Broadened Public Participation in the Administrative Process

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BROADENED PUBLIC PARTICIPATION IN THE ADMINISTRATIVE PROCESS
The significant issues in agency proceedings involve fairly complicated questions of interwoven fact, policy, and law. Detailed factual investigations, preparation of exhibits, and development of expert testimony are the guts of the administrative process. Effective participation in the administrative process, it is all too evident, is an enormously expensive and time-consuming undertaking.

It is not surprising that counsel for public interest groups, having won the right to intervene, are not too sure 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 decision-making. In what ways and to what extent should society subsidize the efforts of public interest groups?

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 groups. According to some, 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.

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. This latter 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 decision-making may require ameliorative steps even if the realities are not as bleak as some critics view them.

It is certainly no more than a truism that in domestic affairs, at least, the federal government today operates largely by virtue of statutory delegations to agencies and departments of authority to regulate or promote various forms of private activity and conduct. These delegations may be in broad or in precise terms, but ordinarily the necessities of the case, the impossibility of Congress' foreseeing or providing for the variety of situations likely to arise, require a generous grant of discretion to the agency.

The cumulative importance to the individual citizen of this agency decision-making would be difficult to overstate. It is, therefore, perhaps surprising that until very recently there was outside the government little interest in the agency decisional process except on the part of lawyers and political scientists and those industry and other economic interest groups most directly affected by the actions of a particular agency. The current surge of interest by consumers, by environmentalists, by members of minority groups, by the public at large, in how well the agencies are doing their job, is a wholesome development and one long overdue. Although accompanied occasionally by undue
Broadened public participation in the administrative process will lead to wiser and more informed decisions.

II

In thinking about areas of 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 in which reasonable people can be expected to come to opposing conclusions.

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 on people. It should attempt to duplicate the representative and political process as fully as possible, which means in my view a broad attempt to encourage individuals and groups, whether or not directly affected by the rule, to present information, views, and argument relating to the proposal.

Public participation is also desirable in economic regulatory proceedings which 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 trial does not normally focus upon the practices or interests of a particular firm, but involves a general inquiry--often industry-wide--into circumstances and conditions. The issues are broad, 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. 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.

At the other extreme is a small category of administrative proceedings in which public participation is not desirable. The "ideal type" is a criminal case in the United States District Court. Neither the John Birch Society nor the Resistance Movement should 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.

Public participation is undesirable in such a case because adjudication functions best as a two-party adversary contest involving well-formulated issues of fact. 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 unfairness of being whipsawed by multiple adversaries.

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

Here again, the amicus brief provides a sufficient method for the presentation of general questions of law or policy. For example, 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 to develop a more discriminating calculus for this balancing function.

In 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. 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. More significant criteria are the nature of the issues in the particular proceeding and the role of the agency staff. 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. 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.

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 arguments in favor of public participation are stronger.

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

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.

III

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. 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.

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.
Procedural problems may be expected to arise, however, if public participation expands dramatically. Problems of overlapping issues, control of complex multi-party proceedings, and the like may arise. These problems, however, will not differ in more than degree from the problems presently faced by the agencies, particularly such agencies as ICC, FPC, and CAB, whose proceedings presently involve a multitude of parties.

It is obvious that for public interest groups, cost is a considerable obstacle to effective participation in formal agency proceedings. 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. The costs involved are enormous, especially if citizen groups attempt to affect materially the record on which agency decisions are based as distinct from relying on legal arguments in reviewing courts—a tactic that is less expensive but usually does not develop an affirmative case for a favorable decision at the administrative level.

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 frequently sufficiently significant to hamper effective participation in a proceeding.

It is my view that 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.

Other litigation costs, especially attorneys' fees and those of expert witnesses, are larger in amount and there is little agreement concerning either the propriety or the preferred method of public funding. Despite much clamor, the existing experience with agency funding of the 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.

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. Four possible approaches are worth consideration:

1. 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. The same institutional devices—public provision of legal 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 multiplicity of legal aid offices or opportunities assures that a wide diversity of views and attitudes will be advanced on behalf of particular clients, which avoids the monolithic character and possible ideological rigidity if the choice of cases is 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.

2. The contingent-fee approach. Many public-interest lawyers believe that adequate provision of legal services to
the otherwise unrepresented will be made available only if the creation of new legal remedies has the effect of sub-
sidizing the cost of litigation. Hence the great attraction of
new damage remedies or institutional devices, such as class-
action suits, that permit the aggregation of numerous small
claims into a single unit.

This approach, of course, tends to shift policy-making
responsibilities from administrative agencies to reviewing
courts. Its advocates, despairing of the administrative
process, seek to invoke the assistance of the judiciary. 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 the alloca-
tion of decisional authority between agencies and courts.

Since the demand for free goods tends to be unlimited,
the likelihood of frivolous, repetitive, or consequential
 suits being brought in large numbers is worrisome. Examin-
ation 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. The ineffi-
ciency of the system, as well as the disparity with which it
treats small and large claims, do not suggest an uncritical
application to other fields.

3. 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 has been frequently made
that each agency which conducts formal proceedings should
provide for representation of interests that are otherwise
inadequately represented in such proceedings. This might
be done either 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 effects on
the attorney-client relationship, they share common ground
in that the agency before which a proceeding was 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 avail-
able 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 non-ideological determination of
requests would be difficult. The availability of assistance
from government, of course, should not turn on ideological
grounds. If agency lawyers are assigned to represent citizen
groups, there may be justifiable concern as to whether they
will be truly independent in litigation with the agency that
hires and promotes them.

4. The advocacy agency approach. Under this ap-
proach, new agencies would be created whose function
would be that of advocating the views of otherwise in-
adequately represented persons in agency proceedings or in
court proceedings involving judicial review of administrative
action. 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. More
recently, proposals for the creation of a consumer advocacy
agency and an Indian advocacy agency 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 that make the
representation of private interest groups so effective in
agency proceedings. Since an advocacy 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
together. 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 con-
sistency and balance applicable to institutional litigants
would 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 presi-
dent, 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
group may become its own client in the sense that the
continuance and furtherance of the institution itself is one of
its major goals.

Conclusion

This quick survey of a complex subject resembles a
helicopter survey of a defoliated and pock-marked battle-
field 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 explored in this paper are
not mutually exclusive. Experimentation with several of
them in particular agencies or areas may provide informa-
tion that will serve as the basis for a more general reform.
Those who believe, as I do, 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.