

A COLLEAGUE'S TRIBUTE TO JUDGE DAVID L. BAZELON,  
ON THE TWENTY-FIFTH ANNIVERSARY OF HIS APPOINTMENT

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I am probably the only judge on any federal court of appeals who can call Judge David L. Bazelon conservative. We have been members of the same court for twelve years. In that time we have often agreed on the answer to questions of law, and our agreement has generally put us both on the liberal side of the court. It is less well known, perhaps, that we have often disagreed on important matters of reasoning or remedy. And in those disagreements, Judge Bazelon has usually taken the conservative side.

For example, in 1970 a group of citizens sought to block the construction of a bridge in the District of Columbia, a bridge that was to be part of the federal interstate highway system. The District had failed to hold public hearings on that bridge, though in general such hearings are required for all interstate highway construction. The District was relying on special legislation passed by Congress to expedite construction of the bridge, and arguably to eliminate the hearing requirement. It was a close question of statutory interpretation, but I was convinced that Congress could not have meant to deprive D.C. citizens of the hearings that all other citizens were entitled to have. For me, that conclusion was buttressed by serious constitutional doubts about the power of Congress to discriminate against D.C. citizens in that way.<sup>1</sup> Judge Bazelon agreed with my reading of the statute, but he pointedly refused to comment on the constitutional question, limiting his concurrence, like a true judicial conservative, to the narrow ground for decision.<sup>2</sup>

Judge Bazelon was also much more cautious than I in dealing with the claim of some environmentalists that the pesticide DDT was too hazardous for continued general use. A pair of

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<sup>1</sup> District of Columbia Federation of Civic Ass'ns v. Volpe, 434 F.2d 436, 443 (D.C. Cir. 1970).

<sup>2</sup> *Id.* at 448 (Bazelon, C.J., concurring).

cases involving that claim came to our court in 1970. Pesticides were at the time jointly regulated by the Secretary of Health, Education, and Welfare (HEW) and the Secretary of Agriculture. Neither official had acted to prohibit the use of DDT. I sat on a panel reviewing the actions of the Secretary of HEW, and Judge Bazelon sat on a panel reviewing the actions of the Secretary of Agriculture. I concluded that the Secretary of HEW had erred, that on the evidence he had a plain duty to publish a proposed ban on DDT, and thereby begin the administrative process that might lead to its prohibition in food products.<sup>3</sup> Judge Bazelon, however, concluded only that the Secretary of Agriculture had failed to give adequate reasons for his inaction, and remanded the case for a statement of reasons.<sup>4</sup> It is true, of course, that different aspects of the regulatory scheme were involved; the cases are not necessarily inconsistent. Nevertheless, I think it fair to say that despite overwhelming evidence of an erroneous decision below, Judge Bazelon chose to deal with that case in his characteristically conservative manner.<sup>5</sup>

Perhaps one last example will bring the point home, since it comes from the area of the law in which Judge Bazelon is rightly regarded as a leader. In 1966 our court was asked to review the confinement of a senile woman in a public mental hospital. Judge Bazelon, writing for the court, concluded that under our statutes she had a right to an inquiry into the possibility that the District of Columbia might be able to provide some less restrictive form of care or supervision for her.<sup>6</sup> In remanding the case for that inquiry, he left room for the possibility that no such alternative would be available. I agreed with the remand, but I would have gone further. In a concurring opinion, I wrote that I "wish to make clear my position that, while the District of Columbia may be able to make some provision for Mrs. Lake's safety under our statute, the permissible alternatives, on the

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<sup>3</sup> *Environmental Defense Fund v. United States Dep't of HEW*, 428 F.2d 1083 (D.C. Cir. 1970).

<sup>4</sup> *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

<sup>5</sup> After the remand, Judge Bazelon eventually ordered the same relief in the Agriculture case as the relief that had initially been ordered in the HEW case; that is, he ordered the issuance of notices that would begin the administrative process that might lead to a prohibition of DDT. *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

<sup>6</sup> *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966).

record before us, do not include full-time involuntary confinement."<sup>7</sup>

I make the point about Judge Bazelon's conservatism not to criticize him, but to call attention to a little-known aspect of his career. For although he is widely regarded as a liberal activist judge, his great contribution has been to ask questions, rather than to answer them. I have often been impatient with that approach, but it has served a very important function over the years. Judge Bazelon's persistent probing and questioning has often confronted his colleagues with issues we might not otherwise have uncovered. And his cautious approach to resolving them for the court has provided a fine forum for me to express my own views in concurrence.

The questions he has asked most, of course, concern the relationship between mental illness and the law. From his landmark 1954 opinion on the insanity defense in *Durham v. United States*<sup>8</sup> to his most recent opinions, he has been consistently sensitive to the legal issues surrounding mental illness, and his opinions on that subject command widespread attention and respect. In that area, he has written more, and been more innovative, than any other judge.

His views have frequently been controversial, both within and without the court. When I first joined the Court of Appeals, it was deeply divided over an attempt to elaborate a definition of mental disease, as that term is used in the insanity defense. As a newcomer to the court, I was cast to some extent in the role of mediator. I worked individually with each of the eight other judges on the court, and ultimately we forged a resolution of the problem, to which each judge contributed.<sup>9</sup> In working on that case, line by line and word by word, I had my introduction to the problem that has occupied such a large share of David Bazelon's attention during his judicial career.

Judge Bazelon's interest in mental health matters far exceeds my own. But I want to pay tribute to the remarkable

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<sup>7</sup> *Id.* at 662 (Wright, J., concurring). In other mental health cases, too, I would have gone further than Judge Bazelon. Compare *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968) (Bazelon, C.J.), with *id.* at 978 (Wright, J., concurring); and *Williams v. Robinson*, 432 F.2d 637 (D.C. Cir. 1970) (Bazelon, C.J.), with *Jones v. Robinson*, 440 F.2d 249 (D.C. Cir. 1971) (per curiam; Wright, J., sitting on the panel).

<sup>8</sup> 214 F.2d 862 (D.C. Cir. 1954).

<sup>9</sup> *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962) (en banc).

character of that interest. For it has not served as a set of blinders that prevented him from seeing other issues. Instead, it has served as a lens that brought other issues into sharper focus. Judge Bazelon began by exploring the relationship of mental illness to crime, and came quickly to explore other sources of crime as well. He asked how complex psychiatric testimony could be developed and understood by courts and counsel, and thereby uncovered the broader problems of scientific evidence of all kinds. He questioned whether poor people could obtain adequate legal and expert assistance for the trial of psychiatric issues, and from there began to investigate the general deficiencies of legal representation for indigents.

Judge Bazelon seems never to tire of raising new questions and uncovering new problems. He has sometimes been accused of making problems for the court, but his response has always been: "I don't make problems, I just uncover problems that were already there." That is a splendid description of his work in the last twenty-five years on this court, and I applaud him for it.