



Recommendation 68-5

Representation of the Poor in Agency Rulemaking of Direct Consequence to Them

(Adopted December 10-11, 1968)

Recommendation

A. Agency Efforts

1. Federal agencies should engage more extensively in affirmative, self-initiated efforts to ascertain directly from the poor their views with respect to rulemaking that may affect them substantially. For this purpose, agencies should make strong efforts, by use of existing as well as newly devised procedures, to obtain information and opinion from those whose circumstances may not permit conventional participation in rulemaking proceedings. The "rulemaking" referred to is that defined by the Administrative Procedure Act, section 2(c), 5 U.S.C. 551 (4) and (5).

2. Agencies should employ as many of the following procedures as are feasible, practicable, and necessary to assure their being fully informed concerning the relevant interests of the poor:

(a) Agencies should seek to inform the poor of all rulemaking proposals that may affect them substantially and should provide opportunities for the poor to submit their views concerning these and related proposals.

(b) Agencies should hold formal public hearings or informal conferences in close geographic proximity to the poor substantially affected by contemplated rulemaking.

(c) Agencies should take care to invite individuals constituting a representative cross-section of the poor to submit their views orally or in writing as to proposed rules substantially affecting the poor.

(d) Agencies should conduct field surveys among the poor to discover their attitudes concerning particular government policymaking substantially affecting them.

(e) Agencies should use advisory committees made up of representatives of the poor as continuing consultants for all programs having a substantial effect on such persons.



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(f) When necessary to assure adequate representation for the poor, agencies should pay the personal expenses and wage losses incurred by individuals incident to their participation in rulemaking hearings. Congress should support agency requests for funds and for authority, where none exists, to make discretionary payments for this purpose. Agencies already authorized to make such payments in whole or in part should use their existing authority and should allocate funds accordingly.

In deciding whether the use of any one or more of the above devices is feasible, practicable, or necessary in a given situation, agencies should resolve doubts in favor of utilizing them; but their enumeration should not exclude or discourage the development and use of other devices to achieve the same result.

In carrying out paragraphs 1 and 2 of this recommendation, agencies should consult with and coordinate their efforts with other Federal agencies having responsibilities in this area and should make maximum feasible use of the facilities of such other agencies for communicating with and obtaining expressions of the views of the poor.

3. Agencies should be encouraged in appropriate circumstances to determine that the exemptions in 5 U.S.C. 553(a)(2) should not be applied with respect to rulemaking which may have a substantial impact on the poor.

B. People's Counsel

4. (a) An organization should be authorized by statute to employ a staff to act as "People's Counsel." The People's Counsel should represent the interests of the poor in all Federal administrative rulemaking substantially affecting the poor.

(b) The People's Counsel should be charged with assuring that the views of significant separable minority interests among the poor are represented in such Federal administrative rulemaking.

(c) The People's Counsel should be required to disseminate to all interested poor people's organizations pertinent information concerning rulemaking substantially affecting the poor.

(d) The People's Counsel should be authorized to participate suitably in its own name to represent the interests of the poor in any Federal agency proceedings in which the poor have a substantial interest.



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(e) The People's Counsel should be authorized to provide representation for organizations and groups of the poor who seek judicial review of administrative action substantially affecting their interests. This recommendation is not to alter the kinds of agency action amenable to judicial review, the requirements of standing to seek review, or the scope of that review.

(f) As an incident to its main responsibilities the People's Counsel should be empowered to recommend to Congress or the President or to both such legislation or other action as it deems appropriate to correct deficiencies in or otherwise improve Federal programs having a substantial impact on the poor.

5. (a) Congress should provide for an appropriate body to perform the functions outlined in section 4. Deserving of consideration as such body would be a new single-purpose corporation, to be created by Congress, modeled on the Corporation for Public Broadcasting, Public Law 90-129, 81 Stat. 368 (1967), 47 U.S.C. (Supp. III) 396, and to be known as the People's Counsel Corporation. In the event this form of organization is adopted, the following considerations should apply:

(1) The People's Counsel Corporation should be made tax exempt and authorized to accept grants of private funds. Gifts to the Corporation should be made deductible as charitable contributions for Federal income tax purposes.

(2) Federal financing of the Corporation should be made available to the extent necessary to assure its effective operation.

(3) The governing board of the People's Counsel Corporation should be constituted to give the poor meaningful representation thereon. Such body should be constituted to ensure close communication with the poor and effective representation of the viewpoints of the poor.

6. All Federal agencies should be required by Executive order to notify the People's Counsel of all proposed rules which would have a substantial impact on the poor. Agencies also should be required by that Executive order to give the People's Counsel an opportunity to present the views of the poor with respect to such proposed rules. Exceptions to these obligations should be permitted only "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that [such] notice and * * * [an opportunity for the People's Counsel to present its views] are impracticable,



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unnecessary, or contrary to the public interest." (See 5 U.S.C. 553(b)(B).) In these exceptional cases, agencies should be required to notify the People's Counsel as soon as practicable of any consummated rulemaking substantially affecting the poor, and should be required to give the Counsel as soon as practicable an opportunity to communicate to the agency its views concerning the desirability of further action with respect to such rulemaking.

Without prejudice to creating or empowering any other appropriate body to perform the general functions outlined in paragraphs 4, 5, and 6, any special provision therefor should be so structured as to take maximum advantage of the capabilities in this field of nongovernment organizations, and of other public bodies, including notably the Office of Economic Opportunity.

NOTE: Six separate statements were filed concerning this Recommendation.

Citations:

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Statement of John H. Crooker, Jr.

The majority position with respect to recommendation [68-5] is that "Federal agencies" should make strong efforts to ascertain from the poor their views regarding rulemaking "that may affect them substantially." I believe that (a) the major independent agencies are seldom involved in rulemaking affecting the poor except insofar as the poor are members of the public generally; and (b) it was the intent of the Congress, in establishing the Administrative Conference, to have studies conducted and information collected and interchanged, so that administrative agencies might improve and expedite their general procedures.

Therefore, I doubt that the Congress, in enacting section 5 of the Administrative Conference Act, 5 U.S.C. 574, intended that the Conference should address itself to the matters



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treated in recommendation [68-5]. My dissent is not, in any way, directed to the wording of the recommendation.

Statement of Paul Rand Dixon

I disagree with the adoption of paragraphs 4, 5, and 6 of recommendation [68-5] developed by the Committee on Rulemaking respecting the creation of a People's Counsel to represent the poor generally before Federal administrative bodies. I am fully aware of and sympathetic with the plight of the poor in our society. I recognize it as one of the primary problems that must be solved if our democratic way is to survive. However, I am fully of the opinion that this is a problem that should be debated and resolved by Congress. I find nowhere in the legislative history leading to the creation of the Administrative Conference of the United States any thought that the Administrative Conference would delve into this social problem. Even if I could bring myself to the thought that it was rightfully within the purview of the duties of the Administrative Conference to deal with the plight of the poor, I still would question the wisdom of creating a Poor People's Counsel as the sole, if not principal, protector of the rights of the poor. The plight of the poor needs everyone's protection, not just the protection of a People's Counsel.

So that my position will not be misunderstood, I want it clearly known that I stand in the forefront of those who deem it necessary to do more to protect those low-income people in our society who are generally classified as poor.

Statement of Joe M. Kilgore, joined by Richard H. Keatinge; Jim C. Langdon; Norman A. Flaningam;¹ Ross L. Malone; Starr Thomas; Harold L. Russell

We did not support paragraph 4, 5, and 6 of the recommendation [68-5]. We do support encouraging the formation of and recognition of a People's Counsel, as a private entity, to represent the public interest in the area of rulemaking in Federal agencies; with such Counsel being oriented to represent most fully those of the public whose interests would otherwise be unrepresented or underrepresented; and with such People's Counsel being eligible to receive Federal grants as required to permit its function.

This dissent from the majority view is dictated by:

¹ Mr. Flaningam joins in this statement noting that the term "rulemaking" as used herein refers to Federal agency processes for formulation, amendment, or repeal of rules of general applicability.



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1. The concern that this proposed function should be restricted, at least until experience might dictate otherwise, to the rulemaking function.
2. The belief that the proposed representation should not be limited to any segment of the public, even though its principal thrust would be so directed.

Statement of Malcolm S. Mason

I support the purposes of this recommendation. When a People's Counsel is constituted, however, it is important to make a distinction between two kinds of advocacy, so different that they cannot be directly conducted by the same organization. There is first of all adversary advocacy, owing an attorney's complete loyalty to a specific client. In this sense, there cannot be a People's Counsel for the poor, because the poor are many and different and must be able to speak with many voices. This kind of advocacy is needed. It must be aggressive and hardhitting. If it is conducted directly by a Government or Government-controlled agency, its independence may be impaired. For this kind of advocacy an appropriate model is suggested by the Legal Services program conducted by many separate private local organizations: Funded by OEO, but free, and indeed encouraged, to act fully on behalf of an actual client without limiting its vigor by reason of relationship to OEO. This, I believe, will also be the pattern of the new HEW Legal Services program.

There is also cooperative advocacy: Unaggressive, quiet, nonadversary, seeking to foster an awareness, a concern and a more lively recognition that poor people are affected by proposed administrative action. This kind of advocacy can be conducted by a Government or quasi-Government organization without inconsistency and with benefit to the effectiveness of its work. An appropriate model is suggested by such accomplishments as new rules on loans to demonstration cooperatives of poor farmers (achieved by mutual agreement of the Department of Agriculture and OEO); new clarification of Government security regulations, removing barriers to the employment of hard-core unemployed with a criminal record (achieved by joint action of the Department of Defense, Department of Labor, and OEO); a new consensus on the wider use of policy advisory boards in programs affecting the poor (resulting in part from encouragement of this kind of action by OEO) .

I urge that the Conference recommendation be implemented. In its implementation, contributions already made in this field should be recognized and used as a basis for expanded activity. The distinction between the two different types of advocacy should also be reflected in the choice of appropriate structure. Both are needed.



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Statement of Nathaniel L. Nathanson

I would like to explain why I voted in favor of the recommendation for a People's Counsel, as amended during the debate, because I believe that my interpretation of the final action taken may have been shared by others who also voted in favor of the proposal and is therefore entitled to some consideration in efforts to secure its implementation.

While I was deeply troubled by some of the arguments advanced against the proposal, particularly by the misgivings expressed concerning the arrogance of a government agency or public corporation undertaking to determine the interests of the poor in particular agency action, I felt that this concern could be met by emphasis upon the representative character of the People's Counsel and a requirement that specific, identifiable interests be represented, rather than hypothetical interests which might be imagined by the People's Counsel. This requirement could appropriately be implemented by the further requirement that those interests be identified in the form of particular groups or associations who could determine their own interests and make their own wishes or basic positions known to the People's Counsel. This view was certainly made explicit in the amendment, proposed by the Judicial Review Committee and accepted by the Rulemaking Committee, to paragraph 4(e) and it is also consistent with the final language of paragraph 4(d) as amended in the course of the debate so as to substitute "participate suitably" for the original word "intervene." This left a large measure of discretion to each agency in allowing participation by the People's Counsel in a particular proceeding, including the requirement of a showing that the concern or position which the People's Counsel undertook to present was in fact shared by an identifiable group of people who were at least informed of the position which the People's Counsel was taking. I also doubt that the leaders of the poor people's movement who were quoted by Professor Bonfield as favorable to the proposal envisaged a People's Counsel who would not be in any way answerable to the people he undertook to represent.

I appreciate that this interpretation, emphasizing as it does the representation of identifiable groups who may exercise some control over the People's Counsel, may not be entirely acceptable to the original proponents of the proposal, particularly those who accepted the amendments with some reluctance. Nevertheless, they did accept the amendments, presumably for the purposes of mollifying the opposition and with some appreciation of the fact that the reasons for the amendments were more than technical. Particularly in view of the closeness of the vote on the final approval of paragraphs 4, 5, and 6, the original proponents are hardly now in a position to insist upon the rejection of a reasonable interpretation which



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may have been decisive in the approval of the recommendation. They may also take comfort in the fact that the current requirements for standing to participate in both administrative and judicial proceedings by groups indirectly affected by governmental action will scarcely inhibit the activities of a People's Counsel anxious and resourceful enough to find out what the people he purports to represent really want.

Statement of Robert W. Graham

May I respectfully record my dissent from the recommendations of the Conference embodied in paragraphs 4, 5, and 6 of recommendation [68-5]. No one can disagree with the stated objectives of these recommendations, and I do not. However, I do not conceive that these recommendations are appropriate within the mission of the Administrative Conference in its efforts to seek improvement of administrative procedures. Furthermore, I consider unsound attempts to fractionate the public interest which is properly the concern of our Federal administrative agencies.