Democratizing the Administrative Process: Toward Increased Responsiveness

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> The tragic irony of the modern era is that some of the institutions originally designed to help men master their world have instead created obstacles to man's endless quest for self-expression, personal efficacy, and human fellowship. These three values form the basis of what people traditionally sought from their social and political institutions—an opportunity for creative development, a means to control their environment, and a sense of community.[1]

Since the turn of the century the decisions of American government have been relegated to the administrative process with increased regularity. The result of this phenomenon has been the creation of a labyrinth of national and local bureaucracies whose impact on our society far exceeds that of the parent branches of government. One need only consider the numerous activities of administrative bodies to conclude that their decisions intimately affect the lives of all Americans.[2] Recent events indicate, moreover, that the continuation of the administrative era is reasonably assured.[3]

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1. Smith, *Alienation and Bureaucracy: The Role of Participatory Administration*, 31 PUB. AD. REV. 658 (1971).

2. Twenty years ago, Mr. Justice Jackson said: "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart." FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

Most state governments employ more than one hundred administrative agencies. Twelve years ago Mississippi, one of the least industrialized states, had more than 75. The number of administrative agencies that have been created by the units of local government is estimated to be in the tens of thousands. K. DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 16-17 (1960).

Charles Reich, in his well known article, *The New Property*, 73 YALE L.J. 733, 749 (1964), argues that the extensive use of regulatory powers by the federal and state governments has made the use of property a liberty subject to prior governmental approval, creating a new class of property. Perhaps the most significant contribution made by Professor Reich is a result of his insight into the workings of administrative agencies: because their powers are largely discretionary, the limitations on their decision-making are few. In effect, this discretion further increases the power of the government over the individual citizen.

3. Exec. Order No. 11,627, 36 C.F.R. 20,139 (1971), *as amended*, Exec.

The emerging practice of public interest law is a challenge to the unchecked abuses of the administrative state. The origins of this type of practice vary, and its long term objectives have not yet been defined with any significant degree of precision. Though the activities of the public interest lawyer are diverse, ranging from advocacy on behalf of the poor and racial minorities to the protection of the human environment and the consumer, each manifests a common belief: the administrative process has failed to protect the powerless and the underrepresented.

Presently, a large portion of public interest activity occurs in Washington.[4] Those pursuing that activity seek primarily to compel the national government, particularly the federal agencies, to be more responsive to the demands and needs of the public. Additionally, many public interest law firms have located in other major urban areas, directing their attacks at the abuses of federal agencies and seeking remedies mainly in the federal courts.[5] With few exceptions,[6] public interest lawyers have remained uninvolved in the affairs of state and municipal administrative agencies and the communities in which the majority of Americans live.

The immediate dangers inherent in limiting public interest activity to Washington, without more, are twofold. Initially, it furthers the tendency to rely on the federal government for solutions to local problems and validates the assumption that all significant change must begin in Washington. Yet many local problems are either beyond the jurisdiction of the federal government or defy national solution, while others, although solvable at the federal level, could be remedied most practically at the community level. Secondly, there is a danger that state and local administrative agencies and their federal counterparts in each community will continue in their present state, unresponsive to the public demand for better government. The problems associated with local bureaucracies will go unchecked; the current failures of the local administrator will continue uncorrected.[7]

Order No. 11,630, 36 C.F.R. 21,023 (1971), 12 U.S.C.A. § 1904 (Supp. 1972) (Cost of Living Council, Pay Board and Price Commission established).

4. In 1970 the *Yale Law Journal* conducted a survey of the then existing public interest organizations. Although the authors stated the survey was not a comprehensive listing, it indicated that over one-half of all public interest lawyers and law firms were located in Washington, D.C. Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1151-52 (1970) (Appendix).

5. *See, e.g.*, Berlin, Roisman & Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 547 (1970); *Public Interest Lawyers*, TRIAL, May-June 1971, at 11. *But see* Boasberg, *Urban Law and the Private Bar*, 2 URBAN LAW. 105 (1970).

6. One notable exception is the firm of Public Advocates Inc. of San Francisco which has contributed a large portion of its time to practicing before state agencies, including the California Fair Employment Practices Commission. Two members of the firm, Peter E. Sitkin and J. Anthony Kline, are contributors to the Symposium. *See*, Sitkin and Kline, *Financing Public Interest Litigation*, 13 ARIZ. L. REV. 823 (1971).

7. Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1011 (1970): "Public interest law institutions that have sprung up in Washington, D.C., will find that each battle fought and won on the national level may well have to be fought again on the regional, state, or local level."

The long term effects of the present concentration of public interest legal activity in Washington are difficult to assess. If past trends are reliable indicators and continue unchanged, one probable result will be an additional expansion of the power of the federal government, coupled with a further expansion of the federal bureaucracy and an increasing alienation of citizen from government. Because the long-revered view of many reformers that the betterment of both society and government can best be accomplished by centralizing and magnifying federal power[8] is now being questioned,[9] the results of this trend could be counter-productive. Indeed, it appears that by centralizing in Washington public interest law may well magnify citizen apathy and alienation. By duplicating bureaucracy, public interest lawyers can neither cure the failures of the administrative process nor attack local problems which demand solution.

For those who desire a government that is responsive to local needs, the implication is clear: public interest lawyers must consider the shortcomings of state and local administrative processes and direct their skills to the resolution of the problems of their communities. Yet the necessary community-oriented public interest lawyers will not arise without motivation, nor will the organized bar lend its support to the public interest law movement without sufficient explanation. The primary purpose of the following analysis, therefore, is to set forth a profile for localized public interest activity. In order to understand the underlying motivations for public interest law and its potential for meaningful accomplishment at the local level, a large portion of the discussion is directed to the interrelationship between the citizen and the administrative agency,

8. Typical of this view is that expressed by John Roche in his book, SHADOW AND SUBSTANCE (1964). Roche lauded the development of the centralization of power in Washington, to the extent that he thought that the development of mass, impersonal government was the best insurance for liberty of the individual citizen. Similarly, he approved of the impersonal elements of urban society. *Id.* at 44. In contrast to this view, many sociologists have labeled the development as catastrophic. Because man needs the personal elements of association and interchange, it is essential that there be a community of man. *See, e.g.*, R. NISBET, THE QUEST FOR COMMUNITY 73 (1953):

> The quest for community will not be denied, for it springs from some of the powerful needs of human nature—needs for a clear sense of cultural purpose, membership, status, and continuity. Without these, no amount of mere material welfare will serve to arrest the developing sense of alienation in our society and the mounting preoccupation with the imperatives of community. To appeal to technological progress is futile. For what we discover is that rising standards of living, together with increases in leisure, actually intensify the disquietude and frustration that arise when cherished and proferred goals are without available means of fulfillment.

While it may be impossible to give each citizen the individualized attention and fulfillment which he requires, the increased impersonality of government can only further alienate the people. *See also* T. PARSONS, THE SOCIAL SYSTEM 268-69 (1951). Similarly, the governmental unit which a citizen utilizes should be able to provide personalized relief to the fullest extent possible. A national agency, by definition, cannot apply individual standards. A local agency, on the other hand, is better equipped to engage in such a function.

9. *See generally, A Symposium: Alienation, Decentralization, Participation,* 29 PUB. AD. REV. 2 (1969).

emphasizing the need for alternatives to the present decision-making process. Specific suggestions are offered where they affect areas of special concern to public interest law. Finally, it should be noted that the discussion is by no means an exhaustive consideration of the subject matter, but rather an effort to illuminate the shortcomings of the administrative state.

DEFINING THE PUBLIC INTEREST IN A DEMOCRACY

Perhaps no phrase is more frequently heard in the legal and political circles of this country than the pathos-inspiring term, "It's in the public interest." The mere mention of the public interest is considered sufficient to validate the most evil of deeds. Whether the speaker be a congressman seeking unnecessary federal projects for his district, a lawyer arguing the most preposterous case or a lobbyist presenting inaccurate information to key administrators, the phrase is constantly voiced in a fashion which approaches the pavlovian.

As a result of this abuse, the term public interest has lost all objective definitional meaning. While an individual may readily identify a purely personal interest and contrast it with the stake of a larger majority, it does not necessarily follow that the majority holds the public interest. In order to determine whether the interest is legitimate, it is first necessary to flavor a view with values. Once colored, the interests fade into the realm of subjectivity and ideology. Thus, like the phrases "general welfare" and "public policy," an objective meaning exists only to the extent that values of groups and individuals coincide.[10]

In order to give the term an identity, it is necessary to view the public interest as a procedural phenomena. This emphasis on procedure is not a deliberate effort to slight the subjective interests, nor is it form over substance. Instead, it is a recognition that the inherent subjectivity of the term requires an emphasis on how the public interest may be achieved. The search for the public interest, therefore, must of necessity focus on the process by which the public interest is best attained.[11]

A variety of procedures have been advanced to aid in the discovery of the nature of the public interest. Jeremy Bentham, for example, although proclaiming that the public interest was in fact merely a fiction, proposed that it could be calculated by adding the individual interests of the members of a polity, the cumulative interest which resulted being the

10. For an exhaustive discussion of the conceptual problems associated with a subjective public interest, see G. SCHUBERT, THE PUBLIC INTEREST (1960); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1070-71 n.3 (1970).

11. Harmon, *Administrative Policy Formulation and the Public Interest*, 29 PUB. AD. REV. 483, 484 (1969): "If we accept the position that the public interest is a descriptive concept, we may regard attention to the policy *process* as being an equally legitimate responsibility as our traditional concern with its *substance*. The former, in fact, is really the prior issue."

public interest.[12] Yet Bentham's process, like the fiction of the corporate entity and its oversight of the differences between minority and majority stockholders, is only valid to the extent that individual interests coincide. As his critics have pointed out, Bentham's quantitative analysis is "predicated upon the unrealistic assumption that an individual can have no interests antagonistic to the political community as a whole."[13]

A comprehensive procedure for giving meaning to the term public interest should be founded upon the recognition that society as an entity is composed of groups and individuals who possess competing interests and diverse objectives.[14] This notion is not a new one. It formed the basis of James Madison's remarks in *Federalist No. 10*[15] and is firmly embedded in the common law[16] and the literature of political science and sociology.[17] The public interest is best served when competing interest groups and individuals ably press their demands for redress.[18] The end product of this process, the public interest, is the result of much controversy and debate and signifies a compromise which carefully respects the rights of each competing interest.

Theoretically, a democratic public interest has some additional value. Basic to the democratic philosophy is the belief that the state exists to serve the citizenry and that the ultimate result of the governmental pro-

12. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 3-4 (1948).

13. E. Bodenheimer, *Prolegomena to a Theory of the Public Interest,* in AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY, THE PUBLIC INTEREST 206 (Yearbook NOMOS V, C. Friedrich ed. 1962).

14. R. FLATHMAN, THE PUBLIC INTEREST 37 (1966).

15. THE FEDERALIST No. 10 (J. Madison).

16. Dean Roscoe Pound, speaking of the law as a means of reconciling competing interests, stated:

> It is submitted that the basis must be the one upon which the common law has always sought to proceed, the one implied in the very term 'due process of law', namely, a weighing or balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment.

Pound, *A Survey of Social Interests,* 57 HARV. L. REV. 1, 4 (1943).

17. *See, e.g.,* R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); R. FLATHMAN, THE PUBLIC INTEREST (1966); G. SCHUBERT, THE PUBLIC INTEREST (1960).

18. Connally, *The Challenge to a Pluralist Society,* in THE BIAS OF PLURALISM 4 (W. Connally ed. 1969):

> Society as a whole benefits from pluralism. The system of multiple group pressures provides reasonable assurance that most important problems and grievances will be channelled to governmental arenas for debate and resolution. The involvement of individuals in politics through group association gives most citizens a stake in the society and helps to generate the loyalties needed to maintain a stable regime with the minimum amount of coercion.
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> In short, pluralism has been justified as a system which develops individual capacities, protects individual rights and freedom, identifies important social problems, and promotes a politics of incremental change while maintaining a long-term stability based on consent.

Theoretically, Connally's assertion is consistent with basic democratic notions. To the extent that it exists, pluralism is beneficial to the individual and the state. *But see,* H. KARIEL, THE DECLINE OF AMERICAN PLURALISM (1961). Connally's emphasis on the stabilization of the state, however, may discourage individual contribution and development which instead should be the primary goal of democracy. *See, e.g.,* Kaufman, *Human Nature and Participatory Democracy,* in THE BIAS OF PLURALISM 178, 184 (W. Connally ed. 1969).

cess, will be that which is just.[19] Foremost among all suppositions however, is the requirement that each competing interest group should be heard on an issue and that free access to the government be obtainable. These tenets are the philosophical concepts expressed in the first and fourteenth amendments and are incorporated into the basic notions of fundamental fairness and due process. Only when these requirements are satisfied does the public interest take on a democratic tenor.[20]

Satisfying the stringent standards of democracy, however, requires more than strict compliance by the executive, legislature and judiciary. For the promises of the democratic process to be fully realized, its influence must extend to every institution of government. When this demand is fulfilled, the public interest has been defined by a democratic society. A public interest otherwise realized would be incorrectly labeled.

AN OVERVIEW OF ADMINISTRATIVE DECISION-MAKING

The magnitude of decisions rendered by administrative agencies makes their judgments the true test of American democracy. While the announced purpose of the administrative process is the advancement of the public interest, it has become increasingly evident that the promise has not been completely fulfilled.[21] The practice of public interest law is but one indication of the frustrations with government which permeate all levels of American society. In order to fully comprehend the justifications for public interest law and to identify the origins of the administrative default, it is necessary that the administrative decision-making process be closely examined.

There are a variety of explanations for the failure of the administrative process to satisfy public and private expectations. The most common criticism is that the public interest is victimized by political scoundrels

19. *See* Vinogradoff, *Legal Standards and Ideals,* 23 MICH. L. REV. 1 (1924). Once having resolved a conflict in a just manner, law and government should constantly reexamine the validity of the judgment. Thus, while the result may favor one interest, the law must also respect the opponent and make available the opportunity of challenging the decision. D. SPITZ, THE LIBERAL IDEA OF FREEDOM 81 (1964):

> [L]aw is not merely the instrument of groups in power, the means whereby they can maintain, enlarge, or suppress the areas of freedom. It is also the means whereby groups out of power can in some measure restrain the holders of power. For law in the minds of men is more than the expression of power; it is sanctioned or legitimate power. It carries the imputation that the power thus exercised is acceptable and morally right.

20. Cahn & Cahn, *The New Sovereign Immunity,* 81 HARV. L. REV. 929, 930 (1968): "In matters of judgment the best means of validation yet devised is the democratic process: the majority's only justifiable source of complacency in a course of action derives from the scrutiny assured by the protection of the right to dissent." *Cf.* HART & SACKS, 1 THE LEGAL PROCESS 1 (Tent. ed. 1958): "A one-sided solution, even if otherwise feasible, can prevail only if the other person lacks the means or disposition to challenge it effectively."

21. *See* Kaufman, *Administrative Decentralization and Political Power,* 29 PUB. AD. REV. 3, 5 (1969).

who have consciously grasped the reins of administrative power. To an extent, this fear is well-founded.[22] The American public is frequently made aware of the power struggle which ensues following the appointment of an administrator to a sensitive post;[23] the effect some interest groups have on the processes of selection and approval approaches total control.[24] The impact of deliberate political manipulation on the decisions of administrative agencies cannot be slighted, and the placement of an administrator whose controlling allegiance is to a single interest is clearly detrimental to the broader public interest.

To label the appointment power and political influence as completely negative forces, however, is a gross oversimplification. While there is much potential for abuse, defenders are quick to point out that the appointment process is a democratic notion which represents one of the few instances in the administrative context where the public will is expressed through the exercise of power by an elected official.[25] To the extent that elected officials represent the will of their constituents, this view cannot be questioned. There are, however, countervailing influences which mitigate the effect of conscious political manipulation on the administrative decision-making process, whether the attempt be made by an elected official or an administrator with an outside allegiance. These influences are the limitation of human resources and the corresponding division of the decision-making process among many people.

Although there are legal distinctions between the varying forms which administrative bodies assume and their subjectivity to external legal power, any differences between their decision-making characteristics based on those distinctions are largely illusory. While some administrative agencies are defined as purely administrative[26] or purely regulatory,[27] pure administrators have nearly the freedom and autonomy which is characteristic of their independent counterparts. There are simply too many decisions being made by too many people to allow close scrutiny by the severely limited resources of the executive[28] and legislature.[29] Thus, with

22. *See, e.g.*, E. COX, R. FELLMETH & J. SCHULZ, THE "NADER REPORT" ON THE FEDERAL TRADE COMMISSION 134-140 (1969); G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 273 (1967).

23. A recent controversy illustrative of this point was the appointment of Dr. Earl L. Butz as the Secretary of Agriculture. N.Y. Times, Nov. 16, 1971, § 1, at 21, col. 1.

24. *See, e.g.*, M. DUFFIELD, KING LEGION (1931).

25. R. LORCH, DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW 99 (1969).

26. J. LANDIS, THE ADMINISTRATIVE PROCESS 21 (1938).

27. THE POLITICS OF REGULATION 92 (S. Krislov & L. Musolf ed. 1964): "The 'pure' regulatory process is best exemplified by the great Independent Regulatory Commissions. These include by general consent, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the Federal Communications Commission, the Federal Power Commission, the Securities Exchange Commission and the Civil Aeronautics Board."

28. G. BERKLEY, THE ADMINISTRATIVE REVOLUTION 20 (1971); R. LORCH, *supra* note 25.

29. R. LORCH, *supra* note 25, at 99: "Legislators are too much in the dark to

the possible exception of crises or issues peculiarly within the interest of an executive officer or legislator,[30] the effect of a conscious political exercise of legal power by extra-agency forces is equally reduced in both types of agencies.

There is a similar freedom from control within each individual agency. Agency heads appointed to guide an administrative body toward a particular end are personally unable to assume an active role in the formulation of each decision which their agency makes. The vast majority of administrative decisions are made by career civil servants who are virtually immune from political pressure.[31] Agency directors, be they well-intentioned or aligned with a special interest,[32] may be able to supervise crises within their area of knowledge, but the overwhelming diffusion of decisions which takes place at subordinate levels minimizes their impact on agency decision-making.[33] Indeed, were intentional political subversion of the public interest the sole defect, the reformation of the administrative process could be properly left to the political arena. Unfortunately, however, the biases which have precipitated the need for public interest law are not so easily remedied. They result, not only from malevolence and conscious political allegiance to a private interest, but from the nature of the administrative process as it currently functions.[34]

The need for reform within the administrative agency context should,

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ask intelligent questions about what administrators are doing, and even if they were not in the dark, they would not have *time* to ask intelligent questions . . . ." *See also,* CITIZEN'S CONFERENCE ON STATE LEGISLATURES, THE SOMETIMES GOVERNMENTS 126-27 (1971), which states that only the California legislature is equipped to fulfill its function of supervising the state bureaucracy.

30. R. LORCH, *supra* note 25, at 99: "A governor or a president may influence broad policy in a few spheres that interest him or in crisis matters, but one man cannot really control the thousand-and-one things that modern governments do, or the hundreds of thousands of people who do them."

31. *Id.*

32. In some cases there is a thin line between conscious political manipulation and public service. Nowhere is the distinction more difficult to draw than at the local level where citizen-professionals constitute the majority of "public servants" who serve on school boards, zoning commissions, industrial boards, airport authorities and countless other local administrative bodies. Many of these administrators are motivated by a desire to serve the public. On the other hand, it seems naïve to assume that the over-representation of immediately interested parties is pure coincidence. In Tucson, Arizona, for example, the Tucson Planning and Zoning Commission is composed of nine members, TUCSON, ARIZ., CODE § 23-511 (1964), six of whom are directly involved in real estate, land development or construction. Arizona Daily Star, Feb. 13, 1972, § A, at 18, col. 1.

33. An example of this diffusion can be found in Cahn & Cahn, *The New Sovereign Immunity,* 81 HARV. L. REV. 929 (1968). There, local elements of the Office of Economic Opportunity were continually deciding issues contrary to the intent of the President, Congress and the Secretary of Health, Education and Welfare. This diffusion was most likely the result of communication distance. *See* K. DEUTSCH, THE NERVES OF GOVERNMENT 162 (1963). The extent of diffusion will vary according to the size of the agency. In cases involving small administrative operations the effect of diffusion would be greatly reduced.

34. The "Fiasco of Hunting Creek" provides a cogent example of both conscious political manipulation by interested parties and oversight by well-intentioned administrators. J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN-ACTION 1-52 (1971).

therefore, be primarily aimed at locating the causes of administrative failure rather than at ferreting out "bad faith" bureaucrats. This task is much more difficult than identifying and attacking the destructive motives of consciously biased administrators. By subjecting the administrative process to a decision-making analysis, however, it is possible to arrive at general conclusions, many of which reveal the foundations of the failure of public agencies to fulfill citizen expectations. For purposes of this analysis, the rational decision-making model will be used as a basis of comparison. In addition to simplifying the decision-making process, it is generally agreed that rational decision theory most closely approximates the exchange of ideas which is inextricably linked to the democratic process.[35]

Rational decision making is generally thought to include the following elements: identification of the problem, consideration of all conceivable alternatives, identification and evaluation of the consequences of each alternative, and selection of the alternative most consistent with desired objectives.[36] Translated into the administrative context, this formula dictates that the rationality of an administrative decision should be judged by the extent to which the agency identified the interests at stake, gathered information concerning possible solutions, evaluated data with a view toward the best resolution of the conflicting interests, and selected the alternative which resulted in the furtherance of the interest of the public.[37] Although use of the rational decision making model is not infallible, it provides a means for comparative analysis, making possible an evaluation of the relative rationality of each decision.[38] Similarly, it is possible to judge the degree of reconciliation of conflicting interests which is achieved by a given administrative decision and, on the broader scale, to determine the rationality of a decision-making apparatus, whether that apparatus takes the form of a governmental agency or a private corporation.[39]

In order for the more rational decision to be obtained, however, each

35. *See, e.g.*, R. DAHL, A PREFACE TO DEMOCRATIC THEORY 46-47 (1956); W. GORE, ADMINISTRATIVE DECISION-MAKING (1964).

36. M. MEYERSON & E. BANFIELD, POLITICS, PLANNING, AND THE PUBLIC INTEREST 314-15 (1955). Admittedly, this is a simplification of an intricate process which is refined at each level of decision making. *Cf.* Lasswell & McDougal, *Criteria for a Theory About Law*, 44 So. CAL. L. REV. 362 (1971).

37. As used herein, the public interest is the final product of the democratic process. See text accompanying notes 10-20 *supra*. By definition, any preconceived notions of what constitutes the public interest would reduce the impact of alternative selection and be repugnant to rational decision-making.

38. Although it is impossible to know all the alternatives which are available, or the consequences of each alternative, decisions can be made with a view to those available. Thus, it is possible to describe some decisions as more rational than others. M. MEYERSON & E. BANFIELD, *supra* note 36, at 314-15.

39. The identification of such systems as more or less rational is based on the premise that the collection of external data and its subsequent transmission within a decision-making system largely shapes the outcome of decisions. *See, e.g.*, K. DEUTSCH, THE NERVES OF GOVERNMENT 161-62 (1963); Sturm, *Rule of Law and Politics in a Revolutionary Age*, 51 SOUNDINGS 4 (1968), reprinted in LAW AND PHILOSOPHY 371 (E. Kent ed. 1970).

phase of the decision-making process must be properly completed. Failure to adequately identify the source of a problem, for example, greatly reduces the likelihood that workable solutions will be selected. Conversely, designation of an incorrect or improbable alternative solution renders the subsequent intervals a meaningless exercise. It is the interdependence of each phase which makes identification of the problem and selection of alternative solutions the crucial stages of the rational decision-making process.

Contrasting this rational analysis with the methods currently employed in bureaucratic decision making, the disparity between the two with regard to the critical stages of interest identification and selection of alternatives illuminates the failings of the administrative process. At the outset, it is helpful to distinguish between two types of limitations which effectively prevent administrative agencies from identifying the interests at stake and selecting workable compromises. First, there are those which may be described as perceptual; that is, those qualities attributable to the mental and social attitudes of the members of a bureaucracy which confine its inquiry and consideration of the relevant interests.[40] Second, there are those limitations which may be labeled procedural, since they arise out of the legal and organizational framework of the agencies and further obstruct the capacity of administrators to adequately evaluate the information they receive.[41]

One commonly expressed perceptual limitation is the elitism of expertise. Bureaucracies, like many organizations of the technological age, are an accumulation of experts with particular skills essential to the performance of an agency task.[42] The level of expertise of a particular agency will, of course, vary according to the complexity of its assigned duties,[43] as will the degree of expertise within a given agency. Nevertheless, expertise is the salient characteristic of the administrative process.[44] While expertise affords many advantages, including increased efficiency resulting from the division of labor,[45] it has its detrimental effects. The acquisition of unique knowledge, individually or collectively, often

40. *See, e.g.*, W. GORE, ADMINISTRATIVE DECISION-MAKING 49 (1964).

41. The distinctions are not easily made. For example, the organizational structure influences the informational exchange within an agency, which in turn may preclude perceptual variables from having a bearing on the decision. See K. DEUTSCH, *supra* note 39, at 163; text accompanying note 33 *supra* (size of bureaucracy may determine its capacity to absorb and transmit information within agency).

42. J. GALBRAITH, THE NEW INDUSTRIAL STATE (1971). For better or worse, reliance on expertise is seemingly the natural consequence of the technological society. *Id.* at 60-62.

43. There is also a corresponding degree of discretion. For a discussion of the merits of expertise in a democratic society, see Thompson, *Bureaucracy in a Democratic Society* in PUBLIC ADMINISTRATION AND DEMOCRACY 205 (R. Martin ed. 1965).

44. *See* G. BERKLEY, THE ADMINISTRATIVE REVOLUTION 70 (1971).

45. J. GALBRAITH, *supra* note 42, at 60-61.

causes the administrator or agency to discredit the views of non-expert citizens. Non-experts do not use the terminology of expertise and phrase their opinions in a manner which the expert considers inarticulate or incomprehensible.[46] Frequently, "Like the blind man who knew only of the elephant's tusks and assumed the rest of the animal was also ivory, people in organizations may slip into the easy assumption that, because they understand enough, they understand all."[47] This is the elitism of expertise.

Moreover, pursuit of the skills and education necessary for the attainment of expertise is an intellectually narrowing experience. By concentrating on one discipline to the sufferance of others, the capacity of an individual to recognize important issues not having a direct bearing on matters immediately before him is necessarily circumscribed.[48] In a collective sense, administrative bodies are prone to discount the value of extra-agency information, especially that which the agency envisions as inconsistent with its self-conceived purpose.[49] The National Environmental Policy Act[50] serves as an example of congressional recognition that administrators tend to slight the importance of information not peculiarly within their competence,[51] interest,[52] or immediate concern.

Furthermore, there is a mutuality of interest between bureaucracies

46. As the metalinguists have noted, "[W]e perceive things not as they really are but as language allows us to approximate reality. Our perception, judgment, and consequent behavior are limited and molded by the language system we use." Roberts, *Language and Development Administration*, 29 PUB. AD. REV. 255 (1969).

47. W. GORE, *supra* note 37, at 50.

48. Smith, *supra* note 1, at 659: "[S]pecialization of functions, while necessary when dealing with complex problems, tends to foster the fragmented or excessively specialized personality. *See also* Lindblom, *The Science of "Muddling Through"*, 19 PUB. AD. REV. 79, 84 (1959).

49. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 489-90 (1952); Straayer, *Public Problems and Non-Decision Making—A Study of the Tucson Water System*, 10 NAT. RES. J. 545, 546 (1970).

50. 42 U.S.C .§§ 4321-4347 (1970).

51. It requires that in determining the consequences of a proposed project a federal agency must "[u]tilize a systematic, *interdisciplinary approach* which insures the integrated use of the natural and social sciences and the environmental design arts in *planning and decision making* which may have an impact on man's environment." *Id.* § 4332(2)(A) (emphasis added). Another subsection reads in part: "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or *special expertise* with respect to any environmental impact involved." *Id.* § 4332(2)(C) (emphasis added).

52. The statute mandates that in evaluating the effects of proposed agency action an agency must "include in every recommendation or report . . . a detailed statement by the responsible official on (i) the environmental impact of the proposed action." *Id.* § 4332(2)(C).

Since each facet of society is changing, although not always at the same rate, new skills and knowledge are necessary to keep pace with the increased complexity. The interdisciplinary approach affords a diverse view with as much objectivity as possible. Henning, *Natural Resources Administration and the Public Interest*, 30 PUB. AD. REV. 134, 138 (1970). For a discussion of the implications of the interdisciplinary approach in public interest law, see Comment, *Interdisciplinary Collaboration in Public Interest Law*, 13 ARIZ. L. REV. 909 (1971).

and the subjects of their power. At the federal level there is a near symbiosis between the regulators and the regulated. The Interstate Commerce Commission owes its existence to the railroads—the future of the ICC and the railroad industry are interdependent.[53] As a result, the attention of administrators shifts from a sole concern for the public interest to a schizophrenic preoccupation with the continued economic viability of the interests they regulate.[54] There are other examples. Some agencies assume the role of developer instead of regulator. The Atomic Energy Commission actively supports the development of atomic energy, and at the local level the zoning board is sympathetic to the private real estate and development interests which guarantee the economic growth of their cities. In effect, this shifting of sympathy dulls the agency's view of matters outside their self-conceived purpose. Consider, for example, the probability that the Atomic Energy Commission will discover that environmental considerations outweigh the need for rapid development of atomic energy.[55]

There are additional perceptual limitations. The negative influences of racial and class bigotry undermine the ability of administrators to be conscious of the interests of the poor and racial minorities. These groups have received little attention from the administrative process.[56] Indeed, nowhere is the irrationality of the current administrative process expressed so clearly. The poor have little opportunity to voice their opinions,[57] and when they do seek relief, they are given less than normative justice.[58] Some administrative oversight is intentional, some is not.[59] To the poor it makes little difference, for the result is the same.

In sum, the competence of bureaucracies to accurately identify the

53. R. LORCH, *supra* note 25, at 41.
54. *See, e.g.*, Huntington, *supra* note 49, at 471-481.
55. *See* Calvert Cliff's Coord. Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).
56. *Cf.* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 284 (New York Times ed. 1968).
57. Harrington, *The Invisible Poor* in INEQUALITY AND POVERTY 140, 143 (E. Budd ed. 1967):

> It is one of the cruelest ironies of social life in advanced countries that the dispossessed at the bottom of society are unable to speak for themselves . . . They are without lobbies of their own; they put forward no legislative program. As a group they are atomized. They have no face; they have no voice.

58. Bureaucracies do not hold true to their systematized decision making, but rather enforce policies differently when confronted with different interests which will be ultimately affected by the implementation of those policies. It has been shown, for example, that the individual's status and social position largely determined the extent and quality of the treatment they received before the agencies. *See* Sjoberg, Bymer & Farris, *Bureaucracy and the Lower Class,* 50 SOC. & SOCIAL RES. 325 (1966).
59. Bloomberg, *The Goals,* in *Symposium: Governing Megacentropolis,* 30 PUB. AD. REV. 515 (1970):

> [T]he complex pluralism of the super city was not acknowledged by the planners who usually shared the middle-class and often puritanical values of their appointed commissions and departmental heads . . . They have neither designed neighborhoods with poor people in mind, nor called for the economic programs which would minimize the need for such design.

relevant interests of the contemporary social and physical environment is subject to the frailties of human nature and individual prejudice. Elitism of expertise, communication loss, mutuality of interest, and racial and class bigotry, to name a few, are negative influences which frustrate rational decision-making. When these influences are allowed to continue unchecked, the best-intentioned administrator will rarely obtain a result consistent with the public interest.

Given the potential of perceptual limitations to obstruct the search for the public interest, bureaucracies should seek to minimize their effect. One solution to this enigma is the application of rigorous organizational and procedural standards, each formulated with a view to maximizing interest identification and the selection of feasible alternatives. Unfortunately, the reverse is more commonly the case since procedural frailties magnify those of the human variety. Indeed, to the extent that procedures for the receipt of information exist, they are subverted by the dominance of immediately interest parties.

Perhaps the best example of procedural dominance by immediately interested parties occurs at the fact-finding stage. There the administrator gathers information which he uses to predict the probable consequences of each potential course of action. The data is interpreted, evaluated and filtered. Balancing the merit of each alternative, the decision maker then selects the alternative which is most likely to satisfy the needs of those who have pressed their evidence before him.[60] A view of the prevalent pattern among most agencies, however, discloses a wide disparity between the ideal decision-making model and what actually happens in the everyday transactions between the administrators and the public.

For example, it is often assumed that agencies are factually self sufficient; that is, that they possess the necessary resources to gather the information required for the formulation of public policy. Nothing could be farther from the truth, for most, if not all, agencies can be characterized as under-staffed,[61] under-budgeted[62] or both.[63] As a result, it is

60. *See* text & notes 35-37 *supra.*

61. *See, e.g.*, E. Cox, R. Fellmeth, & J. Schulz, "The Nader Report" on the Federal Trade Commission 87 (1969); Ralph Nader Study Group, The Interstate Commerce Omission: Report on the Interstate Commerce Commission and Transportation 261 (1970).

62. M. Mintz & J. Cohen, America, Inc. 278 (1971): "The 1970 budget of the independent regulatory agencies was $150 million—less Ralph Nader has noted, 'than women spent on wigs last year' ".

63. In Arizona, as in many states, the Corporation Commission is vested with the duty to regulate public utilities. Each corporation subject to its control is assessed 0.10% of taxable revenue for purposes of funding of enforcement and investigation of the Corporation Commission. Yet the revenue from this tax goes into the General Fund and a special act of the legislature is required to free the money necessary for a full-blown investigation. Interview with Evo J. DeConcini, Ass't Exec. Sec'y, Arizona Corporation Commission, Tucson, Arizona, Mar. 2, 1972. The crux of many rate regulating cases is the fixing of property evaluation for determining the rate of fair return. The Arizona Corporation Commission does not permanently employ a property evaluation specialist and has only 7 full

common practice for agencies to rely upon information which they receive from extra-agency sources.[64] More often than not, these suppliers are those whose sole objective is the obtainment of a favorable judgment from the agency. Needless to say, they cast their evidence in a light most consistent with that end.[65]

While there is nothing inherently wrong with participation by immediately interested parties in the decision-making process,[66] the information bias which naturally follows from such procedures is objectionable. Much information must of necessity go unquestioned, since administrators have neither the time nor the resources needed to independently investigate the validity of all data received. Moreover, they are provided with no basis of comparison, as there is a scarcity of information offered to contradict the assertion of the immediately interested party.[67] Consequently, it is arguable that much agency decision-making may be characterized as assumptionary, for it is based on untested data.[68]

The consequences which flow from such procedures, coupled with perceptual limitations, are evident. Administrators, faced with a barrage of information which largely reinforces their pre-existing proclivities,[69] easily decide that the immediately interested party—be it General Motors

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time staff experts. *Id.*

Many times, outside experts are called in to aid agencies. A common practice, however, is for these management and specialist teams to be employed by a public utility in one case and subsequently employed by the agency in another. *Id.* Even though a firm is rarely on both ends of a controversy simultaneously, it is obvious that an expert who is testifying before an agency and is opposing a rate increase in the presence of his future employer is under intense pressure. It would be foolish to suppose this does not affect the presentation of the data.

64. This is done by requiring the applicant to put forth his evidence. The Arizona Corporation Commission, for example, requires that each applicant for a rate increase set forth the grounds for the increase, accompanied by the data which supports the applicant's position. The staff then independently evaluates the application, based on the evidence of the applicant. *Id.* The federal agencies have similar practices. The FDA, for example, approves drug applications on the basis of evidence submitted by the applicant drug company. 21 U.S.C. § 355(b) (1970).

65. *See, e.g.*, "The Tucson Gas & Electric Case" discussed at text & notes 81-91 *infra.*

66. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 102-103 (1941); Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts,* 118 U. PA. L. REV. 540-41 (1970).

67. *But see* J. LANDIS, THE ADMINISTRATIVE PROCESS 39 (1938):

> For [the administrative process] to be successful in a particular field, it is imperative that controversies be decided as "rightly" as possible, independent of the formal record the parties themselves produce. The ultimate test of the administrative process is the policy that it formulates; not the fairness as between the parties of a controversy on a record of their own making.

68. *See* FRIENDLY, FEDERAL ADMINISTRATIVE AGENCIES 144-45 (1962) for a further discussion of the need for extra-agency input.

69. J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, *quoted in* M. MINTZ & J. COHEN, AMERICA, INC. 267 (1971): "Irrespective of the absence of social contacts and the acceptance of undue hospitality, it is the daily machine-gun-like impact on both agency and its staff of industry representation that makes for industry orientation on the part of many honest and capable agency members as well as agency staffs."

or the local real estate developer—clearly deserves a desired ruling, for it is in the public interest. Where these influences are present, it is foolish to expect otherwise. This is how the public interest is unconsciously lost.

CURING THE DEFECTS: THE PUBLIC AS DECISION-MAKER

Much of the irrationality of administrative decision-making is remediable. The effect of the deficiencies attributable to inadequate procedures, for example, can be reduced or obviated by the formulation of new processes which would increase agency informational input. The negative human variables, however, cannot be fully eliminated. The most that can reasonably be expected is an imperfect public interest, fairly representative of the interests at stake; the administrative process is a fallible instrument, capable of improvement yet unable to completely satisfy the demands which are placed upon it.

There are many conceivable alternatives for solving the dilemma of the imperfect public interest. Professor Sax has argued that, at least for purposes of protecting the environment, the courts should play a more active role, in some cases replacing the administrative agency as primary decision maker.[70] Professor Jaffe, on the other hand, advocates a reconstruction of the administrative process with a view toward encouraging consideration of public interest issues.[71] Certainly, both views have merit,[72] but the total abdication of the agency role seems neither imminent nor advisable. The administrative process is designed to aid overburdened courts, executives and legislators, and, if effective, it can operate as a valuable instrument of decision making.[73] For the immediate future, reformation of the administrative process seems to be the preferable alternative.

Curing the defects of the administrative process can result from a variety of motivations. Some reform might be agency-initiated, with ad-

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70. J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 118-24 (1971).

71. Jaffe, *Book Review*, 84 HARV. L. REV. 1562 (1971).

72. Professor Sax correctly outlines some fundamental problems which confront lawyers in reconciling the administrative process with traditional notions of fairness. In many cases, agencies do not view the citizen as a party, since in their opinion there are no rights in controversy. In order to protect the citizen's right to a clean environment, he would counter this with the establishment of the public trust doctrine, J. SAX, *supra* note 70 at 158-74, and public rights would of necessity be given full recognition. *See also*, J. CARLIN, J. HOWARD & S. MESSINGER, CIVIL JUSTICE AND THE POOR 27-29 (1967).

One assumption made by Professor Sax is that courts are not subject to the influences which plague the administrative process. To the extent that courts question the validity of information, this may be valid. *See* text and notes 60-69 *supra*. Professor Jaffe, however, counters this assertion with the doctrine of judicial restraint, Jaffe, *supra* note 72 at 1566-68. Moreover, Jaffe questions Sax's central theme: "Does it make good sense to propagate the thesis that judges alone are fit to govern?" *Id.* at 1569. Professor Jaffe's view was vindicated in Roberts v. Michigan, 2 BNA ENV. REP. DEC. 1612 (Ingham Co., Mich. Cir. Ct., May 4, 1971).

73. Jaffe, *supra* note 71 at 1568-69.

ministrators expanding the information gathering capability of their agency,[74] thereby insuring consideration of the diverse and sometimes conflicting interests affected by their decisions. Alternatively, citizens could pressure the legislative and executive branches to reorganize and restructure the bureaucracies they have created. Finally, citizens can confront the administrative process head on, making direct informational inputs into an agency and, where appropriate, challenging agency legitimacy and responsiveness.

Unfortunately, all present indications make anticipation of agency-initiated reform an exercise in naïveté. Although there is some evidence that a small minority of administrators are conscious of the irrationality of their own methods,[75] most are seemingly unaware of the implications of their decisions. Those who are cognizant of the irrationality generally agree that reform will not come from within the agencies.[76] The immediate realization of reform initiated by the legislature or executive can be similarly classified, since those most capable of causing the necessary structural changes are unable[77] or unwilling to do so. Clearly, any reform of the administrative process must begin with citizen action and involvement. Vigilant activism by the public is a necessary prerequisite to making administrators and bureaucracies responsible, accountable public servants.

Citizen Participation as a Countervailing Influence

Participation by citizens in the affairs of government is a notion which evokes long-forgotten emotions and memories. Immediately, visions come to mind of the town meeting, the packed rows of adamant citizens demanding attention, and the public official present only to account to his constituents. These are the mythological views of citizen participa-

74. One obstacle to agency-initiated reform is the reluctance of the legislatures to adequately fund agencies. See text & notes 60-63 *supra.* Ralph Nader, on the other hand, has maintained that administrators spend their funds in the wrong areas. M. MINTZ & J. COHEN, *supra* note 62.

75. Paul Davidoff, noted urban planner and student of public administration, has argued that urban planning without citizen participation is totally irrational. Davidoff & Reiner, *A Choice Theory of Planning,* 28 J. AM. INST. PLAN. 103, 108 (1962). In order to overcome the tendency of planners to set out elaborate schemes devoid of citizen inputs, Davidoff suggests planners represent the diverse interests of the planning community in the administrative process, each planner protecting his "client's" interest. Davidoff, *Advocacy and Pluralism in Planning,* 31 J. AM. INST. PLAN. 331 (1965). The merits of Davidoff's hypothesis are examined in E. BLECHER, ADVOCACY PLANNING FOR URBAN DEVELOPMENT (1971).

76. *See, e.g.,* Jones, *The Role of Administrative Agencies As Instruments of Social Reform,* 19 AD. L. REV. 279 (1967). Ms. Jones is a Commissioner of the Federal Trade Commission. *Cf.* W. GELLHORN, WHEN AMERICANS COMPLAIN 218 (1966): "Self-policing, highly valuable though it may be for managerial purposes, will never be a wholly accepted means of redressing errors so long as administrative heads may veil their own or their subordinate's discovered blunders in order to avoid possible embarrassment."

77. *See* text & notes 28-32 *supra.* Public interest lawyers may be making some inroads in this area as they are frequently testifying before the legislatures.

tion; partly romantic, partly real, but nonetheless a part of the American dream. But citizen participation is more than mythology, for it epitomizes the recurrent theme of democratic government: the state, whether it be large or small, exists to serve the people.

The merits of citizen participation in the decision-making processes of government are obvious. Such participation exemplifies the role of government in a democratic society and provides an adequate vehicle for the resolution of conflict and diversity. It gives the citizen an investment, indeed a right, to partake in the affairs of his government and supplies a means through which he may effectuate control over his own affairs and those of the society in which he lives. Participation by the public is an indication of both interest in government and an act of consent to the decisions of that government.[78] It further insures that the government will receive adequate information. Furthermore, while citizen participation may provide limited tranquility and order, thereby insuring the stability of the state, it is also a recognition that each member of society can further his own interest and those of his fellow citizens through active cooperation and mutual concern. "Indeed, a democracy of participation may have many beneficial consequences, but its main justifying function is and always has been . . . the contribution it can make to the development of human powers of thought, feeling, and action."[79]

Citizen participation in the traditional political arenas is easily recognized. The franchise is an instrument of power which the citizen may wield to mold the executive and legislative branches into images resembling the public will. Through the checks and balances of the elected legislative and executive branches, coupled with the cumulative forces of litigation and constitutionalism, the citizen is able to insure the fairness of the judicial process. Administrators, however, are another matter, for they are further removed from public scrutiny than the traditional branches of government and are consequently the subject of less citizen debate. Public participation in the administrative process is by far the most difficult to achieve.

Public participation in administrative decision making carries with it the potential to offset the negative influences which precipitate the irrationality of the current process. For example, citizen activism could broaden the limited perceptions[80] of the administrator and the agencies, thereby countering their damaging effects. Agencies and administrators would be aware of the interests which were at stake and would at least

78. *See* CONNALLY, *supra* note 18.

79. Kaufman, *Human Nature and Participatory Democracy*, in THE BIAS OF PLURALISM 178, 184 (W. Connally ed. 1969).

80. *See* text & notes 40-59 *supra*, for examples of perceptual limitations. *See also* Scott, *Organization Government: The Prospects For a Truly Participative System*, 29 PUB. AD. REV. 43, 47 (1969): "Obviously, the usefulness of pluralism on either the macro or micro levels of society is to protect against the tyranny of an elite."

have the opportunity to make decisions which approximate a balance between the diverse interests. Moreover, citizen inputs can mitigate the tragic consequences of the informational and evidentiary biases. Given their present structure, many agencies are incapable of appraising the validity of information and evidence supplied by an immediately interested party.[81] Citizen-supplied information can act as a safeguard, insuring that interested parties will diligently exercise good faith, since any bad faith will be exposed by the adverse citizen interest. Additionally, maximum information input, by providing a basis of comparison and analysis, increases the possibility that agency decisions will correctly evaluate the legitimacy of given information.

The value of public participation in administrative decision making is vividly illustrated by the recent decision of the Arizona Corporation Commission (ACC), in the case of In re *Application of Tucson Gas & Electric Co.*[82] On June 10, 1970, Tucson Gas & Electric (TG&E), an Arizona public utility marketing electrical and gas energy, filed an application, later amended, requesting the Commission to determine the rate base and fair rate of return, and to approve increases in rates and charges based thereon.[83] As was their normal procedure,[84] the ACC requested that TG&E furnish the data necessary to make the evaluation and began an independent investigation. At that point the case was indistinguishable from the countless rate increase requests filed before the regulatory commissions of every state.

Soon thereafter, however, the departure from previous proceedings became evident, as consumer groups with diverse objectives filed motions to intervene. First, the Arizona Consumer's Council and the Legal Aid Society of Pima County simultaneously intervened. Unlike the Legal Aid Society, the Consumer's Council represented middle and high-income families and small, local businesses.[85] The Consumer's Council simply opposed the rate increase sought by TG&E. The Legal Aid Society, however, intervened on behalf of the constituents of the Area Councils of the Committee for Economic Opportunity, an OEO funded group whose objective is citizen representation in all matters affecting the poverty community. In addition to opposing the requested increase, Legal Aid requested that the Commission compel TG&E to alter its rate structure, which Legal Aid alleged was discriminatory and penalized low-income famlies.[86] Subsequently, high-volume energy consumers such as the City of

81. *See* text & notes 60-69 *supra.*
82. *In re* Application of Tucson Gas & Elect. Co., No. U-1933 (Ariz. Corp. Comm'n, Nov. 3, 1971) [hereinafter cited as ACC Order].
83. *Id.* at 1-2.
84. *See* note 64 *supra.*
85. Interviews with Peter D. Eisner, Counsel, Legal Aid Society of the Pima County Bar Ass'n, in Tucson, Arizona, November 18, 1971, and February 22, 1972.
86. T.G.&E. uses the "step up block rate" or inverted pricing. Under this system, high energy users are given a lower rate than consumers requiring less

Tuscon, local industries and the Department of Defense intervened, opposing the rate increase. Interestingly, these groups later were adverse to any restructuring of the rates, since obviously a reversal of the rate setting would increase their utility costs. Nevertheless, the ACC was faced with a barrage of diverse interests.

It is beyond the scope of this discussion to fully examine the legal and factual intricacies of the TG&E decision. The case is particularly noteworthy, however, in that it typifies the worth of public participation in the administrative process. First, virtually none of the evidence offered by TG&E went unquestioned. The vigorous opposition to TG&E's offered proof on nearly every point[87] aided the agency in determining the validity of the evidence and the means by which it was gathered. Second, a consideration not normally at issue—the effect of the rate increase on low and fixed income families—was put before the Commission,[88] thereby making it conscious of the impact of its decisions. Finally, the proceeding afforded an opportunity for the presentation of the rate structure issue, which similarly increased interest identification and information input.

The impact is also demonstrated by the ACC's decision denying the rate increase.[89] In so doing, the Commission gave great weight to the opposition's evidence,[90] while noting its concern for fixed income families. Although the Commission denied the rate restructuring sought by Legal Aid, it fully discussed the issue. One commissioner, however, dissented, stating that the restructuring should be granted.[91] It remains to be seen whether the present rates will continue unchanged,[92] yet there seems to be little doubt that had the long accepted practices of the ACC continued

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energy. Consequently, the low-income family and the residential users pay more per kilowatt than industrial users. Legal Aid suggested the Commission require T.G.&E. to adopt a rate system "with the lowest cost per unit in the first block of usage and with increasingly higher costs in the succeeding blocks. Paradoxically, T.G.&E. "believed that this type of rate is unjust, unduly discriminatory and is, therefore, illegal in this state." ACC Order, *supra* note 82, at 45.

87. *Id.* at 7-45.

88. In order to statistically illustrate the effect of the proposed rate increase on the poor, most of whom live on fixed incomes, the Legal Aid Society presented the results of a survey taken among its client community. The results of the survey were that monthly income was relatively fixed; rent or mortgage payments, debt payments and miscellaneous expenses were similarly stable; and monthly food and clothing expenses varied. Consequently, a higher utility expense would require poor families to reduce their expenditures for food and clothing, since families could not reduce their fixed payments. Interviews with Peter D. Eisner, *supra* note 85.

89. ACC Order, *supra* note 82, at 66.

90. For example, one of the principal issues before the Commission was "Cost of the Capital and Fair Rate of Return" for T.G.&E. *Id.* at 20-32. Basically, T.G.&E. was arguing that projected plant costs would increase its need for capital investment. *Id.* at 21. It specifically contended that the merchantability of its investment bonds would be impaired without the additional revenue provided by the rate increase. The Arizona Consumer's Council, with the concurrence of the Commission's staff, controverted this argument, *id.* at 26-27, and the Commission agreed. *Id.* at 28-32.

91. *Id.* at 6 (Faron, Comm., dissenting).

92. T.G.&E. has recently filed a new request for a rate increase.

without public participation, TG&E would have received its increase. Tragically, had such been the case, the ACC would have believed that it had adequately ascertained the public interest.

Citizen Participation Through Public Interest Law

The immediate discernible value of public interest law and citizen participation is evidenced by the TG&E decision and similar judgments in other jurisdictions.[93] Acting on behalf of citizen complainants, public interest lawyers have repeatedly demonstrated their skill at marshalling an abundance of information to affect or challenge agency decisions. Indeed, in some instances public interest lawyers have assumed the long-neglected supervisory duties of the legislative and executive branches, investigating an agency and making known the extent to which it has abandoned the search for the public interest.[94] To view public interest lawyering as a mere battle of experts in which victory goes to those holding the most facts, however, is tantamount to relegating the public interest lawyer to the status of a functionary with good intentions. While it is true that the most spectacular results of public interest law are manifested by favorable judgments, some equally valuable, although subtle, contributions are also made.

Citizen education, for example, is one contribution of public interest law which is not self-evident. Despite the barrage of information which is available to the citizenry, their awareness of public interest issues remains low. This is particularly true at the community level where local issues are not subject to the scrutiny of the national media. By informing citizens of the consequences of administrative decisions, public interest lawyers can initiate citizen interest and in turn motivate citizen participation.[95] Moreover, public interest lawyers possess the power to help insure that citizen participation is more than an empty promise.

In addition, public interest lawyers can eliminate the chaotic and frustrating effect of administrative red tape. All too often, citizen participation, once begun, is smothered in the myriad of procedures which make the administrative process all but incomprehensible to the unskilled citi-

93. *See, e.g.*, Re Cody Gas Co., 90 P.U.R.3d 239 (Wyo. Pub. Util. Comm'n 1971); Re Bridgeport Hydraulic Co., 90 P.U.R.3d 111 (Conn. Pub. Util. Comm'n 1971); *In re* Consolidated Edison of New York, Inc., 89 P.U.R.3d 113 (N.Y. Pub. Util. Comm'n 1971). *But see In re* Pacific Tel. & Tel. Co., 90 P.U.R.3d 172 (Cal. Pub. Util. Comm'n 1971).

94. *See, e.g.*, E. COX, R. FELLMETH & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969).

95. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLAN. 216, 218 (1969):

> *Informing citizens of their rights,* responsibilities, and options *can be the most important first step toward legitimate citizen participation.* However, too infrequently the emphasis is placed on one-way flow of information—from officials to citizens—with no channel provided for feedback and no power of negotiation. Under these conditions, particularly when information is provided at a late stage in planning, people have little opportunity to influence the program designed "for their benefit." [Emphasis added.]

zen. By virtue of his training, a lawyer is skilled at ferreting out recalcitrant administrators and spurring them to do their duty. Consequently, public interest law can guarantee the continued maintenance of citizen participation.

Furthermore, public interest law is an alternative forum for the receipt and interpretation of citizen grievances.[96] As has been noted previously, administrators often do not possess the sensitivities required to understand citizen complaints.[97] To the extent that they are sensitive to citizen needs, public interest lawyers can act as interpreters of citizen demands and translate them into the terminology of the bureaucrat. Correspondingly, they can articulate the desires of those citizens who, either because of apathy or powerlessness, are unable to obtain representation.[98]

Most importantly, the practice of public interest law guarantees that citizens who are subject to the immense powers of the administrative process will receive fair treatment before the agencies. Not only the rule of law but also fundamental fairness have commonly been denied to many citizens who had no recourse against administrators.[99] Individuals who obtain legal representation, however, no longer are viewed supplicants seeking a government gratuity. Instead, they come before the government as full citizens, seeking the enforcement of their rights. This alone makes public interest law worthy of the label.[100]

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96. For a discussion of the need for grievance mechanisms within a society and suggestions for improving the current practices of administrators, see Carrow, *Mechanisms for the Redress of Grievances Against the Government*, 22 AD. L. REV. 1, 2-3 (1969).

97. *See* note 46 *supra*.

98. Lipsitz, *On Political Belief: The Grievances of the Poor* in POWER AND COMMUNITY 142, 143 (P. Green & S. Levinson ed. 1970):

> Democracy ought to have some connection with men's needs and desires—and that includes all men, whether they are politically articulate or not. We have seen theories elaborated which praise mass apathy or indifference, but even such defenses of democracy have to be understood with reference to a political system meeting the demands of the many and hopefully of all. The hidden assumption in many of these "theories" is that the kind of political arrangements we now have actually *do* meet the needs of the many—though the nature of these needs and their satisfaction is rarely brought up.
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> *We have to decide about political silence.* If we can understand that, we can gain a perspective on society. [Emphasis added.]

99. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1252 (1965): "In the welfare area procedures often exist on paper, but are not pursued in practice. This contrasts sharply with what happens in agencies dealing with business regulation, where lawyers have made paper procedures a reality."

Cf. Project, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 53 (1970):

> Observation of commitment hearings in Maricopa and Pima Counties, combined with extensive interviews in all counties with judges, county attorneys, patients' attorneys and doctors involved in prehearing examination and courtroom testimony, has disclosed some disquieting data concerning the commitment process in Arizona. Probably the most significant conclusions which can be drawn from the data concern the role of counsel and the general lack of any adversity to the proceedings.

100. Reich, *supra* note 99, at 1257: "[D]ecisions concerning human rights are too important to be left to public welfare workers and public administration of-

CONCLUSION

The legal consequences of the public interest law movement, whether they be in Washington or in the local communities, will undoubtedly place a greater burden on an already overtaxed legal structure. But the potential of public interest law to shape and redistribute the wide disparities of power and influence which exist in American society should not be dismissed simply because it will swamp full dockets, cause judges and lawyers a few sleepless nights, or disturb the complacency of administrators. The urgency of the issues cearly outweighs these considerations and, if it is true that a legal system is designed to channel conflict into the forum of rational discourse, it seems as if the other alternatives are all too terrifying.[101]

The brunt of these responsibilities passes to those who hold the power to give meaning to the public demand for a government which is founded on fairness. The cruciality of this demand is operative at all levels, as the nation witnesses a rapidly deteriorating environment, a system of government seemingly oblivious to the consequences of its acts, and a public frustration which is part and parcel to these problems.[102] Perhaps the public interest lawyer and the citizen face obstacles which are insurmountable. Yet it is clear that a superficial effort will only further citizen alienation.[103] If there is time to make good the promises of the legal system, however, the legal profession had best begin, for the future of our democratic system may be at stake.

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ficials without the aid of law. Law is needed to help them see the issue clearly, to guide them, and to strengthen their good intentions."

101. *See, e.g.*, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (New York Times ed. 1968).

102. Green, *The Law Must Respond to the Environment*, 47 TEXAS L. REV. 1327, 1340 (1969):

> There is much cleansing of mind and conscience to be done in the years ahead. Power alone will not sustain a social order dying of internal rot; neither will affluence. Nor does their combination insure social health. Despite the fact that many people have prospered from the cumulative negative values of ignorance, waste, greed, fraud, vice, exploitation and oppression, we cannot accept the philosophy that they serve the welfare of the social order. If these are the products of a group society, their price comes too high even though much of the wealth so accumulated may eventually be turned to charity, religion, payment of taxes, education, and other good purposes.

103. Public interest law will not be able to solve completely the dilemma of modern society because of two repeated tendencies. The first is the continued reliance by the public on the administrative process as a cure-all for society's ills. Americans should begin to question the validity of this premise, for there is a point where all government systems become saturated. J. SAX, *supra* note 70, at 60. The second is the belief that government can cope with social problems arising out of economic disparity without a redistribution and reallocation of wealth. Each time an administrative agency is successful at finding the public interest which infringes on gross economic power, there is a counterreaction by powerful economic interests. Concentrated economic power sustains this reaction, and will usually prevail in the end. M. MINTZ & J. COHEN, *supra* note 62, at 284.