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The Bazelon Opinions: No One Is Ever Neutral

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On David Lionel Bazelon, the most powerful judge in Washington below the Supreme Court and the constant focus of controversy, nobody is neutral.

Says a prominent Washington lawyer: "I think that Bazelon is a first-rate craftsman in the way he analyzes and interprets legal theories and precedents. He is not given to careless or off-the-cuff decisions."

On the other hand, this is the view of one U. S. District Court judge: "I think that Bazelon is one of the worst things that has ever happened to the administration of criminal justice in Washington. I don't even read his opinions anymore."

The attorney, a leading civil libertarian, was commenting in the context of several recent decisions from the U. S. Court of Ap-



JUDGE DAVID L. BAZELON
... a "craftsman"

peals for the District of Columbia with which he was pleased. In some of those, Chief Judge David L. Bazelon had been on the three-judge panel of the court.

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Nobody Is Neutral On Judge Bazelon

BAZELON, From A1

The judge made his remarks to a reporter just as he received a copy of an appellate decision reversing a criminal conviction because of an alleged error on his part during the trial. Bazelon was a member of the panel.

But even without the exhilaration of victory or the humiliation of reversal, their observations would be characteristic for their lack of moderation.

A debate over Bazelon's judicial philosophy and his activist role, which has gone on intermittently almost since he first took the bench here in 1949, recently started up again.

In the last three months alone, he wrote or joined in appellate decisions that:

- Held the D. C. government responsible, legally and financially, for the alleged misconduct of any police officer who might have been improperly trained or instructed.

- Reversed the conviction of a narcotics offender because the trial judge would not admit testimony on the amount of heroin or cocaine required to satisfy an addict's daily habit.

Struck down almost everything the government had done to prosecute the 12,000 people arrested here last spring during the Mayday antiwar demonstrations.

- Ended use here of the "Allen Charge" traditionally employed to end deadlocked juries back for a decision on whether a defendant is guilty of a crime.

- Ordered reconsideration of a lower court's ruling that the Atomic Energy Commission's plan for a major underground nuclear test on an Alaskan island complied with relevant laws.

and treaties.

• Directed a complete review of the plans to build the Three Sisters Bridge across the Potomac River between Georgetown and Arlington, sharply criticizing a Cabinet member and a congressman in the process.

During the same period, he also was active on a few other judicial matters.

Bazelon dissented angrily from a Court of Appeals opinion that affirmed the conviction of a juvenile whose records had been lost by the court considering the case.

To the dismay and public objections of some of his colleagues, he named a committee of the Judicial Conference of the District of Columbia to study the police and government response to the Mayday protests.

In another dissent, he accused his fellow judges of "sweeping (problems) under the rug" by deciding not to rehear a case involving the insanity defense in Washington before the full Appellate Court of nine judges.

All the while, of course, Bazelon remained a member of the committee on child development of the National Academy of Sciences and of the advisory panel on legal research of the Battelle Memorial Foundation in Seattle.

He stepped down from his term on the national advisory council of the National Institute of Mental Health, but continued as a clinical professor of the legal aspects of psychiatry at the medical school of George Washington University and in a host of other—all unpaid—outside positions.

And, as he passed his 82d birthday last month, Bazelon showed no signs of slowing down or of regretting a single action he had taken.

Critics of the "Bazelon Court," as it is inevitably called, often turn first to the apparent frequency of the chief judges' appearance in major cases.

They contend that he rigs the selection of panels to sit on cases, keeping the best and most crucial ones for himself and his liberal colleagues, then writing the most important decisions.

Nathan Paulson, clerk of the Court of Appeals, insists, however, that cases are assigned among the appellate judges on a purely

random basis, with the names of judges and the numbers of cases ceremoniously drawn from plastic bowls and then matched as each of the eight annual sittings is set up.

Statistics compiled by Paulson for fiscal 1971 also indicate that each member of the court sat on about the same number of cases, between 115 and 125, and that opinions were evenly distributed as well.

Court observers and those who have worked closely with Bazelon during his 22 years on the bench are adamant that he does nothing that any other judge could not do, finding great issues in run-of-the-mill criminal appeals.

Even at the expense of slowing down some appeals, he also has insisted on appointing a new lawyer at the appellate level who might

uncover mistakes made by the one who originally represented the defendant at trial.

Bazelon is known for being tough on the trial judges whose work he reviews.

"He simply will not be swayed by the argument that the District judge tried hard or that he is a nice guy or that the case is an old one that doesn't matter much anyway," said one apostle of Bazelon last week.

To the argument that Bazelon was never a trial judge and therefore cannot understand the inherent problems in some cases, his defenders respond that this is a good thing, which maintains balance in appellate standards.

For the past year or so, Bazelon's leadership on the Court of Appeals here—because of its unusual jurisdiction over direct appeals from federal regulatory commissions, the most powerful of the 11 in the nation—has been increasingly challenged.

Few people expect the three conservative judges named by President Nixon

to be in accord with Bazelon very often, but other, more surprising disputes have also appeared.

Judge Harold Leventhal, for example, considered a Bazelon ally from the moment he was named to the court by President Johnson in 1965, has publicly disagreed with the chief judge on a number of occasions, sometimes stating his reasons in writing even when not required to do so.

Among the 15 federal District judges over whom the Court of Appeals has jurisdiction, there probably are 15 different views of Bazelon.

Respecting judicial etiquette, none will discuss him on the record. The judge quoted above was willing to make it clear privately, however, that he considers some Bazelon opinions ridiculous. Another complained that his style is too harsh. But a third District judge stated flatly: "I think he's terrific."

Some observers contend that after years of criticism and the 1970 D.C. crime act, which gradually removes much of the Court of Appeals' criminal jurisdiction, Bazelon himself has become more cautious.

Judge J. Skelly Wright, whose opinions as a rule are more rhetorical and often go further, has gradually taken over leadership of the court's liberal bloc, they argue.

Regardless of who is more liberal, critics say, Bazelon is so activist that he permits a partisan political attitude to influence many of his decisions.

But one wistful supporter of Bazelon suggested that if the chief judge is making mistakes, they are in the opposite direction—that he is being too careful.

He cited Bazelon's vote with a unanimous appellate panel last spring against freeing Leslie Bacon, who was arrested here and charged as a material witness in the bombing of the U.S. Capitol. Miss Bacon was sent in custody to testify before a federal grand

Jury in Seattle.

Only recently, the Ninth U. S. Circuit Court of Appeals in San Francisco, more bold than Bazelon and his colleagues on this point, ruled that Miss Bacon had been held illegally last spring.

In almost all of the recent controversial cases, they maintain, he merely has insisted that government agencies toe the line as spelled out in specific statutes.

Essentially procedural points were involved for example, when Bazelon wrote that anyone who feels he has been wronged by the Washington police is entitled to his day in court to explain why, or that pressure from a House Appropriations Subcommittee is not adequate reason to permit the Secretary of transportation to flout legal requirements in approving construction of the Three Sisters Bridge.

Similarly, a panel that included Bazelon did not order a halt to the AEC's Cannikin test in Alaska recently, but merely insisted that federal District judge George L. Hart Jr. consider more "responsible scientific opinion as to possible adverse environmental consequences."

Sources close to Bazelon say that he set out some major guidelines of his current judicial philosophy, as it applied to civil and administrative cases, in a decision last January directing the Environmental Protection Agency to reconsider banning the pesticide DDT.

"Courts are increasingly asked to review administrative action that touches on fundamental interests in life, health and liberty," Bazelon wrote.