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THE WHY, WHERE AND HOW OF BROADENED  
PUBLIC PARTICIPATION IN THE  
ADMINISTRATIVE PROCESS

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*The actions of federal administrative agencies—rules, orders, licenses, loans, grants, contracts, and the like—have enormous effects on individuals and groups. Yet affected persons and groups are not always accorded the opportunity to participate in decision-making procedures that affect them. Mr. Cramton argues that broadened public participation will improve administrative decisions and give them greater legitimacy and acceptance. After discussing the types of proceedings in which public participation is desirable and the limitations that should be placed upon it, Mr. Cramton evaluates various proposals for assuring the desired degree of public participation.*

Most institutions of government are today under attack, but none more so than the federal administrative agencies.<sup>1</sup> The agencies, it is charged, have failed to develop and implement regulatory policies fully responsive to public needs and the public interest.<sup>2</sup> While no single explanation for this failure has been advanced, there is broad agreement that the lack of adequate citizen involvement and participation in agency proceedings has been a major factor.<sup>3</sup>

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<sup>1</sup> See Johnson, *New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869-71 (1971).

<sup>2</sup> See Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777 (1971).

<sup>3</sup> See Note, *Citizen Organizations in Federal Administrative Proceedings: The Lingering Issue of Standing*, 51 B.U.L. REV. 403 (1971).

The emergence of "public interest groups"<sup>4</sup>—organizations advocating a general and nonprivate interest as distinct from a narrower, private interest—offer a large potential for more responsive agency decision-making. A series of notable decisions, mostly in reviewing courts, has vindicated the right of public interest groups to participate in a broad variety of formal agency proceedings.<sup>5</sup> But the leaders of the public interest movement,<sup>6</sup> having won the early battles to secure the right to intervene, have discovered that some harsh economic realities threaten to make these early victories empty ones.

The significant issues in agency proceeding involves fairly complicated questions of interwoven fact, policy, and law. To make an effective impact on the decisionmaking process, public interest groups must be prepared to do more than submit general legal arguments demanding that the interests of a broad segment of the public, such as consumers, be taken into account. Detailed factual investigations, preparation of exhibits, and development of expert testimony are critical to the administrative process. Effective participation in the administrative process, it is all too evident, is an enormously expensive undertaking.<sup>7</sup> The persistent presence of skilled lawyers and experts in a wide

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<sup>4</sup> Use of the term "public interest group" does not reflect a judgment as to the legal or moral validity of the positions asserted by such groups. Agencies, of course, in making decisions must strive to balance a number of subsidiary interests, private and public, to arrive at the result which serves "the public interest." This decisional standard or ultimate goal should be distinguished from the advocacy by "public interest groups" on behalf of a public, that is, a numerous and perhaps ill-defined constituency the members of which have individually a limited or nonexistent economic stake in the outcome of the proceeding. The "public" nature of the advocacy distinguishes it from the more familiar participation by private parties on behalf of their own direct and substantial economic or personal interests and is not intended to supply a superior moral coloration. See generally Note, *supra* note 3, at 404 n.1.

<sup>5</sup> See, e.g., *National Welfare Rights Organization v. Finch*, 139 U.S. App. D.C. 46, 429 F.2d 725 (1970) (organization of welfare recipients permitted to intervene in proceeding to consider whether state welfare system was in conformity with standards of the Social Security Act); *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966) (representatives of listening public permitted to challenge renewal of television broadcast license); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965) (conservationist organizations permitted to demand completeness in record on which Commission based determination on utility license application under Federal Power Act).

<sup>6</sup> For general descriptions of the "public interest law" movement, see Berlin, Roisman & Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675 (1970); Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

<sup>7</sup> See notes 21-23 *infra* and accompanying text.

variety of administrative contexts calls on scarce human resources and requires financial support of great magnitude.

It is not surprising that counsel for public interest groups, having won their right to intervene, are uncertain as to what to do with their victory. The issue today concerns methods of encouraging and assisting public interest groups in their efforts to participate in administrative decisionmaking. In what ways and to what extent should society subsidize these efforts by public interest groups?

This article arises from a study undertaken by the Administrative Conference of the United States to consider questions relating to public participation in formal agency proceedings<sup>8</sup> and will focus upon three basic issues: 1) Is broadened public participation in the administrative process necessary or desirable? 2) In what areas or proceedings, and with what limitations, is public participation desirable? 3) In the areas in which broadened public participation is desirable, how can it best be brought about?

#### THE DESIRABILITY OF BROADENED PUBLIC PARTICIPATION

The demand for broadened public participation in the administrative process is usually premised upon the notion that the public staffs of agencies cannot be relied upon to present forcefully the views of consumer, environmental, minority, or other inadequately represented

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<sup>8</sup>The Administrative Conference completed its work on this subject in December 1971 with the adoption of Recommendation 28. See Appendix. While some reliance is placed upon the staff work that has been done, the opinions to follow are not those of the Conference, but of the author in his individual capacity. Fortunately, these remarks, which were prepared prior to the Conference action, are consistent with it. The Administrative Conference study is limited largely to the problems of public participation in formal agency proceedings, that is, proceedings, whether adjudicative or rule-making, where the agency determination is required to be made on the record after opportunity for hearing. The study encompasses experience with public participation in seven agencies—Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Food and Drug Administration, Interstate Commerce Commission, Securities and Exchange Commission, and the Social and Rehabilitation Service of the Department of Health, Education and Welfare.

Preliminary results of the study indicate that while the frequency of public participation is increasing, there are still relatively few cases in which intervenors have participated in the trial stage of a proceeding. To date, public intervention seems to be greatest in CAB route proceedings, where local government units and civic organizations often argue for more service to their communities, and in FCC license renewal proceedings. Public participation in ratemaking appears to be less common, but not unprecedented. Data developed as a part of the Administrative Conference study will be summarized in more detail in a forthcoming article by Professor Ernest Gellhorn in the *Yale Law Journal*.

groups.<sup>9</sup> According to some commentators this deficiency occurs because the public staffs are required to present a position that blends a number of interests and policies relevant to the regulatory scheme, with the result that the presentation of any discrete interest is bland and muted.<sup>10</sup>

Other and more extreme critics of the administrative process assert that agencies have been captured by the interests they regulate and hence cannot be trusted to pursue a broad public interest.<sup>11</sup> Such a position may often mask substantive disagreement with the policies embodied in a regulatory scheme.

There is some force to both arguments in support of broadened public participation. Wholly apart from the merits of these arguments, however, any widespread lack of public confidence in governmental decisionmaking may require ameliorative steps even if the realities are not nearly as bleak as some critics view them.

Broadened public participation in the administrative process is necessary and desirable in order to provide an expanded set of ideas, rewards, and incentives for regulators. American democracy is marvelously diverse in its pluralism, variety, and complexity. Critics that saddle it

<sup>9</sup> See Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970).

<sup>10</sup> One commentator has noted:

Very rarely are issues so clearcut that it is possible to say confidently what is in the general good and what is only good for one special interest.

As the agencies have sought a meaning for the public interest, they have come to this: the public interest is served by agency policies which harmonize as many as possible of the competing interests present in a given situation. Thus the objective of the CAB is to work out policies that will be acceptable to the carriers, airline passengers, cities, and local economic interests. The FCC seeks broadcast service that will satisfy competing demands for entertainment, news, culture, religion, and education. . . .

In all of these cases it is thought that the public interest requires some recognition of the claims of each interest that can be identified.

Reich, *The Law of the Planned Society*, 75 YALE L.J. 1228, 1234 (1966); cf. Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 789-90 (1971). See also *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 337-38, 359 F.2d 994, 1003-04 (1966).

<sup>11</sup> See R. FELLMETH, *THE INTERSTATE COMMERCE OMISSION 1-5, 17-22* (1970) (Ralph Nader's Study Group Report on the ICC). "[At present there] is an incredible tangle of agencies with noble-sounding mandates and small budgets; court decisions which, in their reluctance to question administrative decision, send cases back for interminable 'further studies' or with directions for correcting various little procedural blunders they have made; and proceedings that go on for years—and even decades. And when it is all over, we have, as at the beginning, a decision reflecting the agency's response to its political necessities—its insider perspective about the public interest." J. SAX, *DEFENDING THE ENVIRONMENT* 61 (1970). See also Note, *supra* note 3, at 403.

with charges of unresponsiveness are in error, for our governmental institutions are highly responsive. But responsive to what? The answer is obvious. They are responsive to the inputs they receive, including the feedback that greets their actions.

The cardinal fact that underlies the demand for broadened public participation is that governmental agencies rarely respond to interests that are not represented in their proceedings.<sup>12</sup> And they are exposed, with rare and somewhat insignificant exceptions, only to the view of those who have a sufficient economic stake in a proceeding or succession of proceedings to warrant the substantial expense of hiring lawyers and expert witnesses to make a case for them. Noneconomic interests or those economic interests that are diffuse in character tend to be inadequately represented, although agency staffs often make valiant efforts in this direction.

For an individual consumer to intervene in a regulatory controversy that will affect him, for example, only in his capacity as an occasional purchaser of auto tires, is irrational behavior on his part, since the costs of effective participation will be much greater than any benefits he might hope to obtain. Moreover, the transaction costs of assembling a group of persons, each of whom will suffer only a modest harm by a threatened administrative action, so that they may participate through a common spokesman, are extremely large. Even if the transaction costs of group representation were not so large, a number of potential contributors to a common fund are likely to take a free ride at the expense of others.

The view that government regulation tends to give inadequate weight to the general public interest, as distinct from the special interests which participate so effectively in regulatory processes, does not rest on simplistic notions that regulators are incompetent, narrow-minded, or corrupt. Nothing could be further from the truth; our regulators and government servants are generally persons of ability who are trying to do the best job they can under difficult circumstances. But their perspectives are limited by the information that is available to them,<sup>13</sup>

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<sup>12</sup> See Bonfield, *supra* note 9, at 543 (absent ability of concerned public to participate in administrative process, officials satisfied with status quo might neglect to re-examine their positions in light of any new views or information that becomes available). See also Johnson, *supra* note 1, at 873.

<sup>13</sup> See Bonfield, *supra* note 9, at 540 (a single agency's accumulated knowledge and expertise are rarely sufficient to provide all the needed data upon which rulemaking decisions should be based).

and their attitudes are shaped by the rewards and feedback that our system provides to them.<sup>14</sup>

When attention is given to the rewards and incentives that are applicable to regulators, the need for broad public participation becomes apparent. Most regulators and administrators deal with problems that most members of the public never hear about and only occasionally care about. The only people that are concerned on a day-to-day basis are the organized interests that have much to gain or lose from individual decisions. Elected officials are well aware of the views of these interest groups and, in the absence of broad public concern, are highly responsive to them. It is only in situations of crisis or catastrophe that the general public becomes aroused with the performances of regulators and that elected officials join in criticizing them.<sup>15</sup>

The administration of government undoubtedly suffers when important social interests cannot make their voices heard on a day-to-day basis on actions that affect them. Broadened public participation in the administrative process will lead to wiser and more informed decisions.<sup>16</sup>

<sup>14</sup> Lee C. White, former chairman of the FPC, has recited a parable involving "the care and feeding" of regulators which illuminates the argument:

A successful lawyer in Keokuk is appointed by the President to serve on an independent regulatory agency or as an assistant secretary of an executive department that exercises regulatory functions. A round of parties and neighborly acclaim surround the new appointee's departure from Keokuk. After the goodbyes, he arrives in Washington and assumes his role as a regulator, believing that he is really a pretty important guy. After all, he almost got elected to Congress from Iowa. But after a few weeks in Washington, he realizes that nobody has ever heard of him or cares much what he does—except one group of very personable, reasonable, knowledgeable, delightful human beings who recognize his true worth. These friendly fellows—all lawyers and officials of the special interests that the agency deals with—provide him with information, views, and most important, love and affection. Except they bite hard when our regulator doesn't follow the light of their wisdom. The cumulative effect is to turn his head a bit.

Remarks of Lee C. White, Brookings Institute Conf. on Administrative Regulation, Apr. 8, 1971.

<sup>15</sup> There is an important lesson concerning the functioning of the regulatory process in the fact that the pressures on regulators from the organized interests and the general public tend to coincide only when regulators behave so as to prevent sudden changes, crisis situations, and catastrophic accidents. Only a Penn-Central failure or a regional blackout will get the President on the telephone to the head of a regulatory agency or stimulate widespread criticism of agency actions. Thus, regulators are tempted toward safe, nonrisky, cautious policies, in part because the day-by-day pressures of incumbent interests push in that direction, but also because such policies are less likely to result in insolvencies, service failures, and the like. It is not surprising that technological innovation, competitive market behavior, and other highly volatile forces tend to get short shrift from the regulatory process. See Noll, *The Economics and Politics of Regulation*, 57 VA. L. REV. 1016 (1971).

<sup>16</sup> See Bonfield, *supra* note 9, at 540-41.

## THE EXTENT OF PUBLIC PARTICIPATION

Public participation in administrative proceedings is a current faddish notion and, like many faddish notions, has received much uncritical discussion. There is a general tendency to be in favor of "public participation" without worrying about the details. But it is the details—involving such matters as institutional devices and funding—that are all-important. The level of discourse on this subject needs to be refined.

While discussions of public participation have tended to be limited to the administrative process, once the genie is loosed it will not be confined to that bottle. If problems of inadequate representation exist, they are broader than merely the administrative process. Mechanisms of funding public participation, unless narrowly confined to that field by express limitation, will also have profound effects on other governmental institutions, such as prosecutors, courts, and legislatures. The lawyers' neat categories of "civil," "criminal," and "administrative" proceedings do not reflect rational boundaries for public participation. There is a strong *a priori* case that if public participation should be encouraged in a merger proceeding before the Federal Trade Commission, it should also be encouraged in a merger case brought by the Department of Justice in a United States district court. Pressures in that direction will be difficult to resist. Thus, the problem is larger than merely the administrative process.

In thinking about areas or proceedings in which broadened public participation is desirable, it is useful to divide administrative (and other) proceedings into three broad categories: 1) a large number of proceedings in which broadened public participation seems desirable; 2) a small category of proceedings in which it seems clearly undesirable; and 3) a large middle area as to which reasonable men can come to opposing conclusions.

## AREAS IN WHICH PUBLIC PARTICIPATION IS DESIRABLE

Broadened public participation is clearly desirable in the rulemaking activities of administrative agencies. Whether an agency is classifying the use to which public lands may be put, evolving permissible radiation standards, or otherwise legislating for the future, it is performing functions of great public moment which have significant effects for great numbers of people. It should attempt to duplicate the representative and political process as fully as possible, which means making a broad attempt to encourage individuals and groups, whether or not directly affected by the rule, to present information, views, and arguments relating to the proposal.

The same position applies to economic regulatory matters that prescribe services or rates for the future, such as CAB air route licensing, FCC common carrier regulation, and the like. Although trial techniques are used in these proceedings (and they are adjudicatory in that sense), the proceeding does not normally focus upon the practices or interests of a particular business entity but involves a general inquiry—often industry-wide—into circumstances and conditions. The issues tend to be polycentric in character: The parties are often or usually numerous, and there is frequently a wide range of possible solutions, each of which will have a differing impact upon affected interests. In essence, an attempt is being made to apply or formulate legislative policy concerning the degree of competition and the level of service, and the extent and manner of redistribution of income within the community (“who subsidizes whom”). These proceedings have such large effects on the economy that the broadest range of inputs seems desirable. Because trial-type proceedings are required, however, the agency or presiding officer must have powers that allow for effective control of the proceeding.

#### AREAS IN WHICH PUBLIC PARTICIPATION IS NOT DESIRABLE

In contrast to the large number of cases in which public participation should be encouraged, there exists, at the other extreme, a small category of cases in which public participation is not desirable. The “ideal type” is a criminal case in a United States district court. The John Birch Society or the Resistance Movement, for example, should not be allowed to intervene as a party in the pending Berrigan case with all that that implies—the opportunity to introduce evidence, to cross-examine opposing witnesses, and to submit briefs and oral arguments. To the extent that broad issues of law or policy are involved in any such case, they can be presented by an amicus brief limited to those concerns.

Why is broad public participation undesirable in such a case? It is because adjudication functions best as a two party adversary contest involving well-formulated issues of fact, and the efficiency of the entire proceeding, as well as fairness to the defendant, may be undermined by allowing participation in the case to extend beyond the prosecutor and the defendant. In this category of cases, traditional ideas of party control of litigation should be preserved. Moreover, the defendant faced with charges of misconduct or culpability should not be exposed to the attacks of multiple adversaries. Finally, delay, expense to the community, and ineffectiveness in law enforcement will result if prosecutors are deprived of control of the public side of such cases. Precisely because

it is such an important matter, individuals other than the prosecutor should not be allowed to masquerade as representatives of the public.

The same policy which is applicable in criminal cases is applicable in a small and limited category of formal administrative adjudications, such as a deportation proceeding or the revocation by the SEC of a broker-dealer license. In general, administrative imposition of fines, penalties, and forfeitures, as well as license revocation cases, would fall into this category.

Here again, the amicus brief provides a sufficient method for the presentation of general questions of law or policy. For example, if a deportation case involves a general issue on which labor interests seek to establish a position protecting them from foreign competition, an amicus brief may advance this position. Similarly, if the SEC takes a very narrow view as to its powers or responsibilities in penalizing brokers who have violated its rules, an argument for a more severe penalty can be advanced in an amicus brief. The special rights of party participation in the testimonial process and cross-examination of opposing witnesses are not required.

The basic principle is that the scope and method of public participation should vary depending upon the potential contribution it may make to a proceeding and the adverse consequences that are involved. The major problem is the development of a more discriminating calculus for this balancing function.

#### AREAS IN WHICH PUBLIC PARTICIPATION MAY OR MAY NOT BE DESIRABLE

Between the two polar areas already sketched is a doubtful area in which reasonable persons will differ concerning the appropriateness of encouraging public participation. An FTC unfair-trade case provides a good example. A particular respondent is being adjudged guilty of a violation of law based on past events, but the proceeding will result only in prospective relief analogous to an injunction. Moreover, as a practical matter, we know that many of these cases have been used by the FTC as a device to establish new trade-practice rules that will have an industry-wide application. The FTC has taken this path partly because of its lack of clear rulemaking authority and partly because of the advantages offered by the adjudicatory approach in formulating new policy. Similarly, a license renewal case before the FCC involves a situation that sometimes may be indistinguishable from a license revocation case based on specific charges but in other situations is more akin

to a determination of the level and quality of service that the public is entitled to in a particular regulated area in the future.

In order to illuminate this middle ground, less emphasis must be placed on the form of the proceeding, that is, public participation is desirable in rulemaking proceedings but *prima facie* undesirable or at least dubious in enforcement proceedings leading to sanctions, and other similar arguments. More significant criteria are the nature of the issues in the particular proceeding and the role of the agency staff.<sup>17</sup> If an issue involves factual matters which are in the knowledge of the intervenor and if other participants are not in a position to advance the information or argument that the intervenor offers, the case for participation is strengthened.

With respect to the role of agency staff, it seems clear as a general principle that where the agency staff is actively supporting a particular position, the need for public participation on behalf of the same position is diminished. Since enforcement proceedings generally are not instituted unless the agency staff has determined to take the position that the respondent has done wrong, the opportunities for fruitful public participation in favor of enforcement will be limited, and in the rare instance where a public interest group might identify with the respondent, for example, where the respondent is accused of violating an anti-competitive rule, it would still be unlikely to add much by an independent role in the proceeding.

However, it is not impossible to conceive of a situation in which an enforcement proceeding is somehow forced upon an unwilling or apathetic agency staff. An example which comes readily to mind is license renewal proceedings at the FCC, for here, in effect, the law requires the agency to consider the licensee's record periodically instead of putting the burden on the agency staff to initiate proceedings.<sup>18</sup> Similarly, the National Environmental Policy Act requires the agencies to consider potential environmental impact in their decisionmaking.<sup>19</sup> This may,

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<sup>17</sup> For other relevant and useful factors, see Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968).

<sup>18</sup> See 47 U.S.C. § 309(h) (1970). See also Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693, 1694 (1960).

<sup>19</sup> 42 U.S.C. § 4332 (1970). The District of Columbia Circuit recently concluded that "[p]erhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to *consider* environmental issues just as they consider other matters within their mandates," and that "if the [agency] decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse." *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1112, 1115 (D.C. Cir. 1971). The court described the balancing process in the following terms:

in ways we cannot yet foresee, enable outsiders to trigger an enforcement proceeding or, at least, to raise an enforcement issue in another proceeding.

Ordinarily, a proceeding leading to license suspension or revocation is properly viewed as one solely between the agency and the respondent. An obvious example is an SEC disciplinary proceeding. But it may be relevant here that the SEC regulatory scheme is not primarily aimed at limiting access to the industry. That is to say, there is only a limited public interest in whether a broker or dealer is put out of business because the public has a broad choice of brokers and dealers. Where the license is in fact a franchise, the public interest is rather different, and the case is stronger where the agency staff has instituted a proceeding to fine or otherwise to impose a light penalty on a franchise-holder, to permit a public interest group to argue and produce evidence to the effect that the respondent's derelictions have been so serious that the public interest would be better served if someone else were awarded the franchise.<sup>20</sup> It is not necessarily the form of the proceeding or the fact that a cease-and-desist order or sanction may lie at the end that is determinative of the degree of public participation which would be appropriate.

#### CHOICE OF RULEMAKING OR ADJUDICATION

There are implications in this analysis for the choice between rulemaking or adjudication as a method of formulating regulatory policy.<sup>21</sup> In all probability public interest groups can make a greater

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"Environmental amenities" will often be in conflict with "economic and technical considerations." To "consider" the former "along with" the latter must involve a balancing process. In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and "systematic" balancing analysis in each instance. [The statute is designed] to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance.

*Id.* at 1113-14.

<sup>20</sup> See *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966), *Commission decision on remand rev'd*, 138 U.S. App. D.C. 112, 425 F.2d 543 (1969); cf. *Hale v. FCC*, 138 U.S. App. D.C. 125, 425 F.2d 556 (1970).

<sup>21</sup> See generally *Hale v. FCC*, 138 U.S. App. D.C. 125, 425 F.2d 556 (1970); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Agency Policy*, 78 HARV. L. REV. 921 (1965).

contribution in informal rulemaking proceedings than in adjudicative and formal rulemaking proceedings for at least two reasons: First, they are probably better equipped to speak to general propositions than to engage in trial-type proceedings; second, in the quasi-legislative (hence, political) process the group's viewpoint becomes a relevant datum simply because the group holds it. However, the public interest groups do not control whether agency policy is made by rulemaking or by adjudication.

Thus, an agency's insistence on making decisions case-by-case on the basis of a lengthy evidentiary record may favor the regulated industry at the expense of upholders of the "public" interest because it throws the decision into the forum in which the industry groups are best equipped to compete. It is not merely that trial-type hearings can be used to delay agency action—which is true—but they can also be used to obscure general principles in a mass of factual data, the compilation and presentation of which the industry is better prepared to accomplish than either public interest groups or agency staff. Therefore, one way of encouraging public participation in the agency process (viewing the process as a whole) is to focus that process more in the direction of deciding general principles by rulemaking.

#### AGENCY CONTROL OF PROCEEDINGS

An objective examination of the limited experience with public participation in agency proceedings which has occurred thus far does not indicate that public participation has as yet created significant procedural problems in any agency (the AEC is a possible exception). Indeed, the extent of active public participation has been limited and is likely to remain limited as long as the cost barriers remain at their present level. Procedural problems may be expected to arise, however, if public participation expands dramatically. Problems of overlapping and even frivolous representation, proliferation of issues, control of complex multiparty proceedings, and the like may arise. These problems, however, will not differ in more than degree from the problems faced by the agencies, particularly such agencies as the ICC, FPC, and CAB, whose proceedings presently involve a multitude of parties.

Nevertheless, if opportunities for public participation are expanded, it may be important to reaffirm some established general principles. First, the agency and its presiding officer must be able to maintain control of each proceeding in order to bring it to an expeditious conclusion. Some rules of order are necessary in order to conduct a proceeding, and someone has to enforce them.

Second, the agency must have discretion to structure and limit participation.<sup>22</sup> In some situations this will mean a limitation of participation to the interest asserted and the denial of any opportunity to present evidence or cross-examine on other issues. In addition, the agency must be able to deal with duplicative and repetitive participation on the part of those interests already adequately represented in the proceeding. This may mean in some cases the authority to require duplicative interests to speak through a common voice. Finally, the agency's ability to determine priorities and to expedite decisions means that it must be able to control the compass of a particular proceeding. Agencies cannot be required to reconsider the whole universe in every case. Ample scope to shape and limit the issues in any particular case must be recognized and upheld.

#### ACHIEVING BROADENED PUBLIC PARTICIPATION

The right of groups asserting "public" interests to participate through formal intervention in these agency proceedings appears reasonably well established, particularly since the decision in *National Welfare Rights Organization v. Finch*.<sup>23</sup> That case involved an attempt by associations of welfare recipients to intervene in proceedings of the Social and Rehabilitation Service of HEW to determine whether the welfare laws of certain states were in conformity with federal standards under the Social Security Act. Holding that the associations did have the right to intervene, the United States Court of Appeals for the District of Columbia Circuit reasoned that they would have standing to seek judicial review of the agency action under the test set forth by the Supreme Court in *Association of Data Processing Service Organizations v. Camp*<sup>24</sup> and *Barlow v. Collins*.<sup>25</sup> Since the welfare recipients would have standing to seek review, their standing to intervene in the proceeding should be recognized.<sup>26</sup> Although questions might arise in some agencies as to whether public interest groups were entitled to full or only to limited participation,<sup>27</sup> there is little serious disposition in federal agencies to preclude public participation in their proceedings. This statement must be qualified, however, by noting that efforts to intervene in agency-

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<sup>22</sup> See generally Shapiro, *supra* note 17, at 752-56, 764-67.

<sup>23</sup> 139 U.S. App. D.C. 46, 429 F.2d 725 (1970).

<sup>24</sup> 397 U.S. 150 (1970).

<sup>25</sup> 397 U.S. 159 (1970).

<sup>26</sup> 139 U.S. App. D.C. at 57-59, 429 F.2d at 736-38.

<sup>27</sup> See *Palisades Citizens Ass'n, Inc. v. CAB*, 136 U.S. App. D.C. 346, 420 F.2d 188 (1969).

instituted enforcement proceedings have been limited to a handful of instances.<sup>28</sup>

Obtaining permission to participate in the agency proceeding is, however, merely the threshold problem for the public intervenor. The more serious problems are the practical obstacles to effective intervention. One such problem, the adequacy of agency procedures for notifying the general public regarding the pendency of significant proceedings,<sup>29</sup> will not be dealt with here. Although important, it is dwarfed by the crucial issue of how public interest groups can meet the costs of effective participation in agency proceedings.

It is obvious that for public interest groups cost is a considerable obstacle to effective participation in formal agency proceedings.<sup>30</sup> Since a "public interest group" is defined as a group representing a constituency whose economic interest in the proceeding is diffuse or nonexistent, costs of participation must necessarily be volunteered by persons or organizations which cannot anticipate a commensurate economic benefit from the proceeding.

Rough estimates of the magnitude of the cost of effective participation may be extrapolated from the amounts expended by private participants in particular proceedings. The major cost item, of course, is attorneys' fees.<sup>31</sup> Participation in a major FTC case would probably cost an active intervenor \$100,000 or more if the work were not handled on a *pro bono publico* basis. The estimated cost of active participation in an FDA rulemaking proceeding is in the range of \$30,000-\$40,000. Estimates for ICC proceedings are considerably lower, perhaps on the order of \$4,000, but the ICC has a greater variety of proceedings, and much depends on what is considered the "typical" case.

Of course, degree of participation is another variable. As a practical matter, public interest intervenors are free to define the extent of their

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<sup>28</sup> *Campbell Soup Co.*, FTC Docket No. C-1741, *appeal pending sub nom. S.O.U.P., Inc. v. FTC*, No. 24,476, D.C. Cir., July 24, 1970; *Firestone Tire & Rubber Co.*, FTC Docket No. 8818 (opinion and order granting limited intervention, Oct. 26, 1970); *Kenecott Copper Corp.*, FTC Docket No. 8765, *appeal dismissed without prejudice sub nom. United Steelworkers of America v. FTC*, No. 24,629 (D.C. Cir., May 28, 1971).

<sup>29</sup> See generally Gilhooley, *Public Participation in Formal Agency Proceedings—Public Notice of Formal Proceedings* (Aug. 23, 1971) (a tentative staff report to the Chairman of the Administrative Conference of the United States).

<sup>30</sup> See Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069, 1096-97 (1971).

<sup>31</sup> The rough cost estimates that follow are based upon Administrative Conference staff interviews with informed persons, including agency staff members, public interest lawyers, and private practitioners. Great variation in costs can result from the nature of the proceeding, its scope, the desired degree of participation, and similar factors.

participation (subject, of course, to the hearing examiner's control of the proceeding). What that extent will be depends on the issues in which the intervenors are interested. Intervention, as such, is not ordinarily a costly process. There are no filing fees, the intervenor's right to appear will in most proceedings not be challenged; the principal initial cost will be the preparation and service of documents. If the intervenor desires merely to present a legal argument, he can bypass the trial itself and file a brief, possibly with oral argument. If he merely wishes to bring some factual material to the attention of the agency, he can ordinarily do so without participation in the rest of the proceeding. The figures cited above assume more active participation in the trial stage, and this is where costs rapidly mount. To make an effective impact on agency decisionmaking, public interest groups must be prepared to affect materially the record on which the agency decision will be based. They cannot rely merely on legal arguments that certain interests be taken into account but must develop an affirmative case of their own.

#### TRANSCRIPT COSTS

An isolable area of the cost problem is the question of transcript costs. Most agencies which hold formal proceedings contract with private firms for stenographic services. The parties to the proceeding must obtain their copies of the transcript from the stenographic firm, generally at a considerably higher cost than that charged to the agency. Per page charges vary widely from agency to agency, but charges of \$1.50 and \$1.75 per page for next-day service are not unusual. While transcript costs are not of the same order of magnitude as attorneys' fees, they are often sufficiently significant to hamper effective participation in a proceeding.

Agencies have an obligation to finance the costs of recording formal proceedings out of their own resources. These costs should not be placed upon participants in a proceeding. Existing contracts and arrangements should be revised as soon as possible to provide for the availability, either through the reporting service or the agency itself, of transcripts of any formal proceeding that is open to the public at a low minimum charge reflecting only the cost of reproducing copies of the agency's transcript. This small, minimal charge is necessary in order to discourage frivolous requests. Free transcripts should be supplied only to indigent persons who are being proceeded against by the Government. In that situation, the Government should make available free legal services as well as transcripts.

## EXPERT WITNESSES

Another cost item worthy of separate consideration is that of expert witnesses. Here public interest intervenors face a dual problem. First, witnesses are expensive. In the FDA proceedings studied such fees ranged between \$2,500 and \$5,000. In the *Firestone* proceeding<sup>32</sup> before the FTC the fees for the two experts used by the intervenors would have ranged between \$25,000 and \$50,000 at the going rate, although in the instant case they charged only for expenses. In ICC rate cases expert testimony is very important and may cost a participant from \$4,000-\$5,000 in a moderate size case to 10 times that in a large rate investigation proceeding. Not only are these figures beyond the means of public interest intervenors, but, in addition, many experts would be reluctant to imperil future employment with the regulated industry by becoming identified with the public interest side of agency litigation. These obstacles are not merely speculative, for both cost and witness reluctance are factors cited by government agencies, notably the Antitrust Division,<sup>33</sup> as problems encountered in the course of their participation in formal agency proceedings.

A partial solution to the expert witness problem lies in the considerable in-house expertise of the federal government. But there are obviously difficulties in making this expertise available to public participants unless the expert in question is employed by an agency whose position is not adverse to that taken by the public interest intervenor.<sup>34</sup> With respect to environmental issues, the requirement of the National Environmental Policy Act<sup>35</sup> and the regulations of the Council on Environmental Quality<sup>36</sup> for public circulation of draft environmental impact statements and agency comments thereon should have the effect of bringing out into the open interagency disagreements on environmental questions, which should materially assist the public interest intervenor in developing his case. The Freedom of Information Act offers an additional possibility for access to agency expertise.<sup>37</sup> One approach which

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<sup>32</sup> *Firestone Tire & Rubber Co.*, FTC Docket No. 8818 (opinion and order granting limited intervention, Oct. 26, 1970).

<sup>33</sup> This information was developed as part of the staff study conducted by the Administrative Conference of the United States. See note 8 *supra*.

<sup>34</sup> See generally U.S. Dep't of Justice, Antitrust Division, *Comments on the "Ash Council" Report*, 57 VA. L. REV. 933, 945 (1971).

<sup>35</sup> 42 U.S.C. § 4332 (1970).

<sup>36</sup> 36 Fed. Reg. 7724-29 (1971).

<sup>37</sup> 5 U.S.C. § 552 (1970). See also *Recommendation No. 24 of the Administrative Conf. of the United States—Principles and Guidelines for Implementation of the Free-*

may be worth consideration is the use of neutral experts designated by the agency tribunal, much as court-appointed experts are employed in litigation.<sup>38</sup> Alternatively, devices which subsidize attorney fees, discussed below, should be broad enough to include the cost of procuring expert witnesses.

#### ATTORNEYS' FEES

Despite much clamor, the existing experience with agency funding of attorneys' fees for public interest intervenors is nonexistent. Except in situations involving indigent respondents, in which it is arguable that due process requires a degree of assistance, no federal agency has reimbursed intervenors for outlays on attorneys' fees. Moreover, there is a serious question of agency authority to do this even if an agency desired to do so.<sup>39</sup>

Despite the dearth of relevant agency experience, it may be fruitful to canvass some of the possible methods of providing financial support for public interest representation in agency proceedings. In the present state of affairs, it is easier to set forth the pros and cons of various approaches than to arrive at a firm conclusion on this vexing subject.

*The General Legal Services Approach.* This approach begins with the premise that there is nothing peculiar about the administrative process in terms of providing legal services. Furnishing legal services to members of the general public who want to participate in administrative proceedings should be viewed as part of the broader social problem of providing legal services to persons who cannot afford to bear the full cost.<sup>40</sup> The same institutional devices—public provision of legal

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*dom of Information Act*, in ADMINISTRATIVE CONF. OF THE UNITED STATES, REPORT 1970-1971, at 51-57 (1971); Gianella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 AD. L. REV. 217 (1971).

<sup>38</sup> See generally W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 769-70 (5th ed. 1970).

<sup>39</sup> The Federal Trade Commission has requested a formal ruling from the Comptroller General on the question of whether the Commission is empowered to pay transcript costs, witness fees, attorneys' expenses, and travel costs for indigent respondents and intervenors proceeding in forma pauperis in Commission adjudications. Letter from Miles W. Kirkpatrick, Chairman, Federal Trade Commission, to Elmer B. Staats, Comptroller General of the United States, Mar. 17, 1971. At this writing, no opinion has yet issued.

<sup>40</sup> Extensive discussions of various aspects of the general legal services problem may be found in the American Bar Foundation's series of publications on legal services for the poor. See L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965) (3 vols.). See also Curran, *Unavailability of Lawyer's Services for Low Income Persons*, 4 VALPARAISO U.L. REV. 308 (1970). Current proposals for fed-

services to indigent defendants, *pro bono* practice by lawyers and law firms, and the efforts of legal aid offices—that are available for provision of legal services in courts and local communities should be utilized in the administrative context.

This approach has the virtue of preserving the attorney-client relationship and of deterring frivolous representation. A lawyer undertakes to act for a particular client or group of clients and is responsible to them. Any member of the public who lacks the necessary resources can attempt to avail himself of the service. Since the legal aid offices or contributed legal services will always be a scarce resource, a choice must be made as to which claims are the most meritorious or significant. Under these circumstances, frivolous cases will be avoided. A multiplicity of legal aid offices or opportunities assures that a wide diversity of views and attitudes will be advanced on behalf of particular clients, thereby avoiding the monolithic character and possible ideological conflicts that might result if the choice of cases were centralized in a single government advocate.

Possible shortcomings are that the general legal services approach may neglect the administrative process because of its complexity, specialization, and high cost. Traditional litigation in local courts has greater visibility, and real clients are in need of effective assistance there.

*The Contingent-Fee Approach.* Many public-interest lawyers believe that adequate provision of legal services to the poor will be made available only if the creation of new legal remedies has the effect of subsidizing the cost of litigation, hence the great attraction of new damage remedies or institutional devices that permit the aggregation of numerous small claims into a single unit. This approach, of course, tends to shift policymaking responsibilities from administrative agencies to reviewing courts. Its advocates, despairing of the administrative process, seek to invoke the assistance of the judiciary.<sup>41</sup> Precisely because it seems likely that new departures of this kind would have large consequences for good or ill or a combination of both, a great deal of heated discussion surrounds class-action and damage-remedy proposals.<sup>42</sup>

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erally funded legal services corporations may be found in S. 1305, 92d Cong., 1st Sess. (1971) and 39 U.S.L.W. 2636 (May 11, 1971).

<sup>41</sup> "Administrative agencies have, been gravely deficient, and public confidence in them is eroded to an extreme degree. . . . In desperation citizens have turned to the courts. . . . Our need is not for more or fancier procedures before the same old agencies—it is for a shift in the center of gravity of decisionmaking . . ." J. SAX, *supra* note 11, at 61-62.

<sup>42</sup> See, e.g., *Hearings on S. 984, S. 1222, and S. 1378 Before the Consumer Subcomm. of the Senate. Comm. on Commerce*, 92d Cong., 1st Sess. (1971); Dole, *Consumer Class*

While each proposal must be treated on its own merits, there is no question that the contingent-fee approach is capable of dramatic possibilities. The consequences on the administrative process are also likely to be great. Since legislatures are reluctant to arm administrative agencies with money damage remedies, the creation of such a remedy in an area in which an administrative agency operates raises old but troublesome problems of primary jurisdiction—the allocation of decisional authority between agencies and courts. Moreover, since the demand for free goods tends to be unlimited, the likelihood of frivolous, repetitive, or inconsequential suits being brought in large numbers is worrisome. Examination of the injury reparation system in the automobile negligence field, which is largely dependent upon the contingent-fee device for the financing of claims, is not reassuring: Only about one-half of the total amount that the system costs to operate, measured by payments for insurance and the like, is paid out to injured victims; the remainder is consumed by attorneys' fees, insurance expenses, and other costs of administration.<sup>43</sup> The inefficiency of the system, as well as the disparity with which it treats small and large claims, does not suggest an uncritical application to other fields. What is needed is an institution that will enhance social justice, not a full employment bill for lawyers.

*The Individual Agency Approach.* This approach would concentrate attention on the administrative context rather than viewing the administrative field as part of a larger problem. The suggestion frequently has been made that each agency which conducts formal proceedings should provide for representation of interests that are otherwise inadequately represented in such proceedings.<sup>44</sup> This might be done either

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*Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80 (1969); STARRS, *The Consumer Class Action—Part I: Considerations of Equity & Part II: Considerations of Procedure*, 49 B.U.L. REV. 211, 407 (1969).

<sup>43</sup> See, e.g., A. CONRAD, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION 52-66 (1964); U.S. DEP'T OF TRANSPORTATION, COMPENSATION FOR MOTOR VEHICLE ACCIDENT LOSSES IN THE METROPOLITAN AREA OF WASHINGTON, D.C. (1970); CONRAD, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279, 289-93 (1964).

<sup>44</sup> The Federal Communications Commission has in the past year taken two actions related to this problem. In *KCMC, Inc.* the FCC refused to approve the terms of a settlement agreement under which a television licensee would have reimbursed a public interest intervenor for expenses incurred in opposing the station's renewal application. *KCMC, Inc.*, 25 F.C.C.2d 603, 20 P & F RADIO REG. 2d 267 (1970). The opposition was abandoned in return for specific assurances from the licensee with respect to its future policies. On the other hand, the FCC presently has under active consideration a proposal to set up an "Office of Public Counsel" to act as attorney for citizens' groups in agency proceedings. See *Wall Street Journal*, June 29, 1971, at 6, col. 2.

by reimbursing public interest groups for the costs incurred in providing representation or by employing a special staff within the agency to represent such persons before the agency. While there are substantial differences between the two alternatives, especially in their effect on the attorney-client relationship, they share common ground in that the agency before which a proceeding is pending would be deciding whether or not a particular person or group should be given free legal services. Since the demand for free legal services is certain to be larger than the available supply, choices would have to be made among the various applicants. While in some cases this would consist of cutting out obviously frivolous claims, in other cases the agency would be required to assess the merits or desirability of arguably valid contentions. There are reasons to fear that a fair, objective, and nonideological determination of requests would be difficult. The availability of assistance from government, of course, should not turn on ideological grounds.

Consideration is currently being given to some proposals of this type.<sup>45</sup> The FCC has under active consideration a proposal to establish an "Office of Public Counsel" to act as attorney for listener groups in agency proceedings.<sup>46</sup> Some public interest lawyers believe that this alternative is less desirable than reimbursement devices, since it filters the views of the client group through an agency staff that is to some extent vulnerable to internal pressures and whose obligation to the views of the client group are at least ambiguous.

The FTC is taking a modest step toward the other alternative, by inquiring into its authority to reimburse public interest intervenors for transcript costs and other out-of-pocket expenses.<sup>47</sup> The FTC, while not asserting an agency position on the question, has asked the Comptroller General for his opinion as to statutory authority.<sup>48</sup>

Devices to reimburse public interest groups for litigation expenses could be put into operation either before or after the actual intervention and participation. An advance determination would have to be made on the basis of relatively limited material relating to the group and the position it sought to assert. An after-the-fact determination, although requiring the public interest group or its lawyers to take the risk that reimbursement would not be available, would have the advantage of being made on the basis of the contribution that the intervening group made to the case. The judgment could not be solely on

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<sup>45</sup> See U.S. Dep't of Justice, Antitrust Division, *supra* note 34, at 945-46.

<sup>46</sup> See Wall Street Journal, June 29, 1971, at 6, col. 2.

<sup>47</sup> Kirkpatrick Letter, *supra* note 39.

<sup>48</sup> *Id.*

the basis of whether the intervention was totally successful in its aims, since an effective illumination of matters that resulted in an improved agency decision should be viewed as a positive contribution. If each agency passed on requests for reimbursement and they were made out of the agency's funds, provision for review of the reimbursement request by an outside group—preferably a disinterested body of lawyers and officials that could make an objective judgment of the utility of the intervention—would seem to be desirable.

*The Advocacy Agency Approach.* Under this approach, new agencies would be created whose function would be to advocate the views of otherwise inadequately represented persons in agency proceedings or in court proceedings involving judicial review of administrative action.<sup>49</sup> The Administrative Conference of the United States recommended in 1969 the creation of a "Poor People's Counsel" to represent the interests of the poor.<sup>50</sup> More recently, proposals for the creation of a consumer advocacy agency<sup>51</sup> and an Indian advocacy agency<sup>52</sup> have been given serious consideration in Congress. One advantage of vesting the advocacy function in a new agency is that it avoids the conflict-of-interest problem that is presented when an agency staff purports to represent outsiders in a proceeding before the same agency. A second advantage is that a governmental body with a special mission, if adequately funded, could achieve the advantages of expertise, continuity, and persistence, all factors that make the representation of private interest groups so effective in agency proceedings. As the agency would have limited resources, it would be required to limit its activities to areas in which the greatest contribution could be made. As an institutional litigant, it would be unlikely to support frivolous positions.

The disadvantages of the specialized advocacy agency, as against other alternative devices, are the defects of its virtues. As a monolithic, bureaucratic agency, it would not have an attorney-client relationship with the citizens and groups that it purported to represent. Pressures for consistency and balance applicable to institutional litigants would

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<sup>49</sup> For criticism of this approach, see U.S. Dep't of Justice, Antitrust Division, *supra* note 34, at 945.

<sup>50</sup> *Recommendation No. 5 of the Administrative Conf. of the United States—Representation of the Poor in Agency Rulemaking of Direct Consequence to Them*, in 1 ADMINISTRATIVE CONF. OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS, 1968-1970, at 71 (1970). See also Bonfield, *Representation of the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 530-45 (1969).

<sup>51</sup> H.R. 14, 15, 16, 92d Cong., 1st Sess. (1971).

<sup>52</sup> The Administration is currently sponsoring a bill to create an Indian Trust Counsel Authority. S. 2035, 92d Cong., 1st Sess. (1971).

make it unlikely to voice dissenting or unorthodox views. Nor would it necessarily be responsive to either executive or legislative direction: While the power of removal of its head would presumably remain in the President, the political hazards of doing so would give the advocacy agency a considerable degree of independence; and Congress would find it difficult to control the advocacy function except by cutting its appropriation. An advocacy agency may become its own client in the sense that the continuance and furtherance of the institution itself would become one of its major goals.

#### CONCLUSION

This hurried survey of a complex subject resembles a helicopter survey of a defoliated and pock-marked battlefield in which the adversaries are preparing to recommence hostilities. Public participation was a fine slogan when it was confined to securing the right of intervention in agency proceedings. That battle now has been won and the scene has changed to the development of institutions that will encourage and support public interest groups in their effort to make the administrative process more responsive to their desires. The battlelines are being drawn as various proposals for funding public participation are advanced.

Fortunately, the alternatives previously delineated in this article are not mutually exclusive. Experimentation with several of them in particular agencies or areas may provide information that will serve as the basis for a more general reform. Those who believe that it is important, within limits that are bounded by considerations of agency effectiveness and efficiency, to improve the administrative process by broadening public participation have a special obligation to develop institutions that will do the job without crippling the administrative process.

## APPENDIX

RECOMMENDATION 28 OF THE ADMINISTRATIVE  
CONFERENCE OF THE UNITED STATES—  
PUBLIC PARTICIPATION IN ADMINISTRATIVE HEARINGS\*

Individuals and citizen organizations, often representing those without a direct economic or personal stake in the outcome, are increasingly seeking to participate in administrative hearings. Their concern is to protect interests and present views not otherwise adequately represented in the proceedings. Agencies are exposed to the views of their staffs, whose positions necessarily blend a number of interests, and to the views of those whose immediate stake is so great that they are willing to undertake the cost of vigorous presentation of their private interests. The opportunity of citizen groups to intervene as parties in trial-type proceedings where their views are unrepresented, formerly challenged on doctrinal grounds that they lacked a sufficient interest to have "standing," has been greatly broadened by statutes, administrative actions, and judicial decisions. Agency decisionmaking benefits from the additional perspectives provided by informed public participation. However, the scope and manner of public participation desirable in agency hearings has not been delineated. In order that agencies may effectively exercise their powers and duties in the public interest, public participation in agency proceedings should neither frustrate an agency's control of the allocation of its resources nor unduly complicate and delay its proceedings. Consequently, each agency has a prime responsibility to reexamine its rules and practices to make public participation meaningful and effective without impairing the agency's performance of its statutory obligations.

## RECOMMENDATION

In connection with agency proceedings where the agency's decision is preceded by notice and an opportunity to be heard or otherwise to participate—namely, notice-and-comment rulemaking, on-the-record rulemaking and adjudication—each agency should, to the fullest extent appropriate in the light of its capabilities and responsibilities, apply the following criteria in determining the scope of public participation and adopt the following methods for facilitating that participation:

*A. Intervention or Other Participation*

Agency rules should clearly indicate that persons whose interests or views are relevant and are not otherwise represented should be allowed

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\*Adopted Dec. 7, 1971.

to participate in agency proceedings whether or not they have a direct economic or personal interest. Whatever the form of the proceeding, reasonable limits should be imposed on who may participate in order (a) to limit the presentation of redundant evidence, (b) to impose reasonable restrictions on interrogation and argument, and (c) to prevent avoidable delay. In every determination of whether participation is appropriate, the agency should also determine whether the prospective participant's interests and views are otherwise represented and the effect of participation on the interests of existing parties.

1. *Notice-and-comment rulemaking proceedings.* Agencies engaging in notice-and-comment rulemaking should, to the extent feasible: (a) make available documents, materials and public submissions upon which the proposed rule is based; (b) invite the presentation of all views so that the agency may be apprised of any relevant consideration before formulating policy; (c) develop effective means of providing notice to the affected public and to groups likely to possess useful information; and (d) if there is a hearing, allocate time fairly among all participants.

2. *On-the-record rulemaking and adjudicative hearings.* Public participation should be freely allowed in trial-type proceedings where the agency action is likely to affect the interests asserted by the participants. Intervention or other participation in enforcement or license revocation proceedings should be permitted when a significant objective of the adjudication is to develop and test a new policy or remedy in a precise factual setting or when the prospective intervenor is the de facto charging party. Public participation in enforcement proceedings, license revocations or other adjudications where the issue is whether the charged respondent has violated a settled law or policy should be permitted only after close scrutiny of the effect of intervention or other participation on existing parties.

### B. *Selection of Intervenors*

Intervention by a particular group or person as a party in a trial-type proceeding should depend upon a balancing of several factors, including:

- (a) The nature of the contested issues;
- (b) The prospective intervenor's precise interest in the subject matter or possible outcome of the proceeding;
- (c) The adequacy of representation provided by the existing parties to the proceeding, including whether these other parties will represent the prospective intervenor's interest and present its views, and the avail-

ability of other means (e.g., presentation of views or argument as an amicus curiae to protect its interest;

(d) The ability of the prospective intervenor to present relevant evidence and argument; and

(e) The effect of intervention on the agency's implementation of its statutory mandate.

### C. *Scope of Participation*

The scope of an intervenor's participation in a trial-type proceeding must assure it a fair opportunity to present pertinent information and to provide the agency a sound basis for decision, without rendering the hearing unmanageable. The nature of the issues, the intervenor's interests, its ability to present relevant evidence and argument, and the number, interests and capacities of the other parties should determine the dimensions of that participation. In general, a public intervenor should not be allowed to determine the broad outline of the proceeding, such as the scope or compass of the issues. A public intervenor generally should be allowed all the rights of any other party including the right to be represented by counsel, participate in prehearing conferences, obtain discovery, stipulate facts, present and cross-examine witnesses, make oral and written argument, and participate in settlement negotiations. Where the intervenor focuses on only one aspect of the proceeding or does not seek to controvert adjudicative facts, consideration should be given to limiting its participation to particular issues, written evidence, argument or the like. Agencies should be cautious in advance of actual experience in anticipating that intervention will cause undue delays.

### D. *Cost of Participation*

The cost of participation in trial-type proceedings can render the opportunity to participate meaningless. Agencies have an obligation to minimize transcript charges, to avoid unnecessary filing requirements, and to provide assistance in making information available; and they should experiment with allowing access to their staff experts as advisers and witnesses in appropriate cases.

1. *Filing and distribution requirements.* Filing and distribution requirements (e.g., multiple copy rules) should be avoided except as necessary and provision should be made for a waiver where the requirement is burdensome. Existing filing and distribution requirements should be reexamined. Agencies should make every effort to provide duplication facilities at a minimum cost.

2. *Transcripts.* The cost of recording formal proceedings should be

borne by the agencies, not by the parties or other participants to the proceeding (except to the extent that a person requests expedited delivery). Existing contracts and arrangements should be revised to provide for the availability, either through a reporting service or the agency itself, of transcripts at a minimum charge reflecting only the cost of reproducing copies of the agency's transcript. Transcripts should be available without charge to indigent participants to the extent necessary for the effective representation of their interests. Where the aggregate of these transcript costs imposes a significant financial burden on the agency, the agency should seek and Congress should provide the necessary additional appropriation.

3. *Availability of information and experts.* An agency should provide assistance to participants in proceedings before it or another agency, provided that the agency's resources will not be seriously burdened or its operations impaired. Assistance should include advice and help in obtaining information from the agency's files. Each agency should experiment with allowing access to agency experts and making available experts whose testimony would be helpful in another agency's proceeding.

#### E. Notice

Each agency should utilize such methods as may be feasible, in addition to the *Federal Register's* official public notice, to inform the public and citizen groups about proceedings (including significant applications and petitions) where their participation is appropriate. Among the techniques which should be considered are factual press releases written in lay language, public service announcements on radio and television, direct mailings and advertisements where the affected public is located, and express invitations to groups which are likely to be interested in and able to represent otherwise unrepresented interests and views. The initial notice should be as far in advance of hearing as possible in order to allow affected groups an opportunity to prepare. Each agency should consider publication of a monthly bulletin,<sup>1</sup> listing:

- (a) The name and docket number or other identification of any scheduled proceeding in which public intervention may be appropriate;
- (b) A brief summary of the purpose of the proceeding;
- (c) The date, time and place of the hearing; and
- (d) The name of the agency, and the name and address of the person to contact if participation or further information is sought.

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<sup>1</sup> This recommendation does not supersede Recommendation 4, Consumer Bulletin.