistaken." *Id.*

It seems unlikely that the majority in *Cardoza-Fonseca* intended to limit *Chevron* deference to agency statutory interpretations adopted in the context of adjudication. To the contrary, given the context in which the statement was made, the majority's reference to *Chevron* probably was intended to rebuke the agency for unnecessarily adopting a broad, abstract (and erroneous) interpretation of a statutory provision in the context of adjudicating a specific dispute. The passage discussing *Chevron* was totally superfluous dicta, since the majority held the agency's interpretation inconsistent with the plain meaning of the statutory language. Moreover, it seems bizarre to say that *Cardoza-Fonseca* limits *Chevron* to cases in which agencies apply statutory language to specific facts, since *Chevron* was not such a case and *Cardoza-Fonseca* was. Nevertheless, the D.C. Circuit cited *Cardoza-Fonseca* for this proposition in *Union of Concerned Scientists*.<sup>83</sup>

If *Cardoza-Fonseca* actually stands for the proposition that an agency's interpretation of an ambiguous provision in its statute is entitled to deference when the agency applies the provision to specific facts but not when the agency interprets the same provision in a rulemaking, the courts have added a powerful new deterrent to agency policymaking through rulemaking. Appellate courts already had created significant impediments to agency rulemaking by subjecting the agency factfinding and reasoning process to much more rigorous review in the context of rulemaking than in the context of ad hoc adjudication. If the agency is now entitled to deference in statutory interpretation only when it makes policy through adjudication and not when it makes policy through rulemaking, as the D.C. Circuit's interpretation of the *Cardoza-Fonseca* dicta suggests, it is hard to imagine why any agency administrator would choose rulemaking over adjudication as a vehicle for making policy. When the lottery effect of potential judicial review of agency policy decisions by the activist and politically polarized D.C. Circuit is combined with the extraordinarily high cost and strategic disadvantages of rulemaking created by decisions like *Chrysler*, *ILGWU* and *Union of Concerned Scientists*, rulemaking as a vehicle for making policy decisions may soon be relegated to a chapter in a legal history book.

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*Food & Commercial Workers* is likely to increase the existing confusion and disagreement in the lower courts concerning the scope and meaning of *Chevron*. Judges who favor the *Chevron* approach will interpret the concurring opinion as explicit Supreme Court disapproval of *Union of Concerned Scientists*, since there is nothing in the opinion of the entire Court inconsistent with the explicit statement in the concurring opinion. Judges who want to narrow the scope of *Chevron* will interpret *Food & Commercial Workers* as an indication that only four Justices interpret *Chevron* broadly, since the only clear statement to that effect is in the concurring opinion. The Court obviously must revisit this issue in the near future.

83. *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 113 (D.C. Cir. 1987).

## II. SOLUTIONS TO THE PROBLEM

There is a rich and growing literature that supports the proposition that agencies enjoy significant comparative advantages over other institutions of government as sources of policy decisions. Jerry Mashaw concludes that "administrators should make political decisions" principally on grounds of constitutional legitimacy and political accountability.<sup>84</sup> Conferring policymaking discretion on agencies allows presidents and administrations to respond to voter preferences.<sup>85</sup> This, in turn, permits policymaking to take place in accordance with majoritarian principles, avoiding the high transaction cost of enacting specific legislation in Congress, which confers "enormous advantage" on the proponents of the status quo.<sup>86</sup> This constitutional and political advantage is particularly obvious when the comparison is between agencies and courts.<sup>87</sup> As the Supreme Court recognized in 1984, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."<sup>88</sup>

Judge Breyer reaches the same conclusion as Mashaw through analysis of a different set of factors.<sup>89</sup> He urges courts to defer to agency policy decisions for four reasons attributable to other characteristics of judicial and administrative bodies. No judge can understand the complicated issues raised by an agency policy decision based on the only source of data available to her on review—the record of the proceeding.<sup>90</sup> Empirical data on judicial review of agency policymaking demonstrates that the effect of review is not beneficial; rather, the effect is random at best.<sup>91</sup> Courts have little understanding of the difficulty of the process of agency data gathering and policymaking.<sup>92</sup> As a result, courts impose unrealistic demands on agencies and thereby create policy paralysis.<sup>93</sup> Tom McGarity emphasizes the last two points in his careful study of agency

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84. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 82, 93-99 (1985).

85. *Id.* at 95-96.

86. *Id.* at 98. For an excellent discussion of the difficulty of enacting or amending a statute, see generally G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). See also Pierce, *Institutional Aspects of Tort Reform*, 73 CALIF. L. REV. 917 (1985).

87. See Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 504-13 (1985); see also Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986). See generally Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984).

88. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

89. Breyer, *supra* note 55, at 382-94.

90. *Id.* at 389-90.

91. *Id.* at 391.

92. *Id.* at 388-89.

93. *Id.* at 391-94.

policymaking.<sup>94</sup> He describes a process in which agency decisionmakers inevitably are "awash in a sea of uncertainties."<sup>95</sup>

Peter Strauss arrives at the same destination as Mashaw, Breyer and McGarity through yet a third route. He focuses on the managerial implications of appellate-court review of agency decisions.<sup>96</sup> He concludes that judges should defer to agencies with respect to many issues, specifically including agency interpretations of indeterminate statutory language, for three related reasons.<sup>97</sup> First, agencies frequently have the obligation to create and implement a coherent, integrated program to govern a complicated and technically detailed area of regulation.<sup>98</sup> Courts have no such obligation and have little understanding of the integrated whole the agency must attempt to create. A single decision by a reviewing court reversing one element of an agency's regulatory scheme can force the agency to modify its entire integrated approach. Second, circuit courts are likely to adopt inconsistent interpretations of indeterminate statutory language, thereby rendering it impossible for an agency to implement *any* coherent national policy.<sup>99</sup> Third, the Supreme Court has very limited practical ability to eliminate intercircuit conflicts.<sup>100</sup> It can visit any particular corner of the legal environment only about once every five years.<sup>101</sup> As a result, the Court can fulfill its obligation to obtain national uniformity in the administration of national statutes only by instructing circuit courts to defer to agency interpretations of indeterminate congressional instructions in agency organic acts.

The D.C. Circuit's increasing political polarity and inability to resolve intracircuit conflicts through en banc proceedings<sup>102</sup> suggests that Strauss understated the magnitude of the managerial problem presented by permitting courts to second-guess agency interpretations of indeterminate statutory language. Even within the single circuit that dominates judicial review of agency action, different panels give a single agency inconsistent instructions on how to do its job.<sup>103</sup> Strauss's allusion to re-

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94. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243 (1987).

95. *Id.* at 1290.

96. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

97. *Id.* at 1118-29.

98. *Id.* at 1126-29.

99. *Id.* at 1120-23.

100. *Id.* at 1106-07.

101. *Id.* at 1103.

102. See *supra* text accompanying notes 16-44.

103. For instance, two panels of the D.C. Circuit have reached totally inconsistent conclusions with respect to the Federal Energy Regulatory Commission's power and duty to modify contracts applicable to statutorily deregulated natural gas. Compare *Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1139 n.2 (D.C. Cir. 1987) with *Associated Gas Distribs. v. FERC*, 824 F.2d 981,



consistently follow those precedents to reduce the problem of judicial paralysis of government policymaking.<sup>106</sup>

#### A. *Agency Policy Decisions on Remand.*

The D.C. Circuit is the source of a legal doctrine that has the potential to reduce the deterrent effect of the exceedingly demanding standards courts apply in reviewing agency policy decisions made through rulemaking. Traditionally, agencies and courts have drawn a direct analogy between appellate court reversal of an agency action and appellate court reversal of a trial court action. In each case, the legal status reverts back to the status quo ante unless and until the agency or trial court conducts a new proceeding on remand. The analogy works reasonably well in the context of classic agency adjudications. Consider, for instance, a judicial decision reversing a Social Security Administration (SSA) order because the SSA based its decision to deny benefits to an individual on inadequate findings or reasoning. The agency has the discretion on remand to attempt to correct the error on which reversal was predicated by conducting a supplemental hearing to adduce additional evidence and by changing the basis for its original action. As a result, the proceeding reaches a relatively prompt conclusion.

The analogy breaks down, however, in the context of judicial reversal of an agency policy decision made through rulemaking. A judicial determination that an agency erred in the process of adopting a new policy does not necessarily mean that the status quo ante—the agency's old policy—is superior to the agency's new policy. Frequently, the basis for reversal of the new policy is remote from the central purpose and basis of the new policy. Yet, judicial review of the agency rulemaking process is so demanding that the process of policymaking on remand from a court decision reversing an agency rule usually requires many years.

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view must be relaxed accordingly); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-36 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976) (characterizing standard of review for cases involving agency decisions as "highly deferential"); *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 474-75 (D.C. Cir. 1974) (amorphous nature of policy choices justifies more deferential standard of review).

106. Unfortunately, appellate courts are not alone in their inconsistent approach to review of agency policy decisions. The Supreme Court occasionally sends signals that reviewing courts should engage in rigorous review of agency policy decisions. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983). Judge Breyer criticizes *State Farm* in detail. Breyer, *supra* note 55, at 384-94. The D.C. Circuit relies primarily on *State Farm* to support the continued legitimacy of its "hard look" approach to agency policy decisions. See Wald, *supra* note 22. In my view, the Supreme Court decided *State Farm* correctly and accorded the agency's policy decision appropriate deference. The unfortunate effect of *State Farm* in encouraging appellate courts to assume an activist posture in reviewing agency policy decisions is attributable to a few passages of dicta in which the Court referred to "hard look" review with apparent approval. See R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 45, § 7.7, at 394-400.

Mashaw and Harfst's account of the NHTSA's attempt to establish a policy concerning installation of passive restraints to enhance motor vehicle passenger safety, discussed above, illustrates the problem.<sup>107</sup> The reviewing court in *Chrysler* obviously did not reach a conclusion that on the merits the nation was better off with the status quo—no required passive restraints—than with the agency's policy. Its basis for reversal was peripheral to that critical issue. Yet, that was the effect of the court action for many years. It took NHTSA seven years from the 1972 judicial reversal of its passive restraint rule to reissue the rule in a form ultimately affirmed by a court under the exacting standards established by the Sixth Circuit in *Chrysler*.<sup>108</sup>

In 1987, the D.C. Circuit took the first step toward developing a pragmatic approach to the issue of agency discretion to make policy on an interim basis after a court has reversed and remanded a major rule. In 1983, the Federal Energy Regulatory Commission (FERC) promulgated a rule that permitted electric utilities to include up to fifty percent of their investment in construction work in progress (CWIP) in their rate base if they could show that this rate treatment was necessary to alleviate financial problems encountered in constructing a new plant. In *Mid-Tex Electric Cooperative v. Federal Energy Regulatory Commission*<sup>109</sup> (*Mid-Tex I*) the court reversed and remanded the CWIP rule. The court held that FERC had not adequately considered allegations that the rule might have anticompetitive effects in some circumstances.

On remand, FERC took two actions. It issued a new notice of proposed rulemaking in which it solicited comments on the alleged anticompetitive effects of its rule and on ways in which it could avoid those effects in a revised permanent rule. Simultaneously, it issued an interim rule that repromulgated, with a few modifications, the rule that had been reversed and remanded. The modifications consisted of assurances that the agency would attempt to provide relief to any customer that suffered anticompetitive effects as a result of application of the rule in an individual case.

The parties who obtained judicial reversal of the original rule challenged the repromulgated and slightly modified interim rule on two grounds. They argued that it was substantively invalid because it was inconsistent with the court's mandate reversing the original rule. They also argued that the interim rule was procedurally invalid because it was issued without notice and comment. In *Mid-Tex Electric Cooperative v.*

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107. See *supra* notes 61-70 and accompanying text.

108. See Mashaw & Harfst, *supra* note 3, at 281-95 (describing *Chrysler* as a "managerial and political disaster" that continues to "haunt" the NHTSA's regulatory activity).

109. 773 F.2d 327, 362 (D.C. Cir. 1985).

*Federal Energy Regulatory Commission*<sup>110</sup> (*Mid-Tex II*) the court rejected both challenges and affirmed the interim rule.

On the substantive issue, the court noted that its prior opinion did not address the issue of FERC's authority to repropulgate the remanded rule on an interim basis.<sup>111</sup> Since the prior court opinion affirmed the rationale stated as the basis for the rule, and since the agency took steps "reasonably calculated to protect customers from the anticompetitive effects" of the rule on an interim basis, the court held the repropulgated and slightly modified interim rule consistent with the letter and spirit of its prior decision reversing the permanent version of the rule.<sup>112</sup>

On the procedural issue, the court held that the agency had established "good cause" to promulgate the interim rule without notice and comment for three reasons. First, the rule was an interim measure adopted as a step in the continuing process of establishing a permanent policy.<sup>113</sup> Second, even though the original rule was reversed, its fundamental approach was approved "in substantial measure."<sup>114</sup> Third, the court affirmed FERC's finding that continuing its pre-rulemaking policy during the lengthy period required to formulate a permanent policy on remand would be "contrary to the public interest."<sup>115</sup>

The D.C. Circuit's opinion in *Mid-Tex II* represents a promising first step toward reducing the multi-year policy paralysis that has resulted from judicial reversal and remand of an agency rule. Under *Mid-Tex II*, an agency can repropulgate promptly a rule that was reversed and remanded if (1) the major elements of the rule were affirmed; (2) the repropulgated rule is adopted only as an interim measure in an ongoing process to establish a permanent rule; and (3) the interim rule includes features that represent a good faith effort to ameliorate on an interim basis the problems created by the original rule that caused the court to reverse that rule.

*Mid-Tex II* suggests that reviewing courts are becoming more sensitive to the policy paralysis that frequently results from court decisions reversing agency rules on the basis that the agency failed to consider adequately one of the hundreds of issues raised in a rulemaking proceeding. The *Mid-Tex* approach will reduce the scope of that problem in an important context—when the basis for judicial reversal leaves intact the rationale that lies at the core of the agency's policy and when the agency

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110. 822 F.2d 1123 (D.C. Cir. 1987).

111. *Id.* at 1130.

112. *Id.* at 1130-31.

113. *Id.* at 1132.

114. *Id.* at 1133.

115. *Id.* at 1133-34.

is enthusiastic to implement its new policy. In other important contexts, however, *Mid-Tex* has no effect on the problem.<sup>116</sup> The long-term solution to the problem of policy paralysis attributable to frequent judicial reversal of agency rules lies in more realistic judicial attitudes toward agency policymaking in areas of scientific complexity and uncertainty.

### B. *Duty to Consider Alternative Policies.*

Few judges understand the process of agency policymaking sufficiently to enable them to empathize with the agencies whose decisions they must review. Judges search for "findings" of fact, comprehensive analysis of data and thorough consideration of multiple alternatives. The nature of the tasks assigned agencies and the resources made available to perform those tasks do not permit agencies to meet such exacting standards. Judge Breyer helps to put the agency's plight in perspective with his graphic description of agency attempts to comply with the judicial command to consider alternatives and to consider criticisms raised in comments:

The reason agencies do not explore all arguments or consider all alternatives is one of practical limits of time and resources. Yet, to have to explain and to prove all this to a reviewing court risks imposing much of the very burden that not considering alternatives aims to escape. Of course, the reviewing courts may respond that only *important* alternatives and arguments must be considered. But, what counts as "important"? District courts often find that parties, having barely mentioned a legal point at the trial level, suddenly make it the heart of their case on appeal, emphasizing its (sudden but) supreme importance. Appellate courts typically consider such arguments as long as they have been at least mentioned in the district court. But district courts, unlike agencies dealing with policy change, do not face, say, 10,000 comments challenging different aspects of complex policies. And, when appellate courts "answer" an argument they write a few words or paragraphs, perhaps citing a case or two. A satisfactory answer in the agency context may mean factfinding, empirical research, detailed investigation. Accordingly, one result of strict judicial review of agency policy decisions is a strong conservative pressure in favor of the status quo.<sup>117</sup>

The precedent that addresses Breyer's well-supported concerns most directly and effectively is the D.C. Circuit's opinion in *Center for Auto Safety v. Peck*.<sup>118</sup> The court was called upon to review NHTSA's decision to reduce the minimum performance standard for bumpers from 5.0

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116. Consider, for instance, the situation when an agency has a legal duty to establish a policy through rulemaking, but it is not very enthusiastic about doing so. See, e.g., *Public Citizen Health Research Group v. Brock*, 823 F.2d 626 (D.C. Cir. 1987).

117. Breyer, *supra* note 55, at 393.

118. 751 F.2d 1336 (D.C. Cir. 1985).

to 2.5 miles per hour. The Center for Auto Safety challenged that decision on a wide variety of grounds, including inadequate consideration of alternatives and inadequate data to support the decision. The court rejected each basis for challenge. It began by emphasizing that judicial deference is particularly appropriate "when the agency is called upon to weigh the costs and benefits of alternative policies, since '[s]uch cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency.'"<sup>119</sup> It declined to reverse the agency for relying on one set of data while refusing to rely on conflicting data, noting the Supreme Court's admonition that "it is within the agency's discretion to pass upon the generalizability of . . . field studies."<sup>120</sup> It also declined to reverse the agency's decision to rely on its judgment to resolve a major gap in available data rather than to conduct expensive and time-consuming studies in an attempt to determine the magnitude of "unknowable risks of injury."<sup>121</sup> Finally, the court affirmed the agency's decision to evaluate only two of the infinite number of theoretically available alternatives to the policy decision it made.<sup>122</sup> It found the agency's consideration of alternatives adequate notwithstanding a patent error in part of the agency's analysis and reasoning: "Considering the record as a whole, we cannot say that this single error on an alternative point—blatant though it may be—renders the entire rulemaking arbitrary or capricious."<sup>123</sup>

*Center for Auto Safety* places an agency's duty to consider alternatives and to consider contrary arguments in realistic perspective. An agency cannot possibly consider more than a very few alternatives. Its analysis and reasoning always will contain flaws. The data available to it to analyze alternatives invariably will leave major gaps and uncertainties. Reviewing courts must tolerate a level of performance well short of comprehensive analysis of alternatives.

### C. Agency Policy Decisions as "Findings of Fact."

Tom McGarity's careful study of agency policymaking highlights other critical features of the process that reviewing courts must understand. Because agencies regularly address "questions plagued by multiple uncertainties and a scarcity of information, . . . [a] bright lawyer and

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119. *Id.* at 1342 (quoting *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C. Cir. 1983)).

120. *Id.* at 1346 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 53 (1983)).

121. *Id.* at 1349.

122. *Id.* at 1365.

123. *Id.* at 1366.

two or three technical aides can make almost any regulatory analysis document appear to be irrational."<sup>124</sup> Precedents abound that support the need for judicial deference to agency policymaking in conditions of uncertainty.<sup>125</sup>

In *Federal Power Commission v. Florida Power & Light Co.*,<sup>126</sup> the Supreme Court was presented with a challenge to an agency "finding" that electricity flowed in a particular way. The company argued that the agency had not supported the finding with substantial evidence because it had accepted the theory of one expert and rejected inconsistent theories presented by other experts without evidence that established which theory was "correct." The court of appeals reversed the agency on the basis that "expert opinion about the nature of reality . . . is not fact."<sup>127</sup> The Supreme Court reversed the court of appeals and affirmed the agency:

[W]e hold that well-reasoned expert testimony . . . may in and of itself be "substantial evidence" when first-hand evidence on the question . . . is unavailable. This proposition has been so long accepted . . . that we do not consider it fairly in dispute.<sup>128</sup>

Yet, appellate courts reject this "long accepted" principle at least as often as they accept it.

The D.C. Circuit's decision in *Electricity Consumers Resource Council v. Federal Energy Regulatory Commission*<sup>129</sup> (*Elcon*) illustrates the tendency of appellate courts to ignore what the Supreme Court characterizes as a "long accepted" principle. FERC adopted marginal cost principles as its basis for calculating wholesale electric rates. It relied on expert testimony to support its finding that marginal cost pricing would enhance economic efficiency.<sup>130</sup> The court reversed the agency based in part on a lack of substantial evidence to support this finding: "[M]ere reliance on an economic theory cannot substitute for substantial record evidence."<sup>131</sup> Another panel of the D.C. Circuit has analogized this part

124. McGarity, *supra* note 94, at 1329.

125. See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453 (1972); *Center for Auto Safety v. Peck*, 751 F.2d 1336 (D.C. Cir. 1985); *National Cable Television Ass'n, Inc. v. Copyright Royalty Tribunal*, 724 F.2d 176 (D.C. Cir. 1983); *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); *Industrial Union Dep't v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974).

126. 404 U.S. 453 (1972).

127. *Id.* at 464.

128. *Id.* at 464-66.

129. 747 F.2d 1511 (D.C. Cir. 1984).

130. *Id.* at 1513.

131. *Id.* at 1514.

of the *Elcon* holding to a requirement that an agency "conduct experiments in order to rely on the prediction that an unsupported stone will fall."<sup>132</sup> Economists characterize marginal cost pricing as "the central policy prescription of microeconomics."<sup>133</sup>

The Supreme Court's decision in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*<sup>134</sup> provides another good illustration of powerful precedent instructing courts to defer to agency policy decisions made in conditions of uncertainty. The Nuclear Regulatory Commission (NRC) issued a rule that licensing boards should *assume* that permanent storage of nuclear waste will have no adverse effect on the environment for purposes of deciding whether to grant a license to any particular nuclear power plant.<sup>135</sup> The D.C. Circuit reversed the NRC on the basis that its *finding* of no adverse environmental effect was arbitrary and capricious.<sup>136</sup> The Supreme Court unanimously reversed the D.C. Circuit and affirmed the NRC. The Court noted that the NRC did not predicate its policy on a "finding" of no adverse environmental effect.<sup>137</sup> The NRC explicitly acknowledged the existence of uncertainty concerning the environmental effects of permanent storage of nuclear waste.<sup>138</sup> Its directive to *assume* the absence of environmental effects of permanent nuclear waste storage in plant licensing decisions was a policy decision that the risks were too uncertain to use their existence as a basis for denying a license to any particular power plant.<sup>139</sup> In affirming the agency, the Court reemphasized the "long accepted" principle that courts should defer to agency policy decisions made in conditions of uncertainty:

Resolution of these fundamental policy questions lies . . . with Congress and the agencies to which Congress has delegated authority . . .

. . . .

. . . [A] reviewing court must remember that the Commission is making predictions, within its special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a court must generally be at its most deferential.<sup>140</sup>

By following *Louisiana Power & Light* and *Baltimore Gas & Electric*, and applying the "long accepted" principle that courts must defer to reason-

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132. *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987).

133. 1 A. KAHN, *THE ECONOMICS OF REGULATION* 65 (1970).

134. 462 U.S. 87 (1983).

135. *Id.* at 89-90.

136. *See id.* at 95.

137. *Id.* at 98-99.

138. *Id.*

139. *Id.* at 101-03.

140. *Id.* at 97, 103.

able agency policy decisions, appellate courts can reduce materially their inadvertent role in creating policy paralysis. The D.C. Circuit also can use adherence to this important principle as a way of reducing the political polarity that now infects that court's decisionmaking.

D. *Agency Policy Decisions in the Form of Interpretations of Indeterminate Congressional Instruction.*

Appellate courts also must recognize that a high proportion of agency interpretations of statutory language actually are policy decisions due deference by the unelected judiciary. The Supreme Court recognized this important principle in its oft-cited opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>141</sup>

The issue in *Chevron* was the proper interpretation of the term "source," as that term is used in the 1977 Amendments to the Clean Air Act. That Act requires any company that proposes to create a major new source of air pollutants to go through an elaborate "new source review" process.<sup>142</sup> The Environmental Protection Agency (EPA) originally interpreted "source" in a way that subjected any significant addition to or modification of a plant, such as addition of a boiler, to the new source review process, as long as the addition or modification produced emissions of pollutants above a relatively low threshold. In 1981, the EPA changed its interpretation of "source" to refer to an entire plant. Under this much broader definition, a company was required to go through the new source review process only if the net effect of all additions or changes proposed at a plant would be an increase in emissions above the specified threshold. Thus, a company could avoid the new source review process by simultaneously increasing emissions through an addition to a plant and reducing emissions by a corresponding amount through other modifications to the same plant. This change in statutory interpretation was part of the EPA's movement to the "bubble concept," which is intended to give company management greater control over specific decisions affecting air quality as long as the total impact of a plant on air quality is not affected negatively by those decisions.

The Natural Resources Defense Council (NRDC) appealed the EPA's new interpretation of "source." The D.C. Circuit recognized that the language and legislative history of the statute did not indicate how "source" was to be interpreted.<sup>143</sup> The court itself had adopted different

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141. 467 U.S. 837 (1984).

142. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

143. *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718, 723-24 (D.C. Cir. 1982), *rev'd*, 467 U.S. 837 (1984).

interpretations of the term in different contexts in its prior opinions.<sup>144</sup> The D.C. Circuit reversed the EPA's interpretation in the present context, however, because the EPA did not submit any studies to rebut the NRDC's contention that the EPA's new interpretation of source would produce less improvement in air quality than its old interpretation.<sup>145</sup> The court held that an agency cannot change its policy without documenting the effect of such a change. The court seemed untroubled by the fact that the EPA's old interpretation, and thus the policy underlying that interpretation, also was not supported by studies demonstrating the effect of various statutory interpretations. Indeed, there was no evidence available concerning the air quality impact of the two competing interpretations, and experts disagree concerning the likely effect of each.

The Supreme Court unanimously reversed the D.C. Circuit and affirmed the EPA's new interpretation of "source" based on the following reasoning. The language of the statute and its legislative history indicated that Congress never addressed the issue of whether "source" was to be interpreted to mean each part of a plant or an entire plant.<sup>146</sup> The EPA's new interpretation furthered one of the two principal goals of the 1977 amendment—permitting economic growth.<sup>147</sup> There was no evidence available concerning the impact of the new interpretation on Congress's other major goal—improving air quality.<sup>148</sup> Hence, the EPA's choice of interpretations reflected a pure policy decision in an area in which Congress delegated the EPA power to make such policy decisions.

The Court used strong language in rebuking the D.C. Circuit for the expansive role it assumed in reviewing the EPA's policy decision. In the Court's words, the D.C. Circuit "invented the nature of its role."<sup>149</sup> "[F]ederal judges—who have no constituency—have a duty to respect policy choices made by those who do."<sup>150</sup> The Court noted that judges are neither experts in the field nor members of "either political branch of government."<sup>151</sup> By contrast, agencies are politically accountable experts to whom Congress has delegated a policymaking role.<sup>152</sup> The Court concluded with this unequivocal statement: "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle

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144. *Alabama Power Co. v. Costle*, 636 F.2d 323, 373 (D.C. Cir. 1979).

145. 685 F.2d at 720, 727-281

146. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864 (1984).

147. *Id.* at 866.

148. *Id.*

149. *Id.* at 845.

150. *Id.* at 866.

151. *Id.* at 865.

152. *Id.* at 865-66.

between competing views of the public interest are not judicial ones."<sup>153</sup>

Some commentators have misunderstood the Court's message in *Chevron*. They characterize it as a case in which the Court inexplicably departed from the fundamental principle that judges should decide issues of law.<sup>154</sup> This characterization is based on a serious misunderstanding of the legislative process.<sup>155</sup>

Any time Congress enacts a statute that creates a new regulatory regime, it creates the need for some governmental institution to resolve hundreds of policy issues. Congress resolves some of those issues itself at the time it enacts the statute. When a court reviews an agency's interpretation of statutory language, its responsibility is to determine what the language means. If it finds evidence that Congress addressed the policy issue that corresponds to the interpretive issue before it, the reviewing court must confine the agency's choice of policies within the boundaries established by legislative resolution of policy issues. The court does so by reversing any agency interpretation inconsistent with congressional intent. Thus, for instance, a reviewing court should reverse the EPA's interpretation of "source" as a matter of law if it finds a statutory definition of "source" inconsistent with the EPA's interpretation or an indication in the language or legislative history of the statute that Congress considered and rejected the "bubble concept" that the EPA's interpretation of "source" would implement. In the absence of such evidence, the court fulfills its responsibility to declare what the law is by holding that the term "source" is sufficiently ambiguous to support the EPA's interpretation.

The court's task does not end at this point. It then must review the agency's interpretation of the ambiguous statutory term to see whether it is arbitrary and capricious. In performing this responsibility, however, the court is reviewing an agency's policy decision. It should adhere to the "long accepted" principle that reviewing courts should defer to agency policy decisions as long as they are "reasonable." Since the effect of the "bubble concept" on pursuit of the congressional goal of enhanced air quality is uncertain, the court should affirm the EPA's decision to adopt the "bubble concept" by holding "reasonable" the agency's interpretation of the ambiguous statutory term "source."

Consistent adherence to the principle announced in *Chevron* is a particularly important component of the solution to the twin problems of

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153. *Id.* at 866.

154. Sunstein, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 366-71 (1987); Breyer, *supra* note 55, at 372-82.

155. See Pierce, *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Pierce, *supra* note 87, at 473-81, 504.

judicial deterrence of rulemaking and political polarity on the D.C. Circuit. If judges view their responsibilities to include determining congressional intent with respect to issues Congress did not address, they will find it impossible to perform their roles in a politically neutral manner. Anyone who attempts to determine the meaning of indeterminate statutory language is bound to be greatly influenced by her personal political perspective. If judges consistently defer to agency interpretations of indeterminate congressional instructions, and confine their role to enforcing those policy decisions Congress actually has made, they are far less likely to succumb to the temptation to make disguised policy decisions based on their own political perspective.

The D.C. Circuit's holding in *Union of Concerned Scientists*<sup>156</sup> represents the worst possible approach to the issue of judicial review of agency interpretations of ambiguous statutory language. By holding that courts should defer to an agency if, but only if, its interpretation is adopted in the adjudicatory process, the D.C. Circuit simultaneously exacerbates both of the major problems that are the focus of this paper. If the judges of the D.C. Circuit feel obliged to determine congressional intent with respect to issues on which Congress has expressed no intent, they will be forced to resolve major public policy issues every time they review a major agency rulemaking. This will inevitably increase the already considerable political polarity on the D.C. Circuit. At the same time, courts will have given agency administrators the message that the only relatively safe method of administrative policymaking is through making policy decisions disguised as ad hoc resolutions of specific disputes.

### CONCLUSION

The appellate courts have made the process of policymaking by rulemaking extraordinarily expensive and time consuming by imposing unrealistic requirements on agencies. The politically polarized and judicially activist D.C. Circuit, which dominates judicial review of agency rulemaking, has added a high degree of risk to the process of policymaking through rulemaking. If these two problems persist, agencies will have to follow the lead of the NHTSA—they will cease attempting to make policy decisions in any systematic manner.

It seems apparent that the Supreme Court must play a significant role in solving these functionally related problems. It should reemphasize in a few more cases the point it has so often made in the past—reviewing courts must adhere to the “long accepted” principle that

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156. 824 F.2d 108 (D.C. Cir. 1987); see *supra* text accompanying notes 75-83.

unelected judges must defer to policy decisions made by politically accountable agencies. At bottom, however, the Supreme Court cannot solve the problem; it can only point in the right direction. Chief Judge Wald identified the only true solution in 1986:

I am afraid the only solution lies in genuine self-restraint on the part of our judges . . . .<sup>157</sup>

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157. Wald, *supra* note 1, at 34.