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PUBLIC COUNSEL CORPORATION

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-FIRST CONGRESS

SECOND SESSION

ON

S. 3434

TO AMEND TITLE 5, UNITED STATES CODE, TO PROVIDE FOR THE ESTABLISHMENT OF A PUBLIC COUNSEL CORPORATION TO INSURE FULL PARTICIPATION BY AND ON BEHALF OF UNREPRESENTED CITIZENS IN ADMINISTRATIVE RULE-MAKING PROCEEDINGS

AND

S. 2544

JULY 21, 22, 1970

Printed for the use of the Committee on the Judiciary



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PUBLIC COUNSEL CORPORATION

TUESDAY, JULY 21, 1970

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICES AND PROCEDURE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 1318, New Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senators Kennedy (presiding) and Thurmond.

Also present: James Flug, majority counsel; Thomas M. Susman, assistant counsel; and Michael A. Pulliam, minority counsel.

Senator KENNEDY. The subcommittee will come to order.

All of us are affected, and often overwhelmed, by the complex processess of the Federal Government. Thousands of decisions are made each day affecting every aspect of our lives, while we stand by wondering whether the Government—our Government—exists of the people and for the people, or whether it merely exists for its own sake, perpetuating itself at our expense year after year.

The average American doesn't know who makes the decisions here in Washington. He doesn't know how they are made. And of course he isn't involved in the process by which they are made. But he does know one thing: these decisions affect him, nd he must live with their outcome. The decisions affect industry, too, but its interests are seldom forgotten in this city. It and other large economic blocks have their agents who keep tabs on governmental activities, and they appear before agencies with armies of experts to persuade the Government that the "public interest" coincides with their position. Yet all the while the consumer, the taxpayer, the elderly, and the average citizen are, and feel, left behind.

Why shouldn't those who pay exorbitant prices for drugs and who rely on them for their daily well-being be represented as well as drug manufacturers?

Why shouldn't parents of children attending federally assisted schools be heard along side representatives of local governments?

Why shouldn't airline, bus, and railway passengers be heard as well as the airlines, bus companies, and railways?

Why shouldn't those who breathe polluted air, who are displaced or annoyed by freeways, and who buy and drive automobiles be spoken for as well as the automobile manufacturers and the concrete industry?

Why shouldn't the purchasers and viewers of television sets be heard as well as the spokesman for the networks and stationowners?

Why aren't construction workers as well as contractors consulted about Federal or federally assisted projects?

Why isn't the interest of the housewife in providing wholesome and reasonably priced food for her family represented in addition to the food wholesalers and manufacturers in relevant agency proceedings?

Who speaks for the disabled veteran, the widow, the elderly, when proposed Federal action will affect their security?

I believe that the average citizen should have his day in court before our complex and omnipresent Government. I believe that this Government does exist for the people of this country. But only when the average citizen has a realistic opportunity to be heard by the Government and to participate in its processes will democracy be a meaningful word. That is why I introduced the Public Counsel Corporation bill to provide for representation of the interests of the average American citizen in Federal agency proceedings.

My Public Counsel Corporation would be independent of the present governmental structure, to afford minimum flexibility and freedom to the public advocate in his dealings with Government agencies. The Public Counsel would be authorized to represent directly or by contract, the interests of the unrepresented public in agency proceedings, either on its own initiative or by request of the agency. It could initiate rulemaking proceedings and could represent individuals or groups seeking judicial review of administrative actions where issues involved substantially affect the interests of the unrepresented public.

At present more than 33 Federal departments and agencies carry on over 260 activities affecting the consumer alone. Responsibility for enforcing the Truth-in-Lending Act is vested in nine separate agencies. Programs to control air and water pollution can be found in half a dozen agencies. The Flammable Fabrics Act is enforced by the Department of Commerce, the Federal Trade Commission, and the Food and Drug Administration. The Department of Health, Education, and Welfare adopts rules relating to old age assistance, aid to the blind, medicare, and aid to families with dependent children. The list is practically endless. Little wonder that the public has not been able to find its way into the hearing rooms where its voice in the decsionmaking process is desperately needed.

A recent study completed for the National Product Safety Commission analyzed the scope and adequacy of the automobile safety, flammable fabrics, toys, and hazardous substances programs of the Department of Transportation, Commerce, and Health, Education, and Welfare. That study concluded:

> Continual communications with lobbyists and representatives of the regulated industries causes agency preoccupation with the economic burdens and dislocations that specific safety standards would impose. In sum, the consumer safety regulatory process in fact has too often been a dialog between Government and industry, with informal communications not open to public scrutiny.

Last year the Subcommittee on Administrative Practice and Procedure published a compilation of responses from members of major regulatory agencies to a questionnaire I sent them on citizen involvement and responsive agency decisionmaking. The same theme echoes on page after page. The chairman of the Civil Aeronautics Board ob-

served that "ordinarily, the Board does not specifically seek out the views of persons who would not otherwise be likely to present their views to the Board." That's a short-hand way of saying that only commercial interests regulated or directly affected are involved in the administrative process. Commissioner Johnson, who is with us this morning, observed that "citizen participation in the Federal Communications Commission process is virtually nonexistent." Former Chairman Lee White of the Federal Power Commission wrote: "On the whole, I believe meaningful citizen involvement in the administrative process is sorely lacking."

Consumers, the poor, the elderly, taxpayers, debtors, tenants—the list of the unrepresented in an agency proceedings goes on and on. At last count over 43 separate bills had been introduced before this Congress to provide, in some manner, representation for the consuming public—often broadly defined—before Federal agencies. All of these would, among other things, give the unrepresented public a vehicle through which their interests could be translated into effective representation and channeled through the proper administrative channels to reach Government decisionmakers. Proposed legislation would place this public advocate in a Cabinet-level agency, in an independent agency, in the Executive Office, in the Justice Department, or in an independent public corporation. Each approach has its advantages and disadvantages, and many of these have been brought out and will continue to come out in hearings on the bills. We no longer question the need for effective representation of the public interest in the agencies of the Government. We are now searching for the means for more of such representation.

As a final report of the National Commission on Product Safety recommended:

> Quite as private enterprise requires counsel to represent its interest in dealings with agencies of Government, the public requires an advocate who will defend consumer safety against exploitation, excess or neglect.

This morning we begin consideration of the Public Counsel bill. Our witnesses are both well known advocates of the public interest, Commissioner Johnson from within the Government framework, Mr. Nader from the outside. I hope that we can explore a number of the issues raised by this bill and by the other bill we are considering, including present obstacles within the Government to greater public participation, and the general atmosphere outside the Government relating to public interest advocacy. In the end we are concerned whether our Government agencies, as presently structured, are capable of responding to the real needs of the American public.

(S. 3434 and S. 2544 follow:)

91ST CONGRESS
2D SESSION

S. 3434

IN THE SENATE OF THE UNITED STATES

FEBRUARY 10, 1970

Mr. KENNEDY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 5, United States Code, to provide for the establishment of a Public Counsel Corporation to insure full participation by and on behalf of unrepresented citizens in administrative rulemaking proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 5 of title 5 of the United States Code is amended by adding at the end thereof the following new subchapter IV:

"SUBCHAPTER IV—PUBLIC COUNSEL CORPORATION

"§ 581. Findings

"The Congress hereby finds and declares—

"(1) that there is substantial evidence that large segments of the American public are not adequately represented in the Federal rulemaking process, and that thus the views of those directly affected by administrative agencies are frequently not heard in the formulation of rules;

"(2) that the sound operation of the administrative rulemaking process demands that all relevant interests and viewpoints be considered prior to the formulation and promulgation of an administrative rule or regulation; and

"(3) that to assure the interests of the public are considered, means should be established to provide the unrepresented public with competent, consistent, and aggressive advocates in Federal rulemaking.

"§ 582. Definitions

"For the purpose of this subchapter—

"(1) 'Corporation' means the Public Counsel Corporation.

"(2) 'Board' means the Board of Directors of the Corporation.

"(3) 'regulatory agency of the United States' includes the Atomic Energy Commission, the Equal Employment Opportunity Commission, the Civil Aeronautics Board, the Civil Service Commission, the Federal Communications Commission, the Federal Power Commission, the Federal Maritime Board, the Federal Reserve Board, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the Securities and Exchange Commission, the United States Tariff Commission, and such other boards, commissions, offices of executive departments, or agencies of the United States which the Board of Directors of the Corporation determines are charged with rulemaking responsibilities that affect the general public.

"(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

"(5) 'rulemaking' means agency process for formulating, amending, or repealing a rule.

"(6) 'unrepresented public' means groups of persons whose collective interests are not likely to be adequately represented in regulatory agencies of the United States because such persons lack resources necessary to provide such representation.

"§ 583. Public Counsel Corporation established

"There is established a nonprofit corporation, to be known as the Public Counsel Corporation, which shall not be an agency of the United States Government. The corporation shall be subject to the provisions of this subchapter, and, to the extent consistent with this subchapter, to the District of Columbia Nonprofit Corporation Act.

"§ 584. Board of directors

"(a) The corporation shall have a board consisting of fifteen members appointed by the President, by and with the advice and consent of the Senate. Not more than eight members of the board may be members of the same political party.

"(b) The members of the board shall be appointed from among citizens of the United States who are not regular full-time employees of the United States and who together will provide, to the extent practicable, a broad representation of the unrepresented public, including various regions of the

country, and who possess the ability and experience appropriate to the functions of the corporation.

"(c) The members of the initial board shall serve as incorporators and shall take whatever actions are necessary to establish the corporation under the District of Columbia Nonprofit Corporation Act.

"(d) The terms of office of each member of the board shall be three years; except that (i) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term; and (ii) the terms of the members first taking office shall begin on the date of incorporation and shall expire, as designated by the President at the time of appointment, five at the end of the first year, five at the end of two years, and five at the end of three years. No member shall be eligible to serve in excess of two consecutive terms of three years each. Notwithstanding the preceding provisions of this paragraph, a member whose term has expired may serve until his successor has qualified.

"(e) Any vacancy in the board shall not affect its power, but shall be filled in the manner in which the original appointments were made.

"§ 585. Election of chairman; compensation

"(a) The President shall designate one of the members

first appointed to the board as chairman; the following year and thereafter the members of the board shall biannually elect one of their number as chairman. The members of the board shall also elect one or more vice chairmen from among members of the board.

"(b) The members of the board shall not, by reason of such membership, be deemed to be employees of the United States. While attending meetings of the board or while engaged in duties pursuant to this Act, they shall be entitled to receive compensation at a rate of $125 per day, including traveltime, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence equal to that authorized by law for persons in the Government service employed intermittently.

"§ 586. Executive director

"There shall be an executive director of the corporation who shall be appointed by the board. The executive director shall be the chief executive officer of the corporation and shall carry out the programs of the corporation subject to supervision and direction of the board. The executive director shall be compensated at a rate to be fixed by the board, not to exceed the rate prescribed by section 5316 of title 5, United States Code.

"§ 587. **Nonprofit and nonpolitical nature of the corporation**

"(a) The corporation shall have no power to issue any shares of stock or to declare or pay any dividends.

"(b) No part of the income or assets of the corporation shall inure to the benefit of any member of the board, the executive director, other officer, employee, or any other individual except as salary or reasonable compensation for services.

"(c) The corporation may not contribute to or otherwise support any political party or candidate for elective public office.

"(d) Except as provided in section 584 (a) of this subchapter, no political test or qualification shall be used in selecting, appointing, promoting, or taking other personnel actions with respect to officers, agents, and employees of the corporation.

"§ 588. **Activities and powers of the corporation**

"(a) In order to carry out the objectives of this subchapter, the corporation is authorized to—

"(1) represent, either directly or by contract with appropriate individuals or private organizations, the interests of the unrepresented public and, where appropriate, separate interests of distinct groups within the unrepresented public, in proceedings before regulatory

agencies of the United States, either upon the request of any such agency, or on its own initiative; provided that in carrying out its contracting authority under this section, the corporation shall give preference to nonprofit organizations with experience in representing the public interest before Federal agencies;

"(2) initiate rulemaking proceedings in any regulatory agency when otherwise authorized, upon the vote of two-thirds of the members of the board;

"(3) collect and disseminate to all interested organizations and to the general public information concerning rulemaking with particular emphasis upon rulemaking and the interests of the unrepresented public;

"(4) represent, upon request, individuals or private organizations who seek judicial review of Federal administrative actions whenever the executive director determines that the issues involved in such review substantially affect the interest of the unrepresented public;

"(5) perform such other functions as may be prescribed by law;

"(b) In the performance of the functions set forth in subsection (a), the corporation is authorized to—

"(1) enter into such contract, agreements, or other transactions as the board of directors deems appropriate;

"(2) accept in the name of the corporation and

employ or dispose of in furtherance of the objectives of this subchapter any money, or property, real, personal, or mixed, tangible or intangible, received by gift, devise, bequest, or otherwise;

"(3) appoint such officers and employees as the board deems necessary, and fix their compensation, and such compensation shall be without regard to the provisions of chapter 51 and subchapter III of chapter 53 of this title relating to classification and General Schedule pay rates.

"(4) obtain the services of experts and consultants on such terms as the board deems appropriate;

"(5) accept voluntary and uncompensated services of attorneys, consultants, and experts notwithstanding any other provision of law;

"(6) appoint such advisory committees as the board deems appropriate;

"(7) accept and use with their consent, with or without reimbursement, such services, equipment, and facilities of agencies of the Federal Government, State governments, or local political subdivisions thereof, as are necessary to conduct the activities of the corporation efficiently;

"(8) exercise all powers conferred upon a nonprofit

corporation by the District of Columbia Nonprofit Corporation Act.

"(c) Upon request made by the executive director, each Federal agency is authorized and directed—

"(1) to make its services, personnel, and facilities available to the greatest practicable extent to assist the corporation in the performance of its functions; and

"(2) subject to provisions of law and regulations relating to the classification of information in the interest of national defense, to furnish to the corporation such information, suggestions, estimates, and statistics as the executive director may request.

"§ 589. Audit and records

"(a) The corporation shall keep such records as the Director of the Bureau of the Budget shall prescribe, including records which fully disclose the amount and the disposition of sums received under this subchapter, and such other records as will facilitate an effective audit.

"(b) The Comptroller General of the United States, or any of his duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the corporation that are pertinent to sums received under this subchapter.

"§ 590. Report to Congress

"The corporation shall submit an annual report for the

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preceding fiscal year ending June 30 to the President and the Congress on or before the 31st day of December of each year. The report shall include a comprehensive and detailed report of the corporation's operations, activities, financial condition, and accomplishments under this subchapter and may include such recommendations as the corporation deems appropriate.

"§ 591. Authorization of appropriations

"There are authorized to be appropriated to the corporation such sums as may be necessary to carry out the provisions of this subchapter."

(b) The analysis of chapter 5 is amended by adding at the end thereof the following:

"SUBCHAPTER IV—PUBLIC COUNSEL CORPORATION

"Sec.
"581. Findings.
"582. Definitions.
"583. Public Counsel Corporation established.
"584. Board of directors.
"585. Election of chairman; compensation.
"586. Executive director.
"587. Nonprofit and nonpolitical nature of the corporation.
"588. Activities and powers of the corporation.
"589. Audit and records.
"590. Report to the Congress.
"591. Authorization of appropriations."

91ST CONGRESS
1ST SESSION

S. 2544

IN THE SENATE OF THE UNITED STATES

JULY 2, 1969

Mr. HART (for himself and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide greater opportunity for participation in rulemaking by and on behalf of persons of limited means.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is fundamental to wise administrative rulemaking that, except in limited or unusual circumstances, persons whose interests may be affected be assured of an opportunity to participate in rulemaking through submission of data, views, or arguments to the responsible rulemaking agency. Rulemaking frequently affects persons without the resources necessary to keep themselves informed concerning proposed rules or to petition for rules or amendment or repeal of rules. Hence it is necessary that means be provided whereby, inso-

far as feasible, the interests of such persons may be protected in rulemaking and whereby the rulemaking process may be benefited by advocacy on behalf of such interests.

SEC. 2. Section 553, in chapter 5, Administrative Procedure, of title 5, United States Code, is hereby amended by adding thereto the following subsection:

"(f) The Attorney General is directed to enter into contracts with, or to make grants subject to appropriate conditions to, the National Legal Aid and Defender Association, or such other nationally organized nonprofit bodies with generally similar objectives as he may deem desirable, whereby such body or bodies may be provided with funds to enable them to participate in rulemaking in accordance with this section on behalf of interested persons who, because of their lack of personal resources, are unable effectively to do so. Any such body shall be deemed to be an interested person for the purpose of this section. Such body or bodies may contract with other persons to aid in effectuating the purposes of such contract or grant. The Attorney General is authorized to adopt such rules or regulations as may be appropriate to the administration of this subsection. He is authorized, further, after consultation with the agency involved, by order to make this section applicable to matters relating to public property, loans, grants, benefits, or contracts in circumstances where he determines that such matters

so affect the interests of persons of limited means as to make it appropriate that, in connection with rulemaking with respect to such matters, a body or bodies receiving a contract or grant under this subsection should have an opportunity to represent such interests."

SEC. 3. There are hereby authorized to be appropriated such funds as are necessary to carry out the provisions of section 2.

Senator THURMOND. There can be no doubt that the interests of the general public should be protected. Many of our Federal agencies were created for this very reason. Except in unusual circumstances all of these agencies provide for public hearings as an integral part of their rulemaking procedures. At the public hearings interested parties may appear and advise of their support or opposition to the measure under consideration.

The bills before this subcommittee today, S. 3434 and S. 2544, provide the means for the representation of all unrepresented citizens in administrative rulemaking proceedings.

These bills were introduced with the knowledge that many people desire the opportunity to be heard and are not informed that such hearings exist, or do not have the necessary funds with which to employ legal counsel. However, the same questions need to be answered concerning the proposed operation of any new agency or new department within an existing agency that would be created.

We need to know, first, how many people will use the services of such an agency?

Second, how should the agency personnel be located, geographically?

Third, will this agency work in conjunction with the President's Special Assistant for Consumer Affairs?

Fourth, will the function of this agency and existing agencies or departments overlap?

Fifth, what criteria will be used to determine if one does not have the necessary funds to be adequately represented?

Sixth, what are the projected costs of such an agency?

The above questions, along with many others, should indeed and must be answered before this subcommittee can intelligently act upon the legislation now before us.

It is usually easy to recognize that a need exists, but it is often difficult to place that need in a correct perspective.

In an effort to place this need in a proper perspective, we must first be sure that we are not adding to the problem we seek to correct.

What will happen, for example, if there are different views among consumers?

Are we sure that the Public Counsel Corporation will represent all sides of the question in a fair and impartial manner, or will the philosophy of the Corporation members be the overriding consideration?

Since Federal agencies were created in the name of public interest, they should operate in a manner consistent with that interest. Unfortunately, I am well aware of the fact that certain agencies make decisions that you ought to disregard the interest in the best interest of the public.

In my judgment, there would be less antagonism toward the Federal Establishment if the public were given a better opportunity to express their views on particular subjects. The means by which this can be accomplished is a matter for consideration.

Senator KENNEDY. Our first witness is Commissioner Nicholas Johnson who is presently in his fourth year at the Federal Communica-

tions Commission, after having served a short time as a Maritime Administrator. He is an outspoken advocate of the public interest and seldom misses a chance to point out the principle with which broadcasting in the United States began, which seems so often to escape us today, that the public owns the airways.

At last count, five broadcasting associations asked President Nixon to fire him for this and similar heresies.

Commissioner Johnson, we welcome you today and look forward to your testimony.

Mr. JOHNSON. Thank you very much, Senator Kennedy.

Senator KENNEDY. And we welcome our lone television station here this morning.

Mr. JOHNSON. It must be an independent.

Senator KENNEDY. It is a public educational television station from Massachusetts.

Mr. JOHNSON. I am very grateful for your interest and your courage in undertaking the subject, and I know millions of Americans are, as well.

STATEMENT OF NICHOLAS JOHNSON, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. JOHNSON. I think it may be useful this morning to talk a bit informally, relying in part on the statement distributed here this morning, and to talk about the Government as I see it from the inside.

I did not come to Government 6 years ago in a disillusioned spirit, and I am not altogether prepared to say that I am disillusioned today. But I am prepared to say that the Government is not working. It is not working the way it was originally intended. It is not working the way it must work if, indeed, this Nation is to survive. The extent to which this is known by those outside of law and political science is something that we sometimes overlook, and that is why I have begun with observations from the popular psychiatrist and philosopher and social critic, Erich Fromm, and the multitalented entertainer, writer, composer, and philosopher, Mason Williams. Mason Williams has put it in epigrammatic form. He says simply: "The Government makes better deals with business than it does with people." Erich Fromm says much the same thing: "Today Government and the corporations are already so interwoven that it is difficult to say who controls whom."

You said much the same thing in introducing this legislation, Mr. Chairman: "Large segments of the American public are not adequately represented in the Federal rulemaking process."

That is the polite way that you and I talk about these things. The point is that people generally are talking about them as well—and in somewhat more colorful language.

The questions to which we have to address ourselves are simple. Given the corporate domination of our national politics and Government, is there any remaining hope that this Congress can, and will, vote for the return of democratic representation and, if so, what is the most appropriate remedy?

But I think it is worthwhile recognizing that the reason we are confronting these issues and proposing these alternatives that you have, is—to be blunt about it—that there are sufficient numbers of

corporate special interests that come out of backroom, surreptitious Government deals with subsidies, Government contracts, awards of monopoly rights, protection from competition, restriction of imports, denial of claims of safety and health, perpetuation of inequities in wealth and income distribution, and barriers to legal redress to form a coalition which can maintain in office—or defeat—most of the present elected representatives. These deals can be effectively concealed, misrepresented and lied about so that the general public will not know what is happening or will be forbidden to discuss it candidly on television. As a result, no effective public outcry can manifest itself in the electoral process which would, otherwise, be the protection of democracy.

It does not take a great deal of looking around to find examples, but I think a few are worth mentioning. Nicholas Von Hoffman is certainly one of the most astute observers of the current scene, and he has said recently: "For a quarter of a century we've abused and used our social and economic systems while we've debauched ourselves in consumerism at home and adverturism abroad. Now we must stop, think and rebuild."

There has been some talk recently of bold new activism at the FCC. Some have even been suggesting that the agency has been moving so fast that it needs to cool down, turn inward, and become reflective. In fact, however, many of the FCC's so-called bold actions have been in the form of the most tentative proposals, put forward as possible actions for the future, which carry with them the strong possibility of long delay and ultimate reversal.

As you look about you, you see there are no domestic satellite systems in operation. There is no pay television station on the air. There has been no deconcentration of local media accumulations, or deconcentration of television network program production domination. There are no competing common carrier systems in operation. There have been no fundamental solutions to the problems of inefficient and congested spectrum allocation. There has been no remedial Commission action to meet the telephone service failure problem.

The FCC's actions, in other words, have only been proposed. A lot of paper has been issued, a lot of talk has ensued, but little has really been accomplished. And for that matter, in every instance, less has been proposed than should have been.

During the same period of time the Commission has acted, however, and decisively, in a number of cases in ways which are clearly designed to frustrate legitimate citizen concerns in the regulatory process.

I have spelled these out at some length in my prepared testimony, and I will not read that here, but it involves telephone rates, public participation in license renewal processes, the development of standards for use in license renewals generally, the access of the public to the airways through the fairness doctrine, the matter of ownership, and in one case the Commission held that the public interest would not be harmed by the continued existence of interlocking relationship which interlocks the Virginia National Bank with 13 radio stations and nine television stations and CATV systems, and at least 17 newspapers.

Of course, the Commission has a history of finding the public interest served and license renewals warranted for stations that have pro-

posed 33 minutes of commercials per hour, no news or public affairs programing, or that have been found guilty of dozens of technical violations, or even in one instance a station charged with bilking advertisers $6,000 through fraud while on a probationary 1-year license renewal for contest rigging.

Now, why does a governmental agency perform in this manner? Why are new consumer protectors, private and governmental, needed to reverse this Government-private interest alliance?

I think some very recent examples from the FCC are helpful, and one of the major concerns is that of personnel, because any governmental agency is simply a reflection of the people who work there, those who in the end are responsible for its actions. The record number of FCC Commissioners and other staff who have left the agency over the years to go to work for the very industries they were supposed to be regulating is not a fact to inspire confidence in the agency's performance. It is what another witness here today, Ralph Nader, has characterized as the deferred bribe. But, as bloodcurdling as the realities may be regarding those who are performing at an agency with one eye on their next job, it is even more frightening to find that those who do want to stay and serve the public are driven off one way or another.

There is substantial question in my mind whether personnel who are dedicated to serving the public interest are welcome at the FCC. Most immediately, we have the case of Commissioner Kenneth A. Cox, who has probably compiled a more distinguished record of service in the FCC than any other commissioner in its history. He is a man who is known for his fairness to corporate interests as well as his dedication to the public interest, a man of unquestioned intelligence and competence and good judgment, a man with good will, and devotion to his work. And yet everyone simply assumes that, of course, he will not be reappointed.

We have the same problem with senior staff, and I have spelled this out in the statement.

One of the things that I find most disconcerting is that a number of the very best of our young people at the FCC have left the agency. One of their complaints is that they are forced to write items and documents to come out the way top officials want them, and to hide matters which cast doubt on the positions that vested interests have taken before the Commission. Some of these younger staff want the commission to allow them to attach dissenting views to documents coming to the commissioner's attention, so that the commissioners will at least be able to make informed judgments. I look for a continued exit of our young disillusioned staff, ultimately joined by more of the senior staff who are fed up with their inability to accomplish change and who are tired of Commission deference to private interests.

Senator KENNEDY. Mr. Johnson, I know you are moving through—and we will include your statement in its entirety—but I noted on page 9 of your testimony, that every Friday, Chairman Burch is required to provide the White House with a memo, a list of non-Republican staff members at a certain level. Could you elaborate on this?

Is this going on in other agencies?

Mr. JOHNSON. I am not familiar with the practices at other agencies, and, basically, what I know about what is going on at the FCC is related here. The particular instance you mentioned came up in my discussion in the prepared testimony of the general counsel, Henry Geller, who has recently won an award as one of the most outstanding Federal employees in Washington and is generally so regarded, I think, by all who deal with him. Even Chairman Burch has given him very high praise for his performance. He has served Democrats and Republicans alike over the years, and yet there has been this interest, let us say, on the part of the White House in the appointment of Republicans to fill these jobs, regardless of the ability of the people who are now there.

Senator KENNEDY. Who asked for the memorandum, do you know?

Mr. JOHNSON. No, I do not know. All I know is that such a memorandum exists.

I also discuss in the statement in some detail the phenomena known as sub-government, which I think is very important, but I will not discuss it here at length. It is simply the bringing together of those interests and personnel surrounding a governmental program, and usually involves trade associations, trade press, some subdivision of the bar, the Government agency involved, and sometimes representation from committees up here. Yet, the sub-government phenomena is particularly powerful and insidious in relationships between involving broadcasting. This is so, because of the very powerful role that commercial broadcasting, especially television, plays in the political process.

Joe McGinniss' book, "The Selling of the President" (1968), has shown us this impact dramatically in the 1968 election, and now we see it this year in election in State after State, where virtual unknowns have come forward and either actually won in primaries or elections or have gained a very substantial number of votes. The short of it is that no citizen who aspires to office anywhere can afford to ignore the impact of broadcasting, the power of broadcasting, the demands and desires of broadcasting, and this is true whether he is a candidate for the first time or an incumbent with the longest seniority.

I have discussed this more thoroughly in a recent lecture at Princeton University, which I will attach for purposes of the record, with some other statements, with your permission, Mr. Chairman.

Delay is another problem which I would like to say a word about, because reform movements generally arise as the result of crises that command public attention and concern. For those who wish to stem their tide, the best antidote for this public outrage is time. The pattern has become almost classic. Something happens which requires Government action, and the matter comes to the attention of the public. Proceedings are undertaken, or sometimes an agency is created, or a task force, to deal with the question. The public believes that something will be done, but it now accepts the fact that, of course, it will take time. Then, the pressure starts on those who have been handed the job of investigation and reform. Corporate interests that will be adversely affected move to delay to water down, to remove dangerous people, and then finally to delay participation in the final whitewash. They hope the public will forget its original outrage until the process is next repeated, and it generally does.

One example: After the violent tragedies of 1968, a panel was appointed on Television and Social Behavior at the National Institutes of Mental Health, to evaluate the impact of television on violence in our society. The panel hoped to have an interim report by October 1969. There was none. There was a crisis of public awareness and concern, and here was an expert group to examine the problem. What happened? Forty professionals were proposed for this panel. The broadcast industry was allowed to veto whomever they did not want, and seven were excluded including some of the most highly qualified. In addition, in contrast to the formulation of the NIMH smoking panel, five of the 12 who were appointed either worked for or were affiliated with the networks.

The coordinator of research has now left the project, in part because of the refusal of NIMH to take the project seriously or to be courageous about its task. The irony is that a significant part of the research is being done by those bumped from consideration for membership on the panel, a tribute no doubt to the efforts of the former coordinator of research to secure the best talent he could. There is now a question of whether that research will be used.

There is another example involving the FCC's handling of the telephone company, but those examples are legion.

It is a rare occasion when pro-consumer action is proposed and a component of the sub-government does not move in to block it. The sub-government has a superior intelligence gathering apparatus to that possessed by the consumer interests. It uses leaks, regular contacts, and the general agency watching. As a result, members of the sub-government can anticipate potential agency action that is either adverse to their interests or can be turned to their advantage. Telephone calls are made. Visits are arranged. Studies are done and released. Congressmen are made to be interested and involve themselves, and the full-page ads begin to appear. Who can really be surprised any longer to have a lobbyist come to his office to discuss the contents of a staff document the Commissioners have not yet seen, or which is supposedly under confidential consideration? That is how things work in Washington. We have to accept that. The point is that the public has no one to represent their interests in this swamp.

The Penn Central situation has interested a large part of the Nation. This is under consideration elsewhere this morning by the Senate. I thought Senator Lee Metcalf had an interesting evaluation in a speech he made recently on the floor on that and other subjects. I will quote briefly:

> It was the private financial community that determined the rules of this rail merger game, and neither the Congress nor the ICC, nor the courts were strong enough to say no. Yet, here we are in Congress being asked to take good taxpayers' money to bail out the Penn Central without even the suggestion of adequate security and management control, and without any real knowledge of the corporate monster which the financial managers have put together. Neither the Supreme Court, nor the Congress, nor anyone except the Wall Street bankers really know who owns and controls this railroad.

Professor Laura Nader, an eminent anthropologist at Berkeley, has recently written in the area of anthropology and the law, and I quote:

> When viewed comparatively our legal system appears extremely harsh, vindictive and violent. Our system is extreme in seeking to place blame,

determine guilt and exact punishment. Violent street acts are labeled criminal while acts which do far greater damage to society at large are virtually ignored.

Now, there are those who believe that it can never be done, that citizens have lost control, and it cannot be regained in the context of the market system. I am not yet one of those. I believe we can work within the system we have created, under the rules to which we have, too often, given no more than lip service.

A public Counsel Corporation with a decent budget and a broad mandate could make an effective beginning. But we must recognize that the public interest is not simply the sum of the private interests that beat a way to our door. There is something more. We have to begin to reward rather than punish citizen representation in the decision-making process. Consumer agencies which become nothing more than carbon copies of present regulatory agencies would be worse than nothing. We certainly do not need more tax dollars spent on increased support for private interests in the guise of agencies defending the public. That is simply a fradulent way of discouraging genuine consumer representation, by represeting that it is unnecessary.

What lessons can we learn that would make consumer agencies more effective? In the end it comes down to the people who will serve in this new agency and the resources they have to work with. Will the corporation merely be directed by another group of establishment representatives? If not, why not? Why can we expect better appointments by the President-Senate here than elsewhere?

I think the idea of funding private consumer representatives is an admirable one. There are large numbers of dedicated and talented people, especially among young professionals, who find only financial considerations preventing their working directly for improved citizen representation and fundamental change in our society.

I think you might want to add a provision that would allow the corporation to do overall studies of agencies supposedly representing the public. It could publish the studies and make organizational recommendations for change, sort of a continuing Landis analysis. You might wish to consider some type of dedicated financing, perhaps keyed to the total budgets of the agencies before which the corporation might appear, to eliminate the process whereby appropriations can be used as a disciplinary device for agencies or activities that are too consumer oriented. While I support the goals of S. 2544, I have some of the same concerns about locating the function in the Department of Justice.

While the idea of a public counsel is an admirable one, I will withhold my enthusiasm until I see what finally emerges from Congress. Too often we have been promised a change which will produce more effective consumer representation only to find that the changes are illusory. I urge you to provide for strict independence of the public counsel from all political pressure. Otherwise, it will simply become a new component in some corporations' sub-governments.

Senator KENNEDY. How would you suggest appointing the board then?

Mr. JOHNSON. I think that this question really goes to the question of whether anything at this point involving government—where there are appointments made by a political official, where the operation is funded with Federal funds—can be expected to do effective work on

behalf of the people who are being oppressed or manipulated or taken advantage of in one way or another by a large industrial, corporate interest, because, ultimately, if the operation becomes successful those interests will be heard from; and so ultimately it rests on the character of the elected officials who are doing the appointing. I think your effort to at least insure that it must be bipartisan is helpful. I think establishing a public corporation rather than an agency more directly within Government is helpful. All of these things are useful to try to distinguish this from other operations, but whether or not it is going to work ultimately is not going to be known until someone has tried, I think.

Senator KENNEDY. Taking what you have expressed here, I do not know how you go about devising any kind of a board if, as we have provided, that it be appointed by the President. You can vary that and have some members appointed by Congress, some by the majority leader, some by the House; or you can try to tailor it the way Congressman Ryan did, that the board members have to be above a certain age or below a certain income. But ultimately the question is: How are you going to devise an independent board who will best serve the public?

Mr. JOHNSON. No. As I say, I think you have done about as well here as Government can do. The question is whether that is good enough. I think there are other approaches to this problem, like making provision for recovery of attorneys' fees in class actions, treble-damage actions in antitrust, the contingent fee of the lawyer in the plaintiff's jury award. All of these are ways into the system, a way of compensating those who want to get involved in consumer representation, or representation of the poor.

But I certainly think that something like this is worth trying. And one thing that, obviously, falls as a burden on you and others of like commitment and mind is to simply make it very clear in the legislative history that you did not intend the makeup of this particular board to look like every other corporate board in the country, that you really have something different in mind, and you might even mention the names of some people who are friends of yours who might very well serve as members of this board, who do not have the distinction of having served as members of other corporate boards so far. I think they might enjoy the experience, and there is no reason to expect that they would not do a good job. But I think that has to be made clear in the legislative history, and followed, then, with some gymnastics.

Senator KENNEDY. Let me ask you, since I have already interrupted you once: Do you see any problem with the Public Counsel Corporation's working in concert with consumer groups that might be developed independently?

Do you see these as mutually exclusive, or complementary?

Mr. JOHNSON. No, I see them basically as complementary.

I am reminded of a saying we have in Iowa, when someone asks: "What can I do to help?" The reply is: "Grab a plow and start plowing." And I would say the more people who follow that adage the better.

I just have one more page here, and I will try to wrap this up.

All we can do, I think, is try, admitting that we have failed in the past. At least, the Corporation, because it is not tied to a specific in-

dustry or activity may be better able to resist capture by the subgovernment. This is an advantage that I think the Antitrust Division is maintaining with great success in another agency.

But, in doing so, I think we must be aware of the political realities, as Attorney General Olney advised a railroad president about the granddaddy of all regulatory commissions, the ICC, back in the early days of its creation. The railroad official was very concerned about the establishment of the ICC and wished to have it abolished, and he wrote Attorney General Olney and told him so. And the Attorney General wrote him back and soothed and educated him in the ways of Washington and the so-called public interest agencies. I would like to read this passage from the text of Attorney General Olney's letter to the railroad company president:

> My impression would be that looking at the matter [abolition of the ICC] from a railroad point of view exclusively it would not be a wise thing to undertake. . . . The attempt would not be likely to succeed; if it did not succeed, and were made on the ground of inefficiency and uselessness of the Commission, the result would very probably be giving it the power it now lacks. The Commission, as its functions have now been limited by the courts, is, and can be made, of great use to the railroads. It satisfies the popular clamor for government supervision of the railroads, at the same time that the supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad point of view of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of a protection against hasty and crude legislation hostile to railroad interests. . . . The part of wisdom is not to destroy the commission, but to utilize it.

Thus, you see, the problem we address today is neither new nor accidental. Those who established the commission knew full well what they were doing. But, perhaps, in this age of the decline and fall of the American empire, the issue takes on greater urgency.

I want to once again commend your commitment and your courage in addressing these issues, and I am pleased that you asked me to participate.

The power to restore the people's legitimate respect in their Government rests with this Congress. We all know what must be done. Whether the will, whether the change, whether the freedom and justice can come quickly enough from those who hold the corporate power that now controls our country remains to be seen.

Thank you.

(The prepared statement submitted by Mr. Johnson follows. Attachments are included in appendix I of this Record.)

TESTIMONY OF FEDERAL COMMUNICATIONS COMMISSIONER NICHOLAS JOHNSON BEFORE SENATOR EDWARD M. KENNEDY, CHAIRMAN, AND THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE JUDICIARY COMMITTEE ON S. 3434 AND S. 2544, JULY 21, 1970

"[T]oday government and the corporations are already so interwoven that it is difficult to say who controls whom. * * *"—Erich Fromm

"Government makes better deals with business than it does with people."—Mason Williams

The Government's not working. Mason Williams knows it. He says: "Government makes better deals with business than it does with people." Erich Fromm knows it. He says: "[T]oday government and the corporations are already so interwoven that it is difficult to say who controls whom. . . ." And you know it, Mr. Chairman. In introducing this legislation you said, "large segments of the American public are not adequately represented in the Federal rulemaking process . . ." The questions we have to address are simple. Given the corporate

domination of our national politics and government is there any remaining hope that this Congress can and will vote for the return of democratic representation? And, if so, what is the most appropriate remedy?

Why are we considering the establishment of Public Counsel Corporations, Utility Consumer Counsels, Consumer Affairs Departments, the authorization of class actions, and independent consumer agencies? What was the purpose behind the establishment of regulatory agencies in the first place except the protection of "the public interest"? If these organizational structures have failed and are failing, how can we insure that new organizations and activities will do better?

My comments emphasize the regulatory process at the FCC. But the FCC is but a microcosm of what passes for governmental representation of the public generally. And the abuse of the people at the hands of their elected government is little different from the treatment they receive when confronting the other large institutions that daily bind their freedom, like corporations.

To be blunt about it there are sufficient numbers of corporate special interests who come out of backroom, surreptitious government deals with subsidies, government contracts, awards of monopoly rights, protection from competition, restriction of imports, denial of claims of safety and health, perpetuation of inequities in wealth and income distribution, and barriers to legal redress to form a coalition which can maintain in office—or defeat—most of the present elected representatives. These deals can be effectively concealed, misrepresented, and lied about so that the general public will not know what is happening, or will be forbidden to discuss it candidly on television. As a result no effective public outcry can manifest itself in the electoral process which would otherwise be the protection of democracy.

It does not take a great deal of looking to find examples. As Nicholas Von Hoffman, one of the most astute observers of the current scene, said recently: "For a quarter of a century we've abused and used our social and economic systems while we've debauched ourselves in consumerism at home and adverturism abroad. Now we must stop, think and rebuild." (*Wash. Post*, July 15, 1970 at B1 Col. 1.)

I have done a little survey of the activities of the FCC in the last six to eight months. There has been some relatively uninformed talk recently of a "new activism" at the FCC. Some have even suggested that the agency has been moving so fast it needs to cool down a little and turn inward.

In fact, many of the FCC's so-called "bold actions" have been in the form of the most tentative proposals—put forward as *possible* actions for the *future*—which carry with them the strong possibility of long delay and substantive reversal.

Look about you. There are no domestic satellite systems in operation. There are no pay television stations on the air. There has been no expansion in the major markets of cable television systems. There has been no deconcentration of local media accumulations, or deconcentration of television network program production domination. There are no competing common carrier systems in operation. There have been no fundamental solutions to the problems of inefficient and congested spectrum allocation. There has been no remedial Commission action to meet the telephone service failure problem.

The FCC's "actions," in other words, have only been *proposed*. A lot of paper has been issued, a lot of talk has ensued, but little has really been accomplished. And for that matter, in every instance less has been proposed than should have been.

Media concentration is an issue where I believe the public has been particularly badly represented. I have discussed the "media barons" more fully in Chapter 2 of my book, *How to Talk Back to Your Television Set*. The Commission's recently proposed rules to order divestiture have generated opposition by the corporations adversely affected—which have announced they will spend hundreds of thousands of dollars to try to stop the Commission. The FCC has little resources, and less inclination to meet this challenge. The public must depend on the occasional private citizen who submits comments, a professor doing research, or the Antitrust Division of the Department of Justice.

But in this same period of time the Commission has *acted* in a number of cases in ways clearly designed to frustrate legitimate citizen concerns in the regulatory process.

In 1967 the Commission set the Bell System rate of return in a formal proceeding. Two years later it rejected the petitions of consumer representatives to

intervene. And it approved, in *private negotiations*, the request from the Bell System that it be allowed to file tariffs which would allow it to earn a higher rate of return. When those tariffs were filed, the Commission without hearing rejected petitions filed against them, permitted the new tariffs to go into effect. This procedure is analogous to one which the U.S. Court of Appeals for the District of Columbia recently concluded "is contrary to the statutory rate-making plan in that it fences the public out of the rate-making process and tends to frustrate judicial review." (*Moss* v. *CAB*, — U.S. App. D.C. —, — F. 2d — (1970) (No. 23,627, decided July 9, 1970).

In January 1970 the Commission, working with White House approval, adopted a "policy statement" which inhibits community groups and other private citizens from competing for broadcast licenses. Under the new policy a potential competitor must show that the existing licensee has not "substantially" served his community in the previous three years. Since the Commission has no standards whatsoever as to what constitutes substantial service, competitors have nothing to go on in determining what licenses to challenge. The Commission, with its traditional preference for the powerful and the status quo, will not say what those standards are. Since the policy statement, not one competing application has been filed for a television station license—which would tend to indicate that the policy statement has served its intended purpose. This statement was adopted without any opportunity for public comment. In fact, the Commission *rejected* pleas from citizen groups that they be allowed to file such comments before the policy was adopted.

No effort has been made to formulate standards by which the Commission could judge the 2500 broadcast renewal applications it must pass on every year—despite three detailed studies Commissioner Cox and I have published as opinions. There has been no response whatsoever from the majority. The only effective scrutiny of renewal applications being done today is being done by hastily organized community groups who have become aware that they cannot depend on the FCC to protect the public interest. In community after community—Rochester, New York, Texarkana, Texas, Atlanta, Georgia, Shreveport, Lousiana, Memphis and Nashville, Tennessee—groups have met with broadcasters and secured changes and promises of better performance in an adversary negotiating process. This may be effective and desirable. But the point is that local groups must now go to the expense and sacrifice of getting together to do the job they are paying the FCC to do—and I can tell you now that the broadcast industry is extremely unhappy about even this modest exercise of public rights.

The Commission, contrary to the clear implications of recent Supreme Court decisions, has imposed technical, legalistic "standing" requirements to prevent a citizen from offering information to us concerning the renewal of the licenses of powerful broadcasters. The majority rejected my argument that since the Communications Act requires us to make an affirmative finding that the renewal would be in the "public interest," we should not reject any information which would better enable us to make a rational decision.

The Commission continues to show a marked disregard for racial problems in communications. By a four-to-three vote the Commission has held that the Alabama Educational Television Commission, appointed by the State government in Alabama, may delete from Alabama, over the protest of concerned citizens, all of the black adult programming originated by the National Educational Television network. In adopting equal employment rules for broadcasting, the Commission refused to adopt a comprehensive questionnaire related to broadcast job categories and instead adopted the broad brush EEOC questionnaire—a situation that community groups and educational broadcasters are now trying to remedy.

The Commission held that without a hearing the Times-Mirror Corporation, owner of the *Los Angeles Times* and a host of other media properties, may acquire *Newsday* and cable systems on Long Island as well as a powerful TV-newspaper combination in Dallas despite the Commission's conclusions in its proposed rule-making that newspaper-TV combinations in local communities should be broken up.

The Commission held that recruiting ads for the military run as public service announcements do not create an obligation requiring that opposing viewpoints be aired, under the Fairness Doctrine.

In adopting standards for the ownership of CATV systems, the Commission refused to extend prohibitions on local cross-ownership to newspapers and radio stations, despite the strongest citizen urgings that we do so, and despite the

fact that the Commission had full information before it on which it could have based such an action.

The Commission held that the public interest would not be harmed by the continued existence of interlocking relationships that link the Virginia National Bank with 13 radio stations, 9 television stations, several CATV systems, and at least 17 newspapers.

And, of course, the Commission has a history of finding the public interest served, and license renewals warranted, for stations that have proposed 33 minutes of commercials per hour, no news or public affairs programming, or that have been found guilty of dozens of technical violations, or even—in one instance—a station charged with bilking advertisers of $6,000 through fraud while on a probationary one-year license renewal for contest rigging!

Why does a governmental agency perform in this manner? Why are new consumer protectors—private and governmental—needed to reverse this government-private interest alliance? Again I believe some recent examples from the FCC are helpful.

PERSONNEL

Any governmental agency is a reflection of the people who work there—those who in the end are responsible for its actions. The record number of FCC Commissioners and other staff who have left the agency over the years to go to work for the very industries they were supposed to be regulating is not a fact to inspire confidence in the agency's performance. It is what another witness here today, Ralph Nader, has characterized as the "deferred bribe." But as blood curdling as the realities may be of those who are performing at an agency with one eye on their next job, it is even more frightening to find that those who *do* want to stay and serve the public are driven off one way or another.

There is substantial question in my mind whether personnel who are dedicated to serving the public interest are welcome at the FCC—or elsewhere in Washington for that matter.

Commissioner Kenneth A. Cox's term expired at the FCC on June 30. He is one of the ablest—and fairest—men ever to serve on the Commission. And yet no one expects that he will be reappointed. The reason he will not be reappointed is that Commissioner Cox has refused to toe the industry line in his opinions and votes at the Commission. It is, of course, a President's prerogative to appoint whom he wishes to a regulatory agency. But for an agency which must perform in a non-partisan way in the heart of the political process (equal time rulings and so forth) it is terribly distressing that partisanship enters into the appointment of its members. President Lyndon Johnson had no difficulty in reappointing Republicans to the Commission—and in fact naming a Republican chairman (Rosel H. Hyde). But good public service is apparently not to be rewarded in Commissioner Cox's case. And so the message goes out. If you want to stay in your job, or move ahead, don't cross strong vested interests or you will be axed. Commissioner Cox has been the subject of unending trade press attacks, and now is to be chopped from a job where he had compiled a record of public service perhaps unequalled in the 36-year history of the Commission.

Commissioner Cox is not alone in the vendetta against Commission employees who support the public interest. General Counsel Henry Geller has recently won an important award as one of the most outstanding federal employees in Washington. His distinguished services as the agency general counsel cover a nine year period that included four chairmen, Republicans and Democrats, Chairman Burch has given him the highest public praise for his abilities. But Henry Geller soon will no longer be the FCC General Counsel—another victim of White House pressure against a dedicated public servant. Of course, Chairman Burch may deny that political pressure entered into his judgment to remove Mr. Geller. But every Friday, Chairman Burch is required to provide the White House with a "Friday memo"—a list of non-Republican staff members of a certain level. And nearly every Monday the White House question was: "When does Geller go?" The White House obviously has no idea of the tremendous public service rendered by the General Counsel—or maybe it knows all too well. Whatever may be the case, such partisanship only makes a mockery of the concept of an "independent agency."

This situation to me is shocking. But it is also instructive in understanding why governmental agencies do not protect the public interest. Those personnel who try to do so lose their jobs. How many people around this town in the past two years, who were doing their best to protect the public, have found them-

selves moved out in response to pressure from vested interests? I would hazard a guess that the number is in the hundreds, at least. And this vendetta extends throughout every level of an agency. (Yesterday's *Washington Post* reported 150,000 civil servants will be removed from their jobs during the next year.) A large number of the very best young staff people at the FCC have left the agency. One of their complaints is that they are forced to write items and documents to come out the way top officials want them—and to hide matters which cast doubt on the positions that vested interests take before the Commission. Some of these younger staff want the Commission to allow them to attach dissenting views to documents coming to the Commission so that the Commissioners will at least be able to make informed judgments. I look for a continued exit of our young, disillusioned staff—joined by more senior staff who are fed up with their inability to accomplish change and who are tired of Commission deference to private interests.

The problem of discouragement of public-interest-oriented staff is only a small part of a larger phenomenon which I have characterized as the "sub-government." In any specialized private interest-government relationship which exists over a period of time a sub-government grows up. This sub-government is self-perpetuating and endures over a long period of time, unaffected by the tides of public opinion and efforts for reform. It is made up of spokesmen for the largest regulated corporations, the specialized law firms and a bar association, the trade press, trade associations, public relations and management consulting firms, and various other hangers-on. (In the case of broadcasting, it includes the networks and multiple station owners, the Federal Communications Bar Association, *Broadcasting* magazine, the National Association of Broadcasters, and so forth.) It also includes the permanent government staff—regulatory, executive, and congressional—which is concerned with day-to-day activities of the private interests in question. People in this sub-government typically spend their lives moving from one organization to another in the sub-government. People who pursue the course of protecting the public interest are rarely admitted to this club. And until advocates for the public interest can begin to approach the influence of this sub-government, consumers and the general public will have to look to the establishment of organizations such as proposed by this bill.

It is especially disturbing that the sub-governments cannot accept the fact that the odds of favorable action for the average citizen are against him 99 to 1. Even that one cannot be tolerated. There is an iron fist reaction every time the public shows even the most pathetic efforts to do battle. The GM-Ralph Nader affair is a classic example. There can be no other reaction to the overkill by one of the world's largest corporations of this lone individual. Most of the public interest groups in communications have been harassed in one way or another. There was even an attempt to have the IRS challenge the activities of these organizations.

Nor is much hope to be found in the Administration's appointment and removals. Look at the history of the appointments to the position of Consumer Affairs adviser in the White House or the head of the Bureau of Mines in the Department of the Interior. Look at the forced resignation of the only true Administration advocate for improved education: Dr. James Allen. Look at the removal of some of the most qualified blacks with jobs of importance in government: Cliff Alexander, for example. Look at the successful efforts by the Justice Department to strip the power from the Antitrust Division, with its vigorous head, Richard McLaren—for example, on the Failing Newspaper Act. I could go on and on—Leon Panetta, David Brooke, the brilliant economist of the Bureau of Mines, Tony Moffett, the only youth adviser in the administration. All are victims of the present rulers' desire to prevent even one dissatisfied voice.

The sub-government phenomenon is particularly powerful and insidious in the relationships between communications interests and government. And this is so because of the crucial role that broadcasting, and especially television, plays in the political process. Joe McGinniss (*The Selling of the President 1968*) has shown this impact dramatically in the 1968 election, and now we see it in this election year. No citizen who aspires to office anywhere can afford to ignore the impact of broadcasting. And this is true whether he is a candidate for the first time or an incumbent of the longest seniority. I have discussed this threat to the democratic process more fully in a lecture given recently at Princeton University which I will submit for the record. But let me make a few points here.

Broadcasting sits at the center of political campaigning. The organizations and interests who provide most of the money for political campaigns are also

the largest broadcast advertisers. An increasingly major proportion of political campaign expenditures goes for broadcast time and preparations for the use of the broadcast media. No politician can afford at any time in his political career to ignore the impact of his position on broadcast interests. While the reception his position and campaign receive from the broadcast media is of crucial importance during an election, perhaps equally important is the manner in which he is treated during his term of office. It is for this reason that media campaign consultancy is one of the fastest growing businesses in the country. And it is not difficult to understand why so many assistants in the White House today are former advertising agency men or others with significant experience in the broadcast media.

REGULATORY DELAY

Reform movements generally arise as the result of crises that command public attention and concern. For those who wish to stem their tide, the best antidote for this public outrage is time—and lots of it. The pattern has become almost classic. Something happens which requires government action, and the matter comes to the attention of the public. A proceeding is undertaken (or an agency created) to deal with the question. The public believes something will be done—but now accepts the fact that it will take time. Then the pressure starts—on those who have been handed the job of investigation and reform. Corporate interests that will be adversely affected move to delay, to water down, to remove "dangerous" people, and then finally to participate in the final whitewash. They hope the public will forget its original outrage until the process is next repeated. They generally do.

Let me give you a couple examples. After the violent tragedies of 1968, a panel was appointed on "Television and Social Behavior" at the National Institutes of Mental Health, to evaluate the impact of television on violence in our society. The panel hoped to have an interim report by October 1969. There was none. Here was a crisis—with public awareness and concern—and here was an expert group to examine the problem. What happened? Forty professionals were proposed for the panel. The broadcast industry was allowed to veto whomever they did not want and seven were excluded, including some of the most highly qualified. In addition, in contrast to the formulation of the NIMH smoking panel, five of the twelve who were appointed either worked for or were affiliated with the networks.

The coordinator of research has now left the project, in part because of the refusal of NIMH to take the project seriously or to be courageous about its task. An irony is that a significant part of the research is being done by those bumped from consideration for membership on the panel—a tribute no doubt to the efforts of the former coordinator of research to secure the best talent he could. There is now a question of whether that research will be used.

Let me mention a second example—this time at the FCC. In 1965 the FCC, concerned over charges of predatory pricing by the Bell System, and conscious of the fact that no formal investigation of the company had been undertaken in years, began a study. Now, five years later, it is worthwhile to examine what has been accomplished.

In 1967 an overall rate of return was set and a rate reduction was ordered. (There are those who believe the rate reduction would have come without the formal proceeding—but a reduction was ordered.) Two years later, as I mentioned earlier, Bell successfully undertook to persuade the Commission—without hearing—to change the rate of return to what Bell had wanted in 1967!

There were four areas of inquiry in addition to rate of return. On the question of the appropriateness of the Bell estimate of the rate base, we took Bell's figures—promising we would get to that question later. On the appropriateness of its costs, including the company's failure to use accelerated depreciation, and its use of institutional advertising at ratepayer expense—we said that, too, would come later. On the question of appropriate regulatory guidelines to prevent predatory pricing by Bell, we simply decided we couldn't decide—and started a new proceeding. And as for the question of vertical integration (the relationship between Bell's wholly-owned supplier, Western Electric, and the rest of the Bell System), there are now no scheduled proceedings to deal with the question at all. In fact there are no schedules to do anything. Such is the typical fate of consumer representation and reform.

BUDGET AND RESOURCES

Government agencies often claim they don't have the resources to do the job. No doubt that is sometimes true. Last year, I am told, the FCC was slated for a significant budget increase that had passed the Bureau of the Budget—only to be vetoed in the White House. But lack of resources does not explain why an agency refuses to take those actions which could be undertaken without any additional personnel. The cry of "lack of resources" is too often merely a coverup for lack of will. If a matter is really important, no agency in this town is so perfectly managed that a reallocation of resources from lower priorities to higher ones could not free up the resources necessary to do a single urgent task. This is especially true at the FCC, where our young lawyers are complaining because they are not given enough work that truly utilizes their talents. The limited talent and resources the FCC does have are simply not being turned loose on consumer matters.

On those rare occasions when pro-consumer action *is* proposed in an agency the sub-government moves in to block it. With its superior intelligence-gathering apparatus—leaks, regular contacts, regular agency watching—members of the sub-government can anticipate potential agency action that is either adverse to their interests, or that can be turned to their advantage. Calls are made, visits are arranged, studies are done and released, Congressmen are made to be interested, the full page ads appear. Who is surprised any longer to have a lobbyist come to his office to discuss the contents of a staff document the Commissioners have not yet seen—or that is supposedly under confidential consideration? This is how things work in Washington—the point is that the public has no one to represent their interests in this swamp.

The Penn Central situation has interested a large part of the nation. I thought Senator Lee Metcalf had an interesting evaluation in a speech he made recently on the Senate floor on that and other subjects:

It was the private financial community that determined the rules of this rail merger game, and neiher the Congress nor the ICC, nor the courts were strong enough to say no. Yet, here we are in Congress being asked to take good taxpayers' money to bail out the Penn Central without even the suggestion of adequate security and management control, and without any real knowledge of the corporate monster which the financial managers have put together. Neither the Supreme Court, nor the Congress, nor anyone except the Wall Street bankers really know who owns and controls this railroad.

Senator Metcalf introducing S.R. 426 to establish a Special Committee to Investigate Economic and Financial Concentration, modeled after the TNEC studies of the Depression (116 Cong. Rec. S10882, 4—daily ed. July 9, 1970).

Professor Laura Nader, an eminent anthropologist, has written recently in her specialty, the anthropology of law, that "When viewed comparatively our legal system appears extremely harsh, vindictive and violent. Our system is extreme in seeking to place blame, determine guilt and exact punishment. Violent street acts are labeled criminal while acts which do far greater damage to society at large are virtually ignored."

And Philip Slater, Chairman of the Department of Sociology at Brandeis University has remarked in his new book, *The Pursuit of Loneliness:* "The law itself, although philosophically committed to equality, is fundamentally a social device for maintaining structured systems of inequality (defining as crimes, for example, only those forms of theft and violence in which lower-class persons engage)."

We will not change the manner in which government operates unless we recognize the central need to make effective citizen representation and consumer advocacy a central part of the governmental process. That we have not done so is reflected every day in the newspaper reports of governmental action. There are those who believe that it can never be done—that citizens have lost control and it cannot be regained in the context of a market system. I am not one of those. I believe that we can work within the system we have created under the rules to which we too often give no more than lip services.

But citizen advocacy is something more than the filing of an occasional brief or criticism of a decision that is clearly contrary to the public interest. Let me show you what I mean. The Ford Foundation completely changed the course of communications history by its filing in the Commission's domestic satellite proceeding, thereby calling attention to the need for funding of public broadcasting as well as for satellites. The Carnegie Commission on Public Broadcasting also

had a significant impact. There are now several independent groups studying the public policy issues in cable television. These efforts cannot help but make for decisions more attuned to public needs. But it is regrettable that the FCC is not doing any of these studies.

Even were we doing studies they, alone, are not enough. I intend to recommend to my colleagues that we put forward a $5 million program in which we ask community groups to make proposals for experimental use of cable as a way of testing and developing what all recognize as a fantastic potential for community service. Such pilot project expenditures might make a greater contribution to wise public policy than all the studies that can or will be done. And these experiments are unlikely to be done by private interests seeking favorable government action. Government grants for experimental cable development would be analogous to the HUD grants to companies for development of "breakthrough" housing techniques to meet the housing crisis in this country. Experimental cable development grants which directly involved grassroots citizen support would then represent true citizen advocacy and citizen representation in Federal rule making activities.

CONCLUSION

A Public Counsel Corporation with a decent budget and a broad mandate could make an effective beginning. But we must recognize that "the public interest" is not simply the sum of the private interests that beat a way to our door. There is something more. We have to begin to reward rather than punish citizen representation in the decisionmaking process. Consumer agencies which become nothing more than carbon copies of the present regulatory agencies would be worse than nothing. We certainly don't need more tax dollars spent on increased support for private interests in the *guise* of agencies defending the public. That is simply a fraudulent way of discouraging genuine consumer representation, by representing that it is unnecessary.

What lessons can we learn that would make consumer agencies more effective? In the end it comes down to the people who will serve in this new agency and the resources they have to work with. Will the corporation merely be directed by another group of establishment representatives? If not, why not—why can we expect better appointments by the President/Senate here than elsewhere?

I think the idea of funding private consumer representatives is an admirable one. There are large numbers of dedicated and talented people, especially among young professionals, who find only financial considerations preventing their working directly for improved citizen representation and fundamental change in our society. I think you might want to add a provision that would allow the Corporation to do overall studies of agencies supposedly representing the public. It could publish the studies and make organizational recommendations for change, sort of a continuing Landis analysis. You might wish to consider some type of dedicated financing, perhaps keyed to the total budgets of the agencies before which the Corporation might appear, to eliminate the process whereby appropriations can be used as a disciplinary device for agencies or activities that are too consumer-oriented. While I support the goals of S. 2544, I have some of the same concerns about locating the function in the Department of Justice.

While the idea of a public counsel is an admirable one, I will withhold my enthusiasm until I see what finally emerges from Congress. Too often we have been promised a change which will produce more effective consumer representation only I find that the changes are illusory. I urge you to provide for strict independence of the public counsel from *all* political pressure. Otherwise it will simply become a new component in some corporations' sub-governments.

All we can do is to try—admitting we have failed in the past. At least the Corporation, not being directly tied to a specific industry or activity (like the Antitrust Division of the Justice Department), may be better able to resist the capture by a sub-government. But in doing so let us be aware of the political realities, as Attorney General Olney advised a railroad president about the granddaddy of all regulatory Commissions, the ICC. The railroad official was concerned about the establishment of the ICC. The Attorney General soothed, and educated, him.

My impression would be that looking at the matter [abolition of the ICC] from a railroad point of view exclusively it would not be a wise thing to undertake. . . . The attempt would not be likely to succeed; if it did not succeed, and were made on the ground of inefficiency and uselessness of the Commission, the result

would very probably be giving it the power it now lacks. The Commission, as it functions have now been limited by the courts, is, and can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of the railroads, at the same time that the supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad point of view of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests. . . . The part of wisdom is not to destroy the commission, but to utilize it.

Thus, you see, the problem we address today is neither new nor accidental. But perhaps in this age of the decline and fall of the American empire the issue takes on greater urgency. I commend your commitment and courage in addressing these issues. I am pleased you would ask me to participate.

The power to restore the people's legitimate respect in their government rests with this Congress. We all know what must be done. Whether the will, whether the change, whether the freedom and justice, can come quickly enough from those who hold the corporate power that now controls our country remains to be seen.

"We look up to no man, look down on no man and demand the same from all men."—Winnebago Indian saying.

Senator KENNEDY. Thank you very much, Mr. Johnson.

As always, your comments are most relevant, perceptive, and helpful.

You mentioned, just in our very brief exchange, that the public counsel approach might be the best governmental response to these important needs. How do you evaluate what is being done in the private field by foundations and the private bar?

What of the bar associations? How impressive has their effort been? And from foundations, what can we expect in the future in the public interest law area?

What comments would you make about these efforts?

Mr. JOHNSON. First, let me say that I have seen action by individuals that rather dramatically makes the point that a single individual can make a difference and a big difference. I think that Ralph Nader has shown that. I think others who have come along in the broadcasting field, John Banzhaf, for the antismoking spots. That is an example of that. And I think there are things that an individual can do without funding, or significant fundings, and an individual ought to be encouraged to do that. But there comes a time when money is necessary. You have to have more than just dedication. You need to have a number of people, you need facilities, you need experts in the fields other than law if you are going to take on an industry that is putting hundreds of thousands of dollars into the effort on its side.

And I must say I have been very discouraged by what has now become the truism that, you know, for every $1 million you can find some universities and foundations for studies, and you are hard pressed to come by a dime for meaningful action, and I think this is a reflection on the attitude of corporate power toward dissent. It is not enough simply that they win, they want to eliminate even the single remaining outspoken, dissident voice. So, we see the phenomena of the Internal Revenue Service pressuring, applying pressure to those people's pathetic efforts in the area of broadcasting to bring some representation of public interest before the FCC.

We see General Motors trying to stomp out Ralph Nader, one of the, you know, largest institutions in the world going after a single individual. That is a discouraging thing.

Senator KENNEDY. What about the Internal Revenue Service going after these public interest groups alined against the broadcast industry?

Mr. JOHNSON. Well, basically, I think it is disgusting, I think it is appalling, and I think it is illustrative of the fact that you cannot got a fair shake. I mean, if there were equal power on both sides and they started playing those kinds of games, it would be understandable.

Senator KENNEDY. What sort of an incident are you talking about? Can you give us some examples of IRS moving into this field?

Mr. JOHNSON. Well, investigations of the tax status of organizations involved in representations with regard to the so-called Pastore bill, S. 2004, a bill designed to curtail the rights of the public to participate in the license renewal process, a bill which ultimately became unnecessary because the FCC, on its own, enacted a policy statement that did very much the same thing. The actions against the foundation generally by Congress is evidence of this, I think. The pressure against even such seemingly democratic and innocuous activities as voter registration is further evidence.

Senator KENNEDY. Let me ask this: Are there procedures now which are available to the FCC where there can be greater public participation in the decisions and rulemaking?

Mr. JOHNSON. Yes, indeed.

Senator KENNEDY. And is citizen involvement encouraged? How would you evaluate the current procedures in this area?

Mr. JOHNSON. Well, there is no effort whatsoever by the FCC to encourage public participation. There are, indeed, many efforts to discourage public participation.

Senator KENNEDY. You do not need new legislation, then, as far as the FCC goes?

Mr. JOHNSON. No, we just need new will. The procedures are there. I mean, there would be nothing to preclude the FCC from notifying local groups when the license renewals are coming up in their local community and let all of the people participate in the license renewal process. We could that; we could do that, but we do not.

Senator KENNEDY. Do you have any advisory committees to the FCC?

Mr. JOHNSON. We have a number of industry advisory committees. We have no citizens advisory committee.

Senator KENNETH. Do you have any consumer advisory committees?

Mr. JOHNSON. Nothing.

Senator KENNEDY. In the advisory committees which have been established for the FCC, what role does the consumer interest play to your knowledge?

Mr. JOHNSON. Well—none.

Senator KENNEDY. Are there any representatives of the consumers on any of these advisory groups that you know of?

Mr. JOHNSON. No; not that I am aware of.

Senator KENNEDY. Could you tell us a little bit about the importance of openness in terms of the agency's activities?

I mean, do you find that the public would have a better chance if the kind of secret contacts and communications which you mentioned in

your earlier statement, the various leaks of draft documents, and similar occurrences, were laid open and on the record?

Mr. JOHNSON. Yes; I think so. Of course, the problem is: As long as you have the sub-government phenomena, as long as you have people whose principal loyalty is with the sub-government, rather than with their agency or whatever, this system is very difficult to beat. I mean, it is no accident that the FCC building is made of glass. You know, the halls are filled with people whose sole job it is to keep their clients informed of what is going on, and they are dealing with people who either used to work with them in their law firm they are now with, or who in the future may come to work with them, or who they knew when they worked for the trade magazine—I mean, this is literally infectious; these people marry each other, and it is a social—I mean, it is a very difficult thing to break up, I think.

Senator KENNEDY. How would you propose to provide the simple, effective notice to the public about FCC activities affecting them?

Mr. JOHNSON. I think one way would be to use one of the most powerful media in this country, that we are supposedly regulating, radio-television. There are now very brief, and not very informative, messages that are really carried on the stations. I think those could be written in a way that would really inform the public and could be put on at times and in numbers that would insure that all people would know what is going on. Newspaper ads would be another way. Simple direct mail to people, personal letters to selected community leaders or organizations would be another way.

Senator KENNEDY. Have you suggested any of these to the Commission itself?

Mr. JOHNSON. We have talked about it on occasion.

Given the general climate of the Commission, some of these proposals would be obviously preposterous to raise. I mean, they would have no hope of success, and there would really be no point in talking about them. Others have been broached and have been turned down.

Senator KENNEDY. As I understand, there are hundreds of rulemaking proceedings before the FCC, dating back as far as 1957, and one question that arises is: If we have the independent advice of the public in these proceedings, would this not just slow down the proceedings even further and delay rulemaking even longer?

What is your reaction to that kind of a charge?

Mr. JOHNSON. Well, my reaction is that it rather misses the mark. If the purpose of the proceeding is to bear any correlation at all to public interest, it seems to me someone must be there speaking on behalf of the public. If, indeed, we are to govern through the adversary process, which is, basically, what the agencies are committed to, then, it seems to me, by definition, you have to have an adversary to make that work.

We have the equivalent of a boxing match in which only one of the two contestants shows up, and he shadowboxes around the ring for 3 minutes, and then the bell rings, and we proclaim him the winner, and he jumps out and runs on his way. I have no objection to the adversary system, but I think you have to have an adversary to make it work, and I think very largely, very often, we do not have this.

Senator KENNEDY. In your book you talk about different ways the public can participate in these FCC proceedings.

Would you outline just briefly some of those?

Mr. JOHNSON. Yes, I would be happy to, and also to mention the name of the book, which is "How To Talk Back to Your Television Set," on which, I should note at the end of this commercial announcement, I received no royalty but a great deal of pleasure.

The book is principally designed as one way of getting information to the public about what their interests are in the television business and what they can do about it.

The ultimate power that the people possess with regard to the licensing of stations is the fact that the station operator is not the station owner. The people own the airways, the people own the station. He is but a trustee, a lessee, he is using their property for a 3-year term for which he has been licensed by the Federal Communications Commission. At the end of that 3-year term, his right to operate that property expires, and he must get another license, and whether or not he gets another license depends in large measure on what the people of that community tell the FCC about the job that he has been doing. So, this is an election and one in which they have not only a right but an obligation to participate to evaluate the local broadcasters, determine which ones they would like to see continue to operate, which ones they would like to see stopped from operating. The problem, the reason why most people do not participate in that election, is because they do not know there is an election. That is the ultimate power. Because when the people know they have that power, they are then in a position to engage in it, in what I think is a very constructive activity of talking to the local station owners and negotiating with them about the things of greatest concern to them. This has been done in Texarkana, Rochester, Atlanta, and so forth. There are groups in the local communities all across the country that are sitting down with the local broadcasters and talking about the complaints, about racist employment practices, local social programing, greater quality of children's programs, and so forth. This has various impacts.

The second thing people can do is to file fairness complaints if they believe a station has not been complying. It has an obligation to treat fairly, give relative equal coverage to all sides on controversial issues of public importance.

Finally, they can offer proposed rulemaking. A group of ladies in Boston called Action for Children's Television came to the FCC and proposed a rule under which we would preclude commercials from programs designed for children.

All of these are areas in which the public can act and has been increasingly becoming more active.

I think that is very encouraging.

Senator KENNEDY. Could you just tell us about the importance of the public voice in decisions at the Maritime Administration, since you've had some experience there also?

How important it is that the public have a voice in those decisions? I think that it is probably somewhat more apparent at the FCC. What are the kinds of things being decided at the Maritime Administration that affect our interests, and how significant is the interjection of public concern in that agency?

Mr. JOHNSON. I would be happy to talk about that.

I think one of the things we often ignore when we talk about the impact of taxes on the average American, we talk in terms of all of this money going to Washington and being wasted on the Washington bureaucrats, and so forth.

If you take the Federal budget, $200 billion, roughly, and take all of the expenses associated with the judicial branch of the Government, all of the salaries and the travel expense, the publishing, and the courthouse, and so forth, and put that on one line; all the money associated with the legislative branch of the Government, the salaries of the Senators and Congressmen and their staff, and this building, and travel, and printing of the Congressional Record, all of that, and put it on another line. Take all of the budget of all of the independent regulatory Commissions, every dime spent on them totally, put them on a third line. Take the salary expenses for most of the executive branch agencies with the exception of defense and a couple of others, put them on the fourth line. Total that. That total is one-half of 1 percent of the Federal budget. I mean, you could become anarchist and abolish the whole Government, and you would never see it on April 15 on your income tax return.

Now, where is that money going?

I mean, where is that 99.5 percent going?

Because you cannot, simultaneously, you see, say that you want to encourage that 99.5 percent, but you want to cut down on Government spending by eliminating that one-half of 1 percent. I mean, it just is not going to wash.

Well, one of the places it is going—and it will illustrate, I think, the other programs at Maritime Administration, over which I attempted to preside for some 28 months which was one of the longest terms ever served by a Maritime Administration official since your father first began that position. Basically, we are now spending about $700 million on subsidizing merchant shipping and attendant activities. Every independent economist who has ever looked at this program has concluded that there is absolutely no benefit whatsoever to the American people from the $700 million a year. It is sort of a pipeline into Fort Knox, and the job of the Maritime Administrator is to hold that valve down, you see, and see to it that the step is kept within reasonable dimensions.

I am sure you do not want me to go into the economic analysis of the sufficiency of industry here. But you can multiply this. There are 10 contractors who between them pull $10 billion a year out of the Defense Department in contracts. An agricultural subsidy program where the largest 500-some farm units are earning an average of $250,000 a year, and the 500,000 smallest farm units are earning an average of $100 a year. The oil import quotas that cost the American people an additional $6 billion a year to support the economic need of the oil industry.

At the same time that we are trying to discourage cigarette smoking, we are continuing to give to the tobacco growers some $18 million a year in Government aid of one kind or another.

You can multiply this industry by industry by industry.

That is where the 99.5 percent is going.

That is why Mason Williams says that the Government makes better deals with business than it does with people, because at the same time that these programs go on our cities are rotting, the people are unfed—they need education and health care, and there is a deterioration of the quality of life in this country. How you get popular representation in something like the Maritime subsidy program is beyond me. In this case, we have set up a special committee in the House, as you know, known as the House Merchant Marine and Fisheries Committee who, while doing worthwhile work on fishing in Massachusetts, also has given an extreme amount of attention to the welfare of the shipping economy, and yet this is an area that the public representatives have not yet entered. But they might very well. They have a great deal of imagination, and to the extent they are interested in economic issues there is sure a lot of slush ground that they could try, I think, to return a little of that back to the Treasury.

Senator KENNEDY. Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Johnson, I notice on a copy of your statement that it says in the beginning:

Testimony of Federal Communications Commissioner Nicholas Johnson before Senator Edward M. Kennedy, chairman, and the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 3434 and S. 2544, July 21, 1970.

The question I first propound to you is: Are you appearing here to testify as a Federal Communications Commissioner, or are you appearing as an individual?

Mr. JOHNSON. I hope I always appear as an individual, Senator, but I cannot escape the fact that I am also a Commissioner of the Federal Communications Commission.

Senator THURMOND. Well, then, do you not think it is misleading to have at the top of your statement, "Testimony of Federal Communications Commissioner Nicholas Johnson?"

That indicates to me, and I think to most people when they pick that up, that you are appearing here to testify as a Federal Communications Commissioner.

Mr. JOHNSON. I think it would be equally misleading, Senator, to suggest that I am here simply because of my past experience as an administrative law professor. I think I am testifying here based upon my experience as a Federal Communications Commissioner. I presume that is why I have been invited.

Senator THURMOND. Are you speaking for the Federal Communications Commission here?

Mr. JOHNSON. I am not speaking for the Commission in the sense that the Commission is a seven-man Commission, as you are aware, and can take action only through a vote of a majority of four Commissioners.

Senator THURMOND. Has the Commission approved your address or your testimony that you gave here this morning?

Mr. JOHNSON. The Commission, Senator, never approves the testimony given by an individual Commissioner, unless it is the chairman appearing with a statement on behalf of the Commission. I am not appearing with a statement on behalf of the Commission.

Senator THURMOND. You mean to say that no member of the Commission ever speaks for the full Commission on any subject?

Mr. JOHNSON. No, sir.

Senator THURMOND. To present the views of the Commission as a whole?

Mr. JOHNSON. I just said that the chairman, and on occasion another Commissioner, can and often does appear on behalf of the entire Commission, but when that is done that is made clear by the testimony.

Senator THURMOND. So, you are appearing here as an individual?

Mr. JOHNSON. Yes, sir.

Senator THURMOND. Individual citizen?

Mr. JOHNSON. No, sir; I am appearing, I hope, always, as an individual. That was my first reaction to your question, Senator.

Senator THURMOND. Well, now, this is a very simple question now, and I want to propound it to you.

You are either appearing here to testify as a Federal Communications Commissioner or you are appearing in some other capacity. Now, will you answer which?

Mr. JOHNSON. I am prepared to answer your question by saying that I am a Federal Communications Commissioner.

Senator THURMOND. We know that. The record is clear on that.

Are you appearing here to testify as a Federal Communications Commissioner? Or are you appearing in some other capacity, for instance, as a private citizen, as a law professor, or some other capacity?

Senator KENNEDY. Excuse me——

Senator THURMOND. Well, Mr. Chairman, now, you let him answer that. I am asking him; not you.

Senator KENNEDY. Well, he can answer it. But I would just like at this point suggest, perhaps, a third alternative, that you are appearing as an individual Commissioner?

Mr. JOHNSON. May I rest with that, Senator Thurmond?

Senator THURMOND. I want to ask him the question, Mr. Chairman, and will you please keep off it.

Are you appearing as an individual Commissioner and testifying in that capacity, or——

Mr. JOHNSON. Yes.

Senator THURMOND. Or are you appearing as a private citizen and testifying in that capacity?

Mr. JOHNSON. Senator, I am a Commissioner of the Federal Communications Commission——

Senator THURMOND. I understand that.

Mr. JOHNSON. Let me, sir, if I may, just finish the sentence.

I am a Commissioner in the Federal Communications Commission. I am appearing as a Commissioner of the Federal Communications Commission, and I am appearing as an individual Commissioner, and I am also appearing in a great number of other roles that I happen to carry, including that of a citizen.

Senator THURMOND. So, you are appearing here, as I understand from what you said, as a Federal Communications Commissioner and making and presenting this testimony——

Mr. JOHNSON. Yes, sir.

Senator THURMOND. As well as in a private capacity as a citizen?

Mr. JOHNSON. Yes, sir; I would have no way by which I could avoid that.

Senator THURMOND. Do I now construe correctly that?

Mr. JOHNSON. Yes, sir.

Senator THURMOND. Well, I am glad that I finally got an answer.

Mr. JOHNSON. I thought I gave you one originally, but I am happy to discuss it with you at any length.

Senator KENNEDY. Let me just at this point make clear for the record that we are delighted to invite the Chairman of the Commission, Mr. Burch, to appear and to make whatever observations he would like to make, either as an individual commissioner or as an individual or as representing the Commission, at a later time.

Senator THURMOND. Mr. Chairman, I have no objection in what capacity they appear. I simply want to know in what capacity they appear. You have a right to appear here as a commissioner, so far as I am concerned. You have a right to appear as a law teacher, as you say you are.

Are you still a law teacher?

Mr. JOHNSON. No, sir.

Senator THURMOND. Or you have a right to appear as a private citizen.

But I want to know for whom you are speaking and in what capacity you are speaking, and that is what I was trying to bring out.

Now, Mr. Johnson, do you believe that S. 3434 as presently written is sufficient to do what it is supposed to do?

Mr. JOHNSON. Let me say "yes," to that, Senator, and, then, see where you and I go from there?

There may very well be modifications that would be helpful. I think it is a constructive, workable bill as it stands, and I think the questions that you put in your opening statement are good ones. I think they should be addressed. I think they can be answered.

Senator THURMOND. If this bill is enacted into law, do we have any assurance that the agencies would respond any differently?

Mr. JOHNSON. Yes; I think so. And, in terms of your opening statement in support of the purposes of this bill, the need for additional consumer representation, I was very heartened by, I think, one of the things I observed as an individual commissioner is that when there is a party in a case before the FCC who has the power to appeal that case to the courts—which means, almost inevitably, to get the FCC reversed—that the FCC tends to do a different if no better job of drafting its opinions and considering the cases, and when there is no party to appeal the fact that I have a pertinent opinion, in my judgment, which deviates from the majority, seems to have very little impact upon my colleagues.

So, I would presume the presence of a party with a capacity to appeal would, indeed, have a very salutary effect on the agency.

Senator THURMOND. Mr. Johnson, to what extent do you believe that administrative, social, economic policy should be considered by the agencies in making a decision?

Mr. JOHNSON. I think that what the agencies do, Senator Thurmond, will, of course, have social, political, and economic impact. I think the agency cannot avoid that. I think the only question is whether the agencies are going to go about their tasks intelligently, openly, and deliberately, or whether they are going to accidently back themselves into corners that they had not anticipated.

But, I think the agencies simply do not have the options, in my judgment, of avoiding the social, political, and economic implications of their decisions.

Senator THURMOND. Mr. Johnson, do you believe that the agency should be concerned with the possible economic effects of their rulemaking?

Mr. JOHNSON. Yes, indeed.

Senator THURMOND. In your statement, you mentioned Dr. James Allen, the only true administrative advocate for improved education. Are you speaking of within the whole United States or just in the Government?

Mr. JOHNSON. I was speaking, sir, of this administration.

It seemed to me that he had been a very outstanding spokesman on behalf of, indeed, education.

Senator THURMOND. Who has been forced to resign.

Are you aware of the fact that before Dr. Allen came to HEW that the State of New York, his employer, by specific legislation, disavowed his educational policies?

Mr. JOHNSON. The details of the proceedings in New York, I am not aware of, Senator. I am aware of his general reputation in this town and the educational community.

Senator THURMOND. Are you familiar with the fact that they passed what they called the "antibusing law" in the State of New York which, in effect, was really a true freedom of choice and that this was roughly opposite from what he stood for in the city of New York?

Mr. JOHNSON. I will rest with your expertise in the area of busing, Senator. I am not familiar with that.

Senator THURMOND. I would be glad to have your expertise if you differ with it.

Mr. JOHNSON. As I said, busing and antibusing does not really fall within the jurisdiction of the FCC, and I am not familiar with the details of it.

Senator THURMOND. Well, I did not know that Dr. Allen was connected with the FCC either, but you brought him into the picture.

Mr. JOHNSON. I felt that his leaving, along with that of many other individuals, seemingly independent spokesmen, from this administration was some evidence of problems we confront in getting effective consumer, taxpayer, citizen representation in Government.

Senator THURMOND. Mr. Johnson, do you think that the Legal Aid Society can assume the responsibilities of serving the unrepresented public without establishing the Public Counsel Corporation?

Mr. JOHNSON. I think probably not, as presently conceived and operated.

Senator THURMOND. Mr. Johnson, will you please elaborate as to how, in your opinion, the provisions of S. 2544 will be implemented?

Mr. JOHNSON. How they will be implemented?

Senator THURMOND. Yes.

Mr. JOHNSON. What are you driving at specifically?

I mean, I——

Senator THURMOND. I am driving at how the provisions will be implemented.

You are strongly in favor of this bill, I believe.

You have studied it, have you not?

Mr. JOHNSON. Yes. I presume the organization would be established;

funds would be appropriated; people would be hired, and the operation would begin.

Beyond that, what do you have in mind?

Senator THURMOND. But you do not care to elaborate, in your judgment, just how the provisions of this law will be implemented other than the simple statement that you made?

Mr. JOHNSON. No, because I am not sure that I comprehend what you are driving at, Senator.

Senator THURMOND. Well, that is as plain as I can made it.

Mr. Chairman, I have no other questions.

Thank you.

Thank you, Mr. Chairman.

Mr. JOHNSON. Thank you.

Senator KENNEDY. As I understand, the legal aid groups have been mostly interested in the problems of disadvantaged groups within our society and have done extremely useful and important work in representing them in court and administrative actions. The thrust of S. 3434 would not only apply to the interests of the poor but to the consumer interests generally. The legal aid agencies and even OEO-supported agencies might take advantage of S. 2544, but they might also contract with the Public Counsel Corporation, which includes not only the poor but also all of the other unrepresented segments within our society.

Mr. JOHNSON. Yes, indeed. I am gad you said that, Senator Kennedy, because it is important to respond more fully than I did to Senator Thurmond's question which he did not follow up on. There is a difference between the kind of legal representation that is needed by the poor, as they must confront the neigbhorhood merchant that they have to deal with, the usury credit terms, the landlord-tenant relationship, the dealings with city hall, and so forth. There is no doubt about that need and that the neighborhood legal center program and the legal aid, and so forth, has helped with that.

But there is another need, and one that I am most conscious of as an individual commissioner, and that is the underrepresentation of the broad, the consumers, the taxpayers before a regulatory commission in the rulemaking process, and that is a need that I would like to see served as well, getting involved in the process of legislation, administrative rulemaking, and adjudication before an agency which is really a different order of magnitude where an individual decision may affect millions of consumers rather than an individual victory affecting one tenant in his relationship with his landlord. Both are clearly needed in our society.

Senator KENNEDY. Well, thank you very much. Mr. Johnson.

You have been extremely helpful in bringing us your views based on broad background of experience and concern in this area. We particularly appreciate your appearance here this morning.

Mr. JOHNSON. Thank you very much, sir.

Senator KENNEDY. Our next witness is Mr. Ralph Nader.

Mr. Nader has for years been the most vigorous advocate for public interest in Washington. He had challenged industry and Government in the name of the consumer, and Mr. Nader has been, in large part, responsible for the growth of public interest law here and has special experience to discuss the legislation before us this morning.

And we are glad you could be with us.

Mr. NADER. Thank you, Mr. Chairman.

STATEMENT OF RALPH NADER

Mr. NADER. I am grateful for the invitation to present some views on S. 3434 and the legal environment it purports to affect.

S. 3434 would establish a Public Counsel Corporation to "provide the unrepresented public with competent, consistent, and aggressive advocates in Federal rulemaking." These quoted words sound remote, but the reality they touch has the most far-reaching impact on the lives of citizens throughout the country. The reality that is the vast legal subsystem known as the Federal administrative Government tends to be excessively abstracted away from the days and cares of the ordinary citizen by means of its extraordinary complexity and remoteness from channels of communications circulating through farm, village, town and city. Yet, consider the ways in which these Federal agencies process private power to allocate the wealth of a nation and the rights of a polity and the risks of present and future generations. The "what" and the "how" of Federal policy on hunger, weapons, welfare disbursements, educational supports, utility rates, industry and commerce subsidies, private use of public land, water, timber and oil resources, licensing, product registrations, consumer product and environmental violence, mortgage insurance, cost of borrowing, taxation and procurement translate into detailed impact on people's lives, income and health and opportunity.

There is little need to elaborate the foregoing sketch. This and other subcommittees of Congress have detailed such phenomena. What now should be focused upon is the fact that most Americans are shut out of this Federal administrative and regulatory system. The preconditions of this massive shutout are inadequate rights, even less adequate remedies and almost no legal representation or advocacy. This sequence of rights to remedies to advocacy is the lifeline of any individual or group desiring access to and participation in the decisionmaking processes of a regulatory body or agency. In terms of quantity and intensity of focus, there has been always significant differences between special and general interest groups. There probably always will be such differences. A basic postulate of a just legal system, however, is that the availability of relatively equal access to the rights-remedies-advocacy lifeline is critical to insuring that power and justice can be two different things and that might does not make right.

The Federal regulatory process is heavily premised on the operation of an effective adversary system of representation and advocacy for optimal regulatory results. The premise is flawed and most seriously so. There are nearly 8,000 practicing lawyers in Washington, D.C., whose daily absorption is directly or indirectly striving to obtain what their clients desire from the rulemaking agencies and their political environments. These lawyers deal along an amply continuum from structural to sidewalk-style successes in the areas of agency action, inaction, delay or nonrecognition. On the other hand, there are probably under 20 lawyers in Washington representing public or consumer interests before these agencies on a regular basis. Being largely reactive instiutions, agencies respond to those interests who are around most of the time, with most of the power and most of the advocacy. As Attorney Howard C. Westwood of the law firm of Covington and Burling put it earlier this year:

The point of the matter is simple: Without aggressive legal advocacy, loyal to a particular interest, the governing of that interest will be less than fair and informed, however good the intention and however diligent the effort of the governor.

Please weigh those words throughout these hearings. And consider how much stronger is the case for advocacy of the interests of unrepresented groups, such as consumers, when incompetence, sloth beyond the pale of stereotoype, rapid personnel turnover, anticipation of future job offers in commerce-industry, patronage, the absence of effective separation of powers between legislative and executive branches and unions bureaucratic monstrosities make good intentions and diligence on the part of the governor a dream waiting to become an ideal.

How well the present adversary system works is the basis for the great divergence of observation between lawyers depending on their clientele. I know of documentation and this subcommittee has documentation showing that the system works so poorly that not only are public or consumer interests ignored but very frequently laws and rules are used as instruments of oppression and exploitation. Urban renewal has become corporate renewal. The tax structure has become a major facility for corporate socialism regarding costs. The Federal Government's corporate welfare system so weakens the impetus toward efficiency and innovation that whole industries, not just consumers, are being harmed. The glacial delays of the Federal Trade Commission-Washington lawyer-corporate complex makes deception and fraud in the marketplace pay and subjects the scrupulous businessman to pressures toward similar deception or suffer competitive disadvantage. The absence of any mechanism of paying back the unjust enrichment to the defrauded consumer further reduces the incentive to comply and goads the lawyer into counseling his clients in the art of evasion and delay.

But it is in the rapidly growing area of unrepresented interests that the advocacy gap is most enormous and rending. As a complex economy grows in its private sector, there is commensurate growth in public needs. The more cars sold, the more highways needed, the more pollution, the more clashes with land, housing, and aesthetics. The same is true in other subeconomies. These unrepresented interests are by no means restricted to minority groups or poor people. They increasingly include interests ranging over broad time and space spectrums—the interest in ceasing the destruction of our natural habitat, preventing the assault on future generations, the national interest in preserving international resources such as oceans and space. Throughout agency Washington, only special interests know what agencies are contemplating and who is contempalating for them, only special interests visit officials in high places, fill dockets, file for judicial review, and so decisively manipulate the discretionary area of administrative regulation. Even explicit standards and rules are violated with impunity—as in the railroad and motor carrier areas or in the pesticide regulation field. Much agency regulation is really a more sophisticated gloss of industry self-regulation otherwise known as collusion. The coal and oil industries have excelled in such extremism.

Notwithstanding the abudance of evidence, leading members of the Washington bar, as they call themselves, continue to luxuriate in the myth of legal countervailing powers or legal pluralism. In a recent

article, a very seasoned Washington lawyer, Max M. Kampleman, epitomized this convenient attitude. He wrote:

> Ours is an adversary system of law that assumes every interest is effectively represented by an advocate. In most cases, the assumption is accurate and from the clash of interests and the resultant decisions or compromise, the "truth" emerges and justice is approximated.

The "assumption" cannot stand examination. Our entire legal system is cracking and breaking before the changes, pressures, and growing legitimate demands of those who want to use it and are blocked from such participation. It must be understood that the forces for anarchy issue forth far more from those who monopolize the legal system for their ends than from the frustrated and angry disadvantaged. Similarly, the kind of waste so endemic to defense contractors and the greed and mismanagement characteristic of the railroads would be inconceivable were it not for an exclusionary, protective legal system shielding them from public accountability. Further, can street crime begin to compare with the violence of unsafe products and environmental contamination? In 1 week more property is destroyed or impaired by the faulty design of products and the violence of pollution than occurs in a year in street crime. Yet, the law virtually ignores the former destruction of innocent peoples' property and safety. A looter of telephone boxes gets 2 to 5 years in jail; while the looters of our life-giving air, water, and land are ignored or chided. Deadly mercury has been knowingly and repeatedly dumped in lakes, rivers, and streams where people fish and swim and obtain their drinking water.

Does existing law contemplate equalizing penalties for such depraved behavior by corporations and their officials to those now imposed on telephone coinbox breakers? Quite apart from the answer, there is no one in Congress who seriously dares to ask the question. This is so, even though it is widely known that deterrence in the corporate crime area is more closely a function of adequate sanctions than is the case in street crime.

The failure of the private bar to be candid about its colossal imbalance, about its noninterest in over 90 percent of its potential customers, and about its crucial role as lawmaker cannot be explained away by saying that lawyers simply represent clients that come to them and are not obliged to consider who, if anyone, is across the aisle. At the minimum, they should act on the obvious, historical evidence that judicial and administrative "doctrines" just are not developed apart from the occasion of advocacy.

There is a distinct correlation of the development of a more just common and regulatory law with the presence of advocates espousing such a development—whether in the area of personal injury law, civil liberties, and now poverty and environmental law. Moreover, lawyers, say their canons of ethics, have an obligation to improve the legal system within which their partisan advocacy takes place. In fact, the very concept of a profession requires an expenditure of time and resources toward prevention of abuses and advancement of more just systems. Yet one searches in vain for both analysis and involvement in such endeavors among established commercial law firms, apart from their recent entry into a noblesse oblige stage of concern wrapped in a more sensitive appreciation of the modern requisites for recruit-

ing young lawyers. Probably the leading national organization, enlisting the time of corporate law firms, the Lawyers' Committee for Civil Rights Under Law, boasts of 14 committees in various cities around the Nation. These committees "have engaged about 300 volunteer attorneys from 150 firms to work on 277 projects, applying an estimated total of 7,000 volunteer hours to a wide range of legal problems," says the latest annual report. These data, covering these committees with an average age of just over 4 months, amount to the time of two full-time lawyers. Clearly, such resources could be expanded beyond an hourly contribution equivalent to two lawyer years over a 4-month period, by the leaders of the bar and their foundation supporters.

What they contribute is being foreshadowed by the few pro bono cases undertaken by several Washington law firms. These involve such activities as representing Alaskan Natives vis-a-vis the projected Alaskan pipeline and the right of shareholders to have the subject of war production engaged in by their company a suitable area for their participation in changing company policy. Another pro bono case brought on behalf of several Congressmen against the CAB for allowing a rate increase without a public hearing resulted in a victory for the plaintiffs.

I might add here that in succeeding days you will hear about the really immense contribution of a handful of public interest lawyers working in Washington over the last few years in these kinds of public policy areas.

Senator KENNEDY. Are you suggesting that the bar and some of the leading law firms have identified the public rights without really moving forcefully into these areas to protect them?

Mr. NADER. That is exactly the case. There is no equal in reading the material that comes out of the record of the Lawyers Committee for Civil Rights Under Law in terms of the desperate need for legal services. The lawyers committee is headed by and has as members leading corporate lawyers of the country, lawyers whose annual incomes range upward of $300,000 a year, and the fact that, even with foundation support constituting most of their operating funds, they have only been able to marshal this degree of resource I think indicates that there is a paralysis of action in contradistinction to their constant recognition of the need.

Senator KENNEDY. Do you want to comment at this time on what the foundations are doing, what progress has been made in terms of recent times, and their appreciation for the protection of the public's interests in this area?

Are foundations moving more forcefully in this area, or are they stepping back from it after the action of the Congress on the Tax Reform Act of last year?

Mr. NADER. I think that that has been a big slowdown factor, that before the tax reform bill was enacted, with its provisions restricting foundation funding and enacting severe penalties for violation, there was some indication that some of the larger foundations were about to support some of the public interest firms. Then, there was a hiatus for about 10 months while the bill was being enacted, and now there is a waiting for the tax regulations interpreting the bill, although counsel for some foundations have rendered opinions that the restrictions are

not as onerous as once thought, and that their clients can contribute to these firms. Indeed, a major grant will be announced very shortly to an institution in Washington dealing in public interest education and litigation, and I think that that will tend to loosen up some of the restraints on the foundation people. However, no matter what——

Senator KENNEDY. We are moving from the organized bar's responsibility to the foundations' responsibility. What about OEO's responsibility? How do you see that expressing itself, and what opportunities or limitations do you see on what they will be able to do?

Mr. NADER. Well, that question has to be answered against the absorptive capacity of public interest lawyers in this country. I think in the next decade we are going to need at least 25,000 public interest lawyers, as a modest figure, to counter the 250,000 private interest lawyers representing their clients. The foundations can only be a drop in the bucket. Largely, they can be an initiatory factor, a ground-breaking factor, in the fundraising. This, then, raises the question of public funding, and the same arguments that can be made for S. 3434, of course, can be made for expanding OEO's support of neighborhood legal services. At the present time, there are about 1,800 OEO legal service lawyers throughout the country. The history of their activities, even under the restraints they have been working under in the last few years, would show the immense leverage that their advocacy has in the poverty area. But I think that the next few months are going to supply those who supported the OEO neighborhood legal services with much concern, and we are going to see a tuning down of the program, a restriction on the policies guiding the legal services throughout the country, and, perhaps, even a reduction in manpower. I think the disillusionment over in OEO and the neighborhood legal services centers is so serious and so soundly based that it itself deserves a congressional hearing before it is too late.

Senator KENNEDY. Would you give us your views on public interest sections in private law firms?

Mr. NADER. At the present time, there are several ways that private firms have been pursuing this in their pro bono work. One way is to assign a partner full time in this area. Another way is assign part-time lawyers. Another way is to open up an office in a slum area. Another way is to encourage across-the-board involvements, say up to 10 or 15 percent of the time, which hardly ever occurs. The full-time partner situation is probably the second-best type of development, where it cuts off the partner from the immediate pressure and conflicts of interests on a day-to-day basis, and let's him pay full attention to the cases in the public interest area. But, the conflict arm is still there, it still lurks, and whenever you really have a tough case that is brought before the consideration of firm management, the other partners obviously are going to raise the consideration of their clients whose interests are involved in this type of case.

I would recommend a much more arm's-length spinoff; that is, the development, in effect, of a public interest subsidiary arm, totally independent in every respect, except the funding. Far more important than the pro bono work in these law firms is the quality of the commercial work. That is, a lawyer can contribute a great deal, say, in the area of pollution if he begins to try to shape the permissible extension of his client's power and begins to try to be his client's con-

science, or the keeper of his client's conscience. All of this involves just an implicit or explicit reading of the canons of ethics which, in effect, urges in many ways, and in many ways almost requires, a lawyer to take the overall public interest into account when he is representing a particular client. So, it is into the commercial practice that the stream of pro bono has to flow, as well as the specific time allocations on a case-by-case basis in these pro bono areas.

If I may continue?

Senator KENNEDY. Certainly.

Mr. NADER. Any thorough hearing process regarding S. 3434 would require invitations to such corporate lawyers and the commercial clients they represent most of the time. There is no point in depriving this subcommittee of the substantial experience and acumen concerning advocacy before the rulemaking bodies and agencies that resides in these firms and industries.

Judging by the radical opposition to other consumer advocacy bills pending in Congress and consumer procedural bills—consumer class actions—on behalf of such firms as Covington and Burling, and Wilmer, Cutler and Pickering, there is no problem with their lack of interest. The U.S. Chamber of Commerce which spends its hours and moneys alerting its membership to any and all opportunities to bring back the 14th century has just dispatched an urgent message to its constituency calling upon all recipients to defeat the consumer protection bill. Here it must be interjected that none of these bills in the Senate provide for regulatory powers; they simply afford consumers professional representation before other agencies and long overdue procedural rights in class actions. But they are so bitterly opposed because these bills are so potentially effective in bringing government closer to the people, in rooting out unjustified corporate welfare waste and in improving the level of work and capability of these agencies shorn of influence-peddling and secrecy and nonenforcement. The U.S. Chamber of Commerce, the National Association of Manufacturers and the American Retail Federation, along with Proctor & Gamble's Mike Manatos, should be requested by this subcommittee to share their knowledge and techniques and advice. Such talent in the ways of Washington should be brought out of the corridors and cloakrooms and into the bright fluorescence of this hearing room. Only then will the merits of S. 3434 be appreciated by those now neutral on its provisions.

I mention this, Senator Kennedy, because in Senator Ribicoff's hearings on his consumer protection bill, none of these lobbies appeared to their satisfaction before the hearing, and now they are complaining that they were not given a chance to testify, and they want to delay the procedures and they want additional hearings. I think it is really very important, not just for the supporters of this bill but for those who are opposed to it, to come up and reveal their particular objections and answer questions.

I would like to insert for the record the urgent dispatch to the members of the chamber of commerce entitled "Congressional Approval Nears on Bill to Create a Continuing Engine of Business Harassment."

Incidentally, that quote of "Continuing Engine of Business Harassment" is attributed by the U.S. Chamber of Commerce to a White

House aide. And judging by the way the White House has been behaving on these bills and opposing them very rigorously, it is quite understandable that that kind of terminology is used to give the White House response to a very elementary voice for the consumers in this country who simply are shut out of the legal system in a practical way so far as resolving their grievances is concerned. [See appendix V.]

S. 3434 would provide a partial redress of the imbalance of advocacy, and I would like to give an illustration. In 1899, the Congress passed the Rivers and Harbors Act. There is a provision in the act which banned the dumping of pollutants into navigable waterways by anybody without a permit of the Army Corps of Engineers. There was no enforcement of this act until last year, although the major corporations and minor corporations of this land resolutely and consciously did violate this act, and the act has rather stringent penalties, much more stringent than the more modern versions of pollution control legislation. The 70-year lag in enforcement, and, indeed, the fact that this provision was rediscovered only about a year and a half ago for public attention is illustrative of the enormous lack of public interest advocacy and the gap therein. Had there been an organization such as is espoused by this bill this gap would never have occurred. The law would have begun to be enforced immediately after passage. There would have been a massive legal strategy of prevention against water pollution, and we would not be in the treacherous and hazardous situation we now find ourselves in pertaining to rapidly deteriorating quality of the drinking water supply.

S. 3434 would not duplicate, as some would imply, but rather would amplify the consumer protection bills now pending in Congress in three ways: (*a*) add a force more outside the Government than in to the necessary pool of public advocates; (*b*) add to and help diversify such advocacy to avoid capture or ossification; and (*c*) range more broadly over all governmental rulemaking operations than conventional consumer issues.

Major special interests in our society are not merely organized to advance their wants from Government; they also have clientele agencies with explicit or operating intent to promote their interests. The Department of Commerce is an unabashedly partisan business advocate, within and outside of Government. Thousands of employees and hundreds of millions of dollars are expended on this effort annually. The Department of Labor behaves similarly but on a narrower and narrower definition of elitely organized labor groups. The Maritime Administration is an accounts receivable for the maritime industry. The Department of Interior gives away for bargain prices natural resources and protects its "free enterprise" from the rigors of competition. And so the list could be extended. The point is clear in these troubled times—the society that is not willing to deploy modest talent to represent general or public interests will soon find the conditions even for special interest well-being eroding.

And so it will continue to regress until bills such as S. 3434 are passed to dispel the myth that there can be rights without remedies and remedies without advocacy. And it is this kind of wise legislation that gives attention to basic problems, attention to the indirect impacts, that they be given priorities over their manifestations in the streets, because there will never be adequate attention in terms of our

legal processing of resources to the problems of law violations affecting and afflicting the lower economic groups in the country unless we pay attention to those at the top of the economic ladder. Organic analogies are not usually appropriate, but in this case I think they are. Society is very much like a fish. It rots from the head down, and unless there is attention by the heads of the political system in this country, to the corporations and the large labor unions and major governmental institutions, and a critical analysis, self analysis of their performance, then the slide which is increasing perceptibly toward everything that none of us wants will obviously continue unabated.

When I see a statement like the U.S. Chamber of Commerce put out this week on this modest consumer advocacy agency, with the kind of additional bits of regulatory power which is proposed in the House, I can only wonder whether these special interest groups are so far gone that they cannot be redeemed by any force internal or external to them.

I would like to submit for the record some articles which indicate some valuable and needed public interest advocacies which show that they can make a significant difference. If this handful of lawyers in this city, working in the public interest area can achieve such relatively monumental things in so short a time, what would it be like if some 10 or 15 or 20 percent of the bar practiced in this manner across the country?

Thank you.

Senator KENNEDY. We will admit those as a part of the record as exhibits.

(Exhibits 1–7 follow:)

[From the Washington Star, Feb. 3, 1970]

CAB, FACING SUIT, RELEASES REPORT CRITICAL OF AIRLINES

(By Robert Walters)

The Civil Aeronautics Board, responding indirectly to a lawsuit alleging that it has been violating "both the letter and spirit of the Freedom of Informaton Act," has released a massive 1967 study on how well the nation's airlines handle passenger complaints.

Release of the document yesterday, coupled with CAB agreement to grant "general public access" to its passenger complaint files in the future, represented a major victory for consumer advocate Ralph Nader's Center for the Study of Responsive Law, which filed the suit last year.

Distribution of the report also marked the first time the CAB had identified individual airlines in its public accounting of customer complaints. Previous reports on those complaints contained only industrywide totals.

The CAB did not, however, release to the public an even more critical document which rated each airline on its "complaint handling capability" and identified seven lines—including three of the country's largest—as doing a "poor" job in identifying and resolving passenger problems.

NAMING NAMES

The airlines rated "poor" were Northwest, National, Pan American, Trans Caribbean, Allegheny, Pacific and Piedmont.

"Very good" ratings were given to American, United, Eastern, Trans World, Central, Frontier and Bonanza.

The remaining carriers received ratings of "good" or "fair" from the CAB's Bureau of Enforcement, which conducted the nine-month investigation to obtain "a clear insight into the bases for customer dissatisfaction."

The document made public by the CAB was 1½ inches thick and represented the

first two phases of its 1967 investigation. It contained lengthy and often critical memos on the handling of passenger complaints by each of the 26 airlines studied.

Not released by the regulatory agency, but obtained from other sources, was a report on the third and final phase of the investigation, presented to the CAB at its Dec. 19, 1967 meeting.

Unlike the now-public report on the first two phases, the third-phase document compared the various airlines' performance in handling complaints, compressed the raw data in the bulkier document into a 16-page memo and included the "ratings."

In addition, the still-secret document was far harsher in its language describing the air carriers' responsiveness to passenger difficulties. Some airlines, the report, said, "have displayed a complete lack of interest in the problems of consumers and our survey as well."

The industrywide survey made "due allowance . . . for the fact that complaints received by the board probably represented only the 'peak of the iceberg' and that for each such complaint there were probably hundreds received by the carriers," the final report said.

SOME LINES PRAISED

The report said some airlines—including United, Eastern, TWA, Braniff, Mohawk and Ozark—were concerned enought about passenger complaints to hold daily briefing sessions for supervisory personnel to discuss the previous day's performance.

"These carriers place particular emphasis on the quality of service they have rendered to their passengers on the previous day, and responsible department heads are required to provide detailed information on delays or irregularities which occurred and to report what has been done to accommodate inconvenienced passengers or correct the deficiencies," the report said.

"In contrast, some carriers neither maintain statistics on complaints nor hold briefings nor make reports to management. Their customer relations directors rely on a mental impression or 'feel' from reading complaints," the document added. It cited these examples from 1967.

"Northwest could not compile any useful statistics since its complaint files are destroyed after a six-month period."

"National Airlines' inadequately staffed Customer Relations Department, on the other hand, has all it can do just to handle complaints, much less analyze or compile statistics about them."

"At Trans Caribbean, Piedmont and National, one official reviews all complaints and is responsible for spotting trends or problem areas."

Without singling out any particular lines, the report said: "Too often, when a complaint deserves a substantive answer, the complainant receives a brush-off or a defensive letter." Those "perfunctory responses" then result in the passengers complaining to a member of Congress, which the report said only caused new problems of increased workload for the CAB.

In some cases, the smaller airlines size prevented them from establishing an adequate program to deal with complaints, "but in the cases of Pan American, Trans Caribbean and Northwest Airlines, their poor rating can be traced, in part, to their apparent lack of interest in problems of the inconvenienced traveler," the report added.

THE PROBLEMS

Lost, damaged and delayed baggage was identified in the report as "by far the most serious cause of complaint." Also listed were flight irregularities, 'particularly the carriers' inability to maintain or adhere to" schedules.

The report proposed a letter to all airlines whose flights were late more than 30 percent of the time, including a warning "that the continued publication of schedules not maintained may represent an unfair method of competition or a deceptive practice."

Other common complaints listed included cancellation of flights without notice to the passengers, "vague, general and unconvincing" explanations of such cancellations and the sale of more tickets than seats available on a given flight.

Release of the CAB data initially was sought in a suit filed in U.S. District Court here on Nov. 25 by Reuben B. Robertson, a young lawyer working with Nader full time, and John D. Pevna, a University of Southern California Law School student who worked with Nader last summer.

The CAB did not respond until yesterday, when its lawyers filed a motion to dismiss the complaint on grounds Robertson and Pevna had not complied fully with CAB regulations in seeking information covered under the Freedom of Information Act, which guarantees public access to many government documents.

At the same time, however, the CAB said that in "re-examining its procedures, (it) has decided to grant Robertson, Pevna and the general public access to the consumer complaint files" and the 1967 report.

[From the Washington Star, Nov. 10, 1969]

NADER ASSOCIATE SEES "CLEAR CAB DISPARITY"

(By Philip Shandler)

An associate of consumer-advocate Ralph Nader sees a "clear disparity" between two statements of the Civil Aeronautics Board on the handling of passenger complaints.

A CAB spokesman says the assessment is based on a misunderstanding, but that the board is reviewing its procedures.

The "disparity" is alleged in a letter to Charles Kiefer, CAB executive director, from Reuben Robertson, a lawyer who directed an investigation last summer by a group of young "Nader's Raiders" into CAB responsiveness to complaints.

Robertson says his investigators were restricted in their examination of complaints and were forbidden to note names and addresses, on the basis that the airlines "would ascertain the identities of complainants and take retaliatory action against them," presumably in service.

COMPLAINT "FORWARDED"

But "to our astonishment," Robertson says, the CAB recently told the Senate Judiciary subcommittee on administrative practice and procedure that complaints are forwarded to the complained-against airline.

A subcommittee report quotes the CAB as stating that "the normal practice" of its Bureau of Enforcement is to reply to a complainant that his complaint "is being forwarded to the carrier with instructions to answer directly and furnish the board with a copy of its anwer."

Robertson says the statement to the subcommittee "plainly contradicts the board's pretended fear of retaliation." He asks Kiefer for an explanation of "the clear disparity between what you stated to us and the truth."

Kiefer told The Star that Robertson misunderstood the CAB officials' earlier comments and was overemphasizing the "retaliation" explanation.

SECURITY PROBLEM

"That was only one of the possible developments which I speculated might occur" if Nader probers were allowed full access to complaint files, he said.

"The truth is" that the complaint files are "associated" with the CAB's investigative files, creating a security problem, he said. But he is taking up with the board the possible separation of these materials, he said.

Asked if Robertson could be allowed to examine the same material that is forwarded to the airlines, Kiefer said: "I'm not sure I can answer that directly."

Nader and Robertson have contended that the CAB is more interested in protecting the airlines it is supposed to regulate than in promoting good service.

Rep. John E. Moss, D-Calif., a leading freedom-of-information advocate, recently asked the board for full and prompt public disclosure of a restudy the CAB has said it is making of how the airlines handle complaints.

The board's new chairman, Secor D. Browne, has said he will reply to Moss soon.

[From the New York Times, July 11, 1970]

JUSTICE DEPARTMENT CURBS USE OF 1899 POLLUTION ACT

(By E. W. Kenworthy)

WASHINGTON, July 10.—The Justice Department revealed today that it had restricted the antipollution actions United States Attorneys may take under

the Refuse Act of 1899. The attorneys may act in cases in which significant discharges of pollutants into navigable waters are "accidental or infrequent." But the department has instructed them that they should not, without department approval, attempt to use the act to prevent or punish discharges "of a continuing nature resulting from the ordinary operations of a manufacturing plant."

In nine pages of instructions, issued recently, the Justice Department said that obviously continuing discharges from industrial plants "pose the greatest threat to the environment." Nevertheless, it continued, it is precisely this kind of continuing pollution that Congress intended should be dealt with by the Federal Water Quality Administration in the Interior Department.

DISCLOSURE AT HEARING

Therefore, the Justice Department said, the abatement and elimination of such continuing pollution should be left to the interior programs and procedures.

The existence of the instructions came to light while Shiro Kashiwa, Assistant Attorney General for the Lands and Natural Resources Division, was testifying before the Senate Commerce Subcommittee on Energy, Natural Resources and the Environment.

He was opposing a bill to assure the right of citizens to file suits to protect the environment. Senator Philip A. Hart, Democrat of Michigan, is the subcommittee chairman and co-author of the bill with Senator George S. McGovern, Democrat, of South Dakota.

Mr. Hart became aware of the instructions from quotations from them in a prepared statement by James M. Moorman, an environmental lawyer, who was to testify after Mr. Kashiwa. When Mr. Hart read the quotations, dealing with enforcement of the 1899 act, and began to question Mr. Kashiwa, the Assistant Attorney General said that he would insert the complete instructions into the hearing record.

The act forbids discharges of refuse, except in liquid form from streets and sewers, into navigable waters without a permit from the Army Corps of Engineers. Although the act enjoins United States Attorneys "to vigorously prosecute all offenders," it has been rarely used until recently, largely because the Corps of Engineers has not insisted on permits and has not brought offenders to the attention of the attorneys.

In addition to civil remedies, the act provides criminal penalties, with fines of $500 to $2,500 a day or imprisonment from 30 days to a year. Finally, it provides that a citizen supplying information leading to a conviction shall get half the fine.

HART TAKES A DIM VIEW

On the basis of this last provision, Representative Henry S. Reuss, Democrat of Wisconsin, has supplied information to the United States Attorneys in his state about 150 alleged industrial polluters. In addition, Representative Michael J. Harrington, Democrat of Massachusetts, has supplied the United States Attorney in Boston with information about 151 alleged polluters in his state.

It was these actions, in the opinion of some conservationists, that touched off the Justice Department's instructions to the United States Attorneys.

One deparment official said today that the attorneys in Wisconsin had been instructed to bring suit where warranted by the information supplied by Mr. Reuss. But, in line with the instructions, such suits would not be brought against continuing industrial polluters but only for "accidental or infrequent" pollution.

Senator Hart took a dim view of the instructions on the Refuse Act. He told Mr. Kashiwa that Congress had specifically said that the Federal Water Pollution Control Act was not to be construed as superseding or limiting the Refuse Act.

Furthermore, Mr. Hart said that, in view of the time-consuming procedures of the Water Pollution Control Act and the slowness with which the Federal Water Quality Administration sometimes acted, he thought the 1899 law was "more potent."

COMMITTEE AIDE CRITICAL

In any event, he said, the 1899 act could be used to complement the pollution control law.

Leonard Bickwit, a committee aide, told Mr. Kashiwa that he feared the instructions would discourage referral of polluters to the United States Attorneys

by the Corps of Engineers because the corps "sees you do not intend to prosecute where the Interior is involved."

Later Mr. Moorman told the committee that he would have thought Interior "would welcome use of the Refuse Act."

Mr. Kashiwa assured the committee, "We will prosecute if someone throws a drum of oil in the river."

On the issue of citizens' suits Mr. Kashiwa said that the Justice Department had not yet taken a position on the Hart-McGovern bill. He then proceeded to state the department's opposition to it.

OBJECTIONS TO HART BILL

The bill would allow citizens to file suits in Federal courts against industry or Federal, state or local governments to secure the protection of the air, water, land, or public trust against "unreasonable pollution, impairment or destruction" resulting from activities affecting interstate commerce.

Mr. Kashiwa said that the department questioned the bill for the following reasons:

It is inconsistent with Federal laws vesting in state and local governments the primary responsibility for air and water pollution control.

It authorizes private litigation even though the defendants might be in compliance with state laws.

It authorizes the Federal courts to grant relief and thereby to interfere in administrative procedures and supersede administrative judgments that should be left to the "expertise" of administrative agencies.

He also said that the bill provided no standards for what was "unreasonable" pollution, leaving it up to the individual judge, who may have no expert knowledge of the subject.

MONTGOMERY, ALA., July 10.—A conservation group initiated legal action in three Federal courts today against 214 Alabama manufacturers, businesses and municipalities, charging them with pollution of streams in violation of the Refuse Act of 1899.

Affidavits were filed here and in Birmingham and Mobile by the Bass Anglers Sportsmen Society, a national conservation group, based here, that claims 11,000 members.

Concerns named in the affidavits ranged from some of the state's largest textile plants to a small turkey processing farm in a rural county. Montgomery is among the 21 cities named in the action.

Ira deMent, United States Attorney in Montgomery, said he was "thoroughly familiar" with the law and would forward the action to the Criminal Division and the Land and Natural Resources Division of the Justice Department for a determination on whether to prosecute. Mr. DeMent said he would tell the department he was "ready, willing and able" to handle the cases.

Four major rivers and several large lakes in Alabama were ordered closed to fishing in the last week after the state health authorities found unacceptable amounts of mercury poisoning in the fish. More than 400 commercial fishermen have been put out of business by the action.

[From the Wall Street Journal, July 10, 1970]

AIR-FARE BOOST CLEARED BY CAB IS RULED ILLEGAL

U.S. COURT OF APPEALS CITES LACK OF HEARINGS; 6.35% RISE WAS GRANTED IN 1969

Rate rollback isn't ordered

WASHINGTON.—A U.S. Court of Appeals panel ruled that a 6.35% air-fare increase granted airlines by the Civil Aeronautics Board last Oct. 1 was illegal because full public hearings weren't held.

The three-judge panel ordered the CAB to hold hearings on the fare boost.

The court ruling came on a petition by 32 Congressmen, led by Rep. Moss (D., Calif.). The Congressmen had failed in a bid to get the CAB to reconsider its approval of the fare increase, then went to court. They charged that the board acted illegally by holding closed meetings with airline representatives to hammer out a fare-increase formula and ignored prescribed procedures for public hearings on setting airlines fares.

A CAB spokesman said the board wouldn't have any immediate comment.

Stuart Tipton, president of the Air, Transport Association, an airline-industry trade group, said that, without regard to the question of whether CAB procedures were proper in the case, "there can be no doubt that the increased fares were and are fully justified on the basis of airline cost increases."

Mr. Tipton noted that the court's decision doesn't require a rollback in the fare increase nor repayment of higher fares collected since last Oct. 1. The board has 35 days to ask the court for a rehearing on the decision.

The Congressmen's court move had already had an effect on the board. Last January, acting on another segment of the Moss group's petition, the CAB announced a sweeping investigation of domestic air fares that is expected to take more than a year from the time it was launched.

The board's investigation is to go well beyond an earlier plan, announced at the time the 6.35% increase was approved in September 1969, to study whether fares should reflect such things as return on investment and the appropriate spread between first-class and coach fares. The study was to have been conducted by last December.

The longer investigation will range over such factors as discount fares, percentage of seats filled and levels and fare structure. The Congressmen have asked the board to put off the deadline for submitting material in the study until August 1971 from January 1971 and extensions of up to two years were requested by the airlines. The board, however, stuck by its one-year deadline.

While the investigation is under way, it puts the board "under pressure" to postpone decisions on any other airline requests for fare increases, Chairman Secor D. Browne said. But he didn't indicate whether this is affecting CAB rulings on such petitions.

Faster FDA Action Asked in Lawsuit

(By Thomas P. Southwick)

The Food and Drug Administration (FDA) last week came under increased pressure to act more rapidly against unsafe and ineffective drugs. The American Public Health Association (APHA) and the National Council of Senior Citizens (NCSC) filed a lawsuit in the U.S. District Court in Washington, D.C., charging the FDA with violation of the 1962 Kefauver-Harris Drug Act. The act, passed in the wake of the thalidomide scandal, required the FDA to certify all drugs on the market as safe and effective. To implement the act, the agency commissioned a study of all drugs by the National Academy of Sciences-National Research Council (NAS–NRC). The massive study was finished in July 1969, but the FDA has so far released only about 15 percent of the results.

The FDA is charged with delaying 8 years in implementing the act, with failure to release immediately the NAS–NRC report, and with failure to follow proper steps for the swift removal of substandard drugs from the market.

The main controversy centers around the definition of "imminent hazard." By labeling a drug an imminent hazard to public health, the FDA can force its immediate removal from the market. FDA spokesmen claim that no drug now on the market is an imminent hazard. FDA Commissioner Charles C. Edwards said, "When we find an imminent hazard to public health we will not hesitate to invoke the procedure." But the exact definition of what constitutes an imminent hazard has never been delineated.

The lawsuit charges that an imminent hazard labeling should have been issued for a category of diuretics—the potassium thiazide combinations—and 50 anti-infection mixtures, including combinations of penicillin and streptomycin (pen-streps). The NAS–NRC study showed that the indiscriminate use of pen-streps has led to a proliferation of resistant organisms, which threaten world-wide epidemics.

The FDA, however, has chosen to avoid using the imminent hazard labeling and instead has used the phrase "serious hazard for some users." This semantic difference has permitted the drugs to remain on the market while their manufacturer fought the FDA ruling in court.

According to Edwards, the NAS–NRC reports cannot be released immediately because "they are subject to interpretation and, unless guidance is provided as to labeling revisions and other changes required, a chaotic situation could result." He added that the FDA is working as fast as possible to produce the needed guidelines and that he expects all the reports to be released by the end of this year.

The decision to file a suit represents a major escalation in the years-long battle to make the FDA act more rapidly. The idea for the suit originated with Dr. Robert McCleery, a former member of the FDA and currently a consultant to Ralph Nader's Center for Responsive Law. McCleery enlisted the support of the APHA and the NCSC in December.

McCleery called the suit a "last resort, taken because administrative procedures such as congressional hearings and letters to the FDA have failed to produce any change." He charged that the real reason behind the FDA's failure to act more quickly against unsafe drugs is that "it fears political and economic consequences if a large group of drugs were rapidly removed from the market." The FDA denied the charge and blamed delays on involved court fights with drug manufacturers. (*Science*, 29 August 1969).

The suit also marks a significant change in policy by the APHA and the NCSC. Neither group has ever before filed suit against a federal agency.

Nelson Cruikshank, president of the NCSC, said that the suit opens the way for similar actions by his group against other federal agencies.

[From the Chicago Daily News, June 29, 1970]

Chicagoan's Crusade—He Fights To Save Trains

(By H–Joost Polak)

Washington.—Anthony Haswell went deep into his own pocket three years ago to try to keep America's passenger trains running.

His only opponents were the railroads, which wanted to dump their passenger service as quickly as possible on the ground that it was profitless and the government, which was letting them.

Now, with the $300 million rail passenger act more than halfway through Congress, Haswell and the small but effective passenger lobby he created and bankrolled from his inherited department-store fortune may be nearing success.

The government has finally come around to Tony Haswell's way of thinking. The railroads haven't but with their mounting financial problems and increasing difficulty in ending passenger runs, they seem willing to go along with the man they call "the crank from Chicago."

Chicago is the 39-year-old lawyer's home, but most of his time is spent in the office of the National Assn. of Railroad Passengers (NARP) at the head of a flight of narrow gauge stairs in a row house three blocks from the capitol.

The $250,000 Haswell has put into NARP since 1967 is not much by Washington lobbying standards and he admits his passenger lobby does not have much "clout," but he says it is "credible, and effective."

NARP has a staff of four—an executive director, a public relations man and two secretaries. The lobby can't afford to wine and dine congressmen, so it works for them instead.

"We serve as a sort of supplemental staff for congressmen interested in railroads", says Woodruff Price, NARP's executive director. "That's what we think a lobby should be."

Congressional staff aides say NARP is "one of only three or four groups being listened to very much up here on rail legislation."

"If Ralph Nader were a railroader, he'd be Tony Haswell," says a railroad lobbyist in grudging admiration. "He's competent, and he knows his subject."

Haswell chugs back and forth between his apartment in Chicago—he owns the Building it is in—and Washington, putting out memoranda, helping draft legislation and sometimes appearing before the Interstate Commerce Commission (ICC) or in court to oppose train discontinuances.

He took his first train ride—from his native Dayton, Ohio, where his family owned Rike's department store to Tucson, Ariz.—when he was 4 years old. As a teen-ager he built himself a tabletop model railroad, and after finishing college—with degrees in public transportation and law—his first job was as a lawyer for the Illinois Central R.R.

He was sitting in the line's offices one day in 1959 when a notice that the New York Central R.R. had applied to drop its Cincinnati-Chicago passenger service came across his desk.

"It was a real shock to me," Haswell said. "For the first time I saw the danger that passenger trains might be eliminated completely."

A year later he left the Illinois Central to "dabble" in private practice, then spent a year as a public defender in Chicago before realizing that "my real interest was in railroads."

So he sat down and wrote the ICC a 48-page petition asking it to investigate rail passenger service. Ten mayors and three governors supported his petition. The ICC turned it down.

By then, Haswell says, he realized train service was "going to pot."

Since then Haswell has poured his own money into NARP, while trying to line up more public members and financial help. So far, he has about 10,000 members, but he's still paying most of the way.

The lobby and its lawyers have gone before the ICC and into the courts half a dozen times to fight train discontinuances. They've never lost.

"Where we've fought, we've fought very hard," Haswell says. "But we've picked our cases very carefully. We've either won them, or the cases aren't over yet."

Haswell says he is not the rigid "preservationist," who wants to keep all passenger trains running—at whatever cost—that railroaders often make him out to be. NARP is willing to see "obviously ineffective" trains stopped.

The group even went before the ICC to support a "train-off" in which the Norfolk & Western R.R. came up with "a fair package" or dropping one run while upgrading another.

But Haswell insists passenger trains are a necessary part of "a balanced transportation system."

The nation's largest railroad, the Penn Central, says passenger-service losses were a major factor in forcing it into reorganization under bankruptcy laws. The Penn Central has urged the government to take over rail passenger service.

The Railroad Passenger Act, which would set up a semipublic corporation guaranteeing the continuance of a passenger network, apparently is in the last stages of its long road to passage, and Haswell's battle to keep the trains seems near victory.

The Senate passed the bill 78 to 3 last month. In the House, final committee action before it is brought to the floor could come as early as next week.

"We'll be down to hardtack and beans if we have to keep lobbying much longer," he says.

But there is no question that if it doesn't pass in this session of the Congress, it will be in the next.

"The only question is how many trains will have to come off before action is finally taken."

[From the New York Times, July 10, 1970]

Four States May Lose U.S. Welfare Aid

California, Arizona, Indiana and Nebraska involved

Washington, July 9 (AP).—The Nixon administration threatened California and three other states today with a loss of Federal welfare aid and told some 35 other states to remedy similar failings in their welfare systems.

The Department of Health, Education and Welfare haled Arizona, California, Indiana and Nebraska into enforcement hearings for alleged violation of Federal laws on welfare uniformity. The hearings could culminate in a termination of Federal welfare aid to the states.

The four hearing notices were the largest number ever served at one time. They signaled the Administration's determination to crack down on longstanding welfare violations by states, official sources said.

The apparent violations in the 39 states range from technical ones of inadequate administrative procedures to substantive issues of residency requirements for welfare eligibility and fairer hearings before a recipient losses aid.

Adjustment required

California, Indiana and Nebraska were called to hearings mainly because they did not comply with a 1967 Congressional amendment requiring a one-time cost-of-living adjustment in welfare payment standards.

"The apparent failure of these states to comply with the law means that families eligible for aid are not getting all the help that they are entitled to in light of inflation in recent years," said John D. Twiname, administrator of the department's Social and Rehabilitation Service.

Arizona was cited for alleged deficiencies in its residency requirements, certain child eligibility rules, and in its formula for disregarding some earned income in computing welfare payment.

The aid at stake ranges from $8-million a year in Nebraska to $978-million in California.

The hearings are scheduled as follows: For Arizona, Aug. 18 in San Francisco; for California, Aug. 25 in San Francisco; for Indiana, Sept. 1 in Chicago, and for Nebraska, Sept. 10 in Kansas City.

ONLY OHIO LOST AID

Since 1939, only 19 other state compliance hearings have been called. Only one state, Ohio, lost its Federal aid for a time.

Mr. Twiname told a news conference, "I am hopeful we won't have to withdraw funds, but we will do it if necessary."

He reported progress in resolving welfare compliance issues with the 39 states but said that some 250 issues remained.

The department's current listing classifies only 11 states in complete compliance with all Federal welfare regulations. They are Maine, Kentucky, Virginia, West Virginia, Alabama, South Carolina, Arkansas, New Mexico, Texas, Oregon and Washington.

Mr. NADER. Thank you.

Senator KENNEDY. Thank you very much, Mr. Nader.

As always, you gave us a great deal of helpful comments and information on the critical need for this kind of legislation. In terms of protection for the consumer, why is it not sufficient to have a Consumer Protection Division of the Justice Department, as suggested by the administration last year, to act as a consumer advocate before the regulatory agencies?

Why would that not meet the kind of needs which you have outlined in your testimony?

Mr. NADER. There are contemporary and structural reasons why I do not think it is advisable.

The contemporary reason is the present posture of the Justice Department which is basically anticonsumer protection. I can submit for the record, if you would like, a memo that the Department sent to the staff of the Senate Commerce Committee in terms of the consumer class action bill and the testimony which is on the public record of Mr. McLaren and other Justice Department representatives to document that point.

Senator KENNEDY. Would you draw at least a part of that conclusion from the fact that the consumer counsel position is still unfilled in the Department of Justice?

Mr. NADER. That is an excellent example. That office, as established, was still very temporary, and then the incumbent passed away in the spring of 1968. It has been empty since, excepting for a short period at the end of the Johnson administration, and it is a bit insincere for the Justice Department to come up to Congress and say "Put the consumer advocacy in our Department. We have 25 or 30 lawyers ready to go," when they have not filled one position in the present defunct office of consumer advocacy.

There are other reasons why it should not be in Justice.

The Justice Department is the lawyer for the regulatory agencies, and there is an inherent conflict of interest for the Justice Department to represent on the one hand, say, the FCC or the Federal Power Commission, and, on the other hand, have a wing of it representing the exact opposite, for the consumer objectives, consumer protection objectives.

There is also a problem of seniority. If the Antitrust Division, for example, wants to cool a particular antitrust issue or does not want to intervene in a regulatory proceeding that has antitrust issues to it, and this little consumer agency says "Oh, no, we want to intervene," which division is going to get preference?

Obviously, the older, the more established one, and the one with the most powerful constituency. There are a large number of reasons in addition—some small and some large—why the Justice Department should not be the repository of this office.

It is a highly secretive department. It is a law enforcement department, and for that reason it tends to be much more secretive than most Government agencies. An officer of consumer advocacy must be as open and as public as possible. It is one of the inherent, exemplary missions to put it in an agency which basically does not operate in a secret way and would be counterproductive.

Another reason why it should not be in the Justice Department, I think, is that the Department prosecutes. I think it can be an abusive power for the Department to have on the one hand "prosecutory" power and regulatory power and, on the other hand, consumer advocacy power. It is an extremely murky mix to put all of those functions under one administrative heading.

Senator KENNEDY. Right now the only vehicle for providing notice to the consumer, the public, is through the Federal Register. How effective do you think the Federal Register is in informing the public at large of administrative activities affecting them?

Mr. NADER. As one who has waded through many pages of the Federal Register, it reminds me of reading a seed catalog. It is extremely inappropriate for informing a wide lay audience. First of all, the layout is staggering, the print is too small, it is too compact; the legal grammar is atrocious. At times you have to read something again and again and again in order to understand what it means. I think that the proposal that has been put forth by Betty Furness, I think first, previously the Consumer Adviser to the President, to establish a consumer Federal register is very wise, one written in very simple language, and it would focus heavily on consumer-oriented regulatory issues, and it can be given much cheaper and wider distribution.

Senator KENNEDY. As I understood, publication of a consumer bulletin would not require any additional legislative action by the Congress? It simply takes a determination by the administration to move ahead and take the steps for the publication of such a bulletin.

But, once again, I suppose that this reaches what has been the underlying theme of your whole presentation, and that is a question of the real concern of the administration in meeting the problems of consumers?

Mr. NADER. That is right. Technically, it does not take congressional authority, but, as a practical matter it is going to have to, because of the disinterest by the present administration.

Senator KENNEDY. We have heard a great deal recently about the administration's attitude toward our minority groups. How would you characterize the administration's consumer record? Is it good; is it bad; is it indifferent?

Mr. NADER. I think it has to be characterized as woefully deficient, even by Republican standards. By that, I mean the following: if there is one thing we can expect from a Republican administration it is a rigorous attention to the quality of competition, at least in terms of the platform of the party. They like to say, let competition do the job in terms of giving the consumer the best bargain.

That means rigorous enforcement by the Federal Trade Commission, and the Antitrust Division, and that simply has not been forthcoming. That means providing the consumer with information so that he can choose between products and generate the maximum utility on the basis of an intelligent choice, and that has not been forthcoming.

Still there are a number of executive branch task forces delivering what the administration's position is going to be in terms of releasing consumer information that it generates in buying its products and services, and this still has not come forth, although there have been meetings and memos and promises of action. It is opposition, however, to the consumer bills pending now in Congress, I think, which illustrates just how serious their lack of interest is in consumer protection.

They have sent not only White House aides and Justice Department officials, but Mrs. Knauer, who is supposed to be the most consumer-oriented assistant to the President, on an anticonsumer lobby here on the Hill, and when the Consumer Office of the President is turned into an instrument to water down and cut our major provisions in pending bills establishing consumer protection agencies and consumer class actions, then the full circle has been completed.

Senator KENNEDY. This legislation that we have before us is really not meant to fill the need for an ombudsman's office within the Government, and realizing the inadequacy of the Congress and their staff to try and fill that particular role, do you have any observations that you would like to make about the need for an ombudsman to handle individual complaints? Do you have any observations on this?

Mr. NADER. Yes, sir. Originally conceived, the ombudsman concept processes citizens' complaints against administrative abuse. It does not change administrative decisionmaking, it simply tries to handle grievances and solve them, and to recommend to regulatory agencies how better to conduct their procedures and be more responsive on the next go-round. The word ombudsman has been given a lot of different and expanded meanings around the country, but in terms of its original concept, and I think still viable concept, that is simply addressing consumer grievances, that kind of liaison between the agency and the citizen is very viable at the local and at the State level, but I do not think it is at the Federal level. This bill, of course, does not envision handling complaints. It envisions primarily legal action, legal administrative action and appeals to the courts.

But, I think, the Federal ombudsman would not only have more than he could possibly handle, but it should be tried out first at the local and States level. Indeed, there is already an ombudsman operating in the State of Hawaii, and Nebraska has passed an ombudsman bill. Preliminary indications are that the Swedish and Danish experience is being followed in the sense of the number of complaints per capita and the mode of operation of the Hawaiian ombudsman.

Senator KENNEDY. As you point out, the Public Counsel Corporation may be able to pressure agencies in the area of nonenforcement of

statutes and regulations and laws, as well as insuring adequate protection for the consumer interests in agency proceedings.

Mr. NADER. Yes.

Senator KENNEDY. You have made a number of controversial comments in the past about the roles of attorneys who are representing private clients before agencies and their ethical obligation when they represent private interests which run contrary to a public interest responsibility.

Is there anything you want to say on this? I know that you have expressed yourself on this before.

Mr. NADER. Yes. This is a long-standing debate among members of the legal profession, which hitherto has been restricted to the criminal law areas and civil liberties area. I think the debate has to be extended to the corporate, consumer regulatory law area, and I think certain important distinctions have to be made so that an analogy drawn from a criminal or civil liberties area is not unjustifiably transferred to corporate areas.

We are dealing here with lawyers who represent large conglomerates of economic power. I think it is incumbent upon them to consider the generalized impact of their representation, not only in terms of citizens today, but also future generations, such as in the pollution area.

I think they have to give far greater play to their professional conscience and their professional duties to the legal system as a whole. We are already handling issues that have critical health and safety components in them, or that have critical repercussions on the use of large tax funds, or the kind of corporate privileges that may, in effect, keep poor people poor forever. This means in a practical way that corporate, civil type of regulatory controversies involving lawyers require a much stronger discipline and a much stronger interaction between the lawyer's role and the responsibility for the legal system.

When he represents the poor man in court he represents that poor man's interest only, that poor man's only interest, his only defense against a government bent on prosecuting. When he represents a client in a criminal area the same is true in terms of the severity of the penalties. But, when he represents, as an independent practitioner, a company like General Motors in the pollution area, he knows that what he gets from General Motors he is going to get for hundreds of other companies that are not his clients, when he knows what he gets from General Motors is going to affect the air and the means of people breathing, then he has to develop a restraint in the scope of his effective use of his client's power and not use his client's power to the utmost.

I think there are many distinctions that can be drawn, too, as to some of the concerns of civil libertarians, that the kind of things that are going on today are going to restrict the intensity of advocacy in the civil liberties and criminal law areas. There are important differences in the clients and the interests, in the range and in the alternatives to such legal representation.

I also think that an independent practitioner has a stronger duty to be the keeper of his client's conscience than a lawyer who is employed by the company, that there is a difference between independent law firms on a retainer and house counsel in terms of the degree with which they must pay attention to their professional missions.

I have just a number of brief comments on the bill. I think some attention should be given to reducing the members of the board so as to make it more manageable. I think 15 members may tend to give us a ICC-type situation, particularly with the every 2-year turnover of the chairman. I think that the ICC experience can be drawn on here to avoid such a pitfall.

I think the definition of "rule" in the bill on page 3 may be too restrictive. I think it should be more liberal to include an agency action, such as recall of various defective products, such as warnings that the agency sends out as to warn consumers or physicians, for example, of hazardous drugs. I think that "rule" can be defined too narrowly and not take into account the other ways agencies act to affect the public interest.

Subsidy decisions, for example, contract awards, allowances and the like are illustrations.

I think on page 7 in section 588, where the corporation is authorized to contract out with the appropriate individuals or private organizations, that might be spelled out in more detail to avoid possible abuse in this area.

Also, the initiation of rulemaking proceedings on page 8, I think, should be more within the discretion of the operating directors of the agency, and not require the vote of two-thirds of the members of the board. One can imagine for example, an agency with, or a public counsel corporation, rather, with 400 or 500 lawyers, in effect, initiating perhaps 20 or 30 actions a week, and to require the vote of two-thirds of the members of the board, I think, would tend to be a very burdensome and unnecessary requirement for the professionals in the agency working day-to-day.

I would also recommend that in section 491 the authorization of appropriations, that a figure be given, that the subcommittee make their best estimate as to just how much money is needed here, and what kind of manpower components are required the first year, second and third year. Otherwise, a bill such as this could well pass, and the budget may be a million dollars or two, which just would not get it off the ground.

Senator KENNEDY. Let me just ask you this sort of a final question. If you were on the board of directors what would be the first four or five areas that you would think that the Public Counsel ought to look into?

Mr. NADER. Well, it depends on how general you want me to be, or how specific, Senator. I would look into the following areas, and I can be more specific if you wish: The Government to corporate disbursement area of subsidies, of allowances, the use of public resources such as the timber and land management areas. I would look into Federal contracting processes.

I think enormous sums are being wasted which could be used for many more pressing needs without increasing the overall size of the Federal budget. I would certainly look into the environmental regulatory agencies. I think this is an area that is going to be of great concern in the next decade, and one that is most responsive to available technology. This is an area where we have the technical answers, but we do not have the advocacy and the legislative and administrative will to put them to work.

I think a fourth area would be the whole range of taxation. The tax system has become a major policy tool. In fact, to the extent, for example, where the very survival of the wildlife in Africa tends to be a function of how the Treasury Department rules on the deductibility of business safaris. In terms of such issues as the growth of population, the allocation of resources to urban problems, the distribution of food, the kinds of innovations that industry undertakes, all of these are now implicated in the kind of tax considerations, and when you combine the immense policy impact of the tax structure with the allocation of resources in a highly unjust way as Congress discovers from time to time in its hearings, you have a major area for public interest advocacy by the Public Counsel Corporation.

Senator KENNEDY. Well, thank you very much, Mr. Nader.

Both of our witnesses this morning have illustrated with example after example the need for independent advocacy for the average citizen, the unrepresented citizen, before the Federal agencies. Brandeis observed in 1905 that "a condition of great unfairness to the public" ensues when only the voices of highly capable lawyers representing private interests are heard, while the public is "inadequately represented or wholly unrepresented." This condition of great unfairness to the public confronts us today, and we must respond to it quickly and decisively.

Tomorrow, we will hear from a panel of public interest lawyers from foundation-supported organizations, from private law firms, from public interest law firms, and from OEO.

I will, as I indicated to Senator Thurmond, at a later date, offer Chairman Burch equal time to respond to Commissioner Johnson; and we will also, as Mr. Nader suggested, offer an opportunity to officers and lawyers of large corporate interests to be heard on the Public Counsel Corporation bill.

I want to thank you very much, Mr. Nader, for your comments and for your responses to the questions.

The subcommittee is adjourned.

(Whereupon, at 12:20 p.m., the subcommittee adjourned, to reconvene at 10 a.m., on Wednesday, July 22, 1970.)

S. 3434—TO AMEND TITLE 5, UNITED STATES CODE, TO PROVIDE FOR THE ESTABLISHMENT OF A PUBLIC COUNSEL CORPORATION TO INSURE FULL PARTICIPATION BY AND ON BEHALF OF UNREPRESENTED CITIZENS IN ADMINISTRATIVE RULEMAKING PROCEEDINGS

WEDNESDAY, JULY 22, 1970

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICES AND
PROCEDURES OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:20 a.m., in room 224, Old Senate Office Building, Senator Edward Kennedy (chairman of the subcommittee) presiding.

Present: Senator Kennedy (presiding).

Also present: James Flug, majority counsel; Thomas M. Susman, assistant counsel; and Michael A. Pulliam, minority counsel.

Senator KENNEDY. The subcommittee will come to order.

The opportunity of the public to participate in the processes of our Government on all levels is fundamental if we are to have confidence in the fairness and equity of those processes. In the realm of criminal procedure, the requirements of notice and an effective opportunity of the accused to participate in the trial, with counsel, are at the very essence of due process and are embodied in the Constitution itself. And we realize now that even outside the criminal law the rights of citizens are illusory unless they can be safeguarded by access to the courts and unless that access is accompanied by adequate legal representation.

These same concepts provided basis for the Administrative Procedure Act, passed by Congress almost 25 years ago. If the Government regulatory framework was to work, Congress reasoned, interested persons must be afforded notice and the chance to participate in its processes. It is clear, however, that this act is only an imperfect guarantee that agency decisionmaking will be in the best interests of the public, so long as the public canot afford effective representation of its interests in those processes. The average citizen sees that large segments of our society know full well how to use the administrative processes to gain favor and protection for their special interests. But he does not, and in the end, he is left behind.

The Federal Government's programs reach almost every activity of every American. Children attend federally assisted schools; laborers work under Federal guidelines governing safety and other conditions of employment and on Federal and federally assisted projects, the farmer, the disabled veteran, the widow, the Indian often rely

heavily on Government assistance. The meat we eat has been inspected pursuant to Department of Agriculture regulations; the products we buy are all manufactured and distributed within the framework of rules and regulations worked out within agencies of the Federal Government.

Yet how many of our citizens know about, much less participate in, the determination of those rules and regulations that so vitally affect them? Who is their advocate in the governmental decisionmaking process? In fact, until now, they have been unrepresented.

In a recent study undertaken for the Administrative Conference, Prof. Arthur Bonfield observed that a number of agencies did not even recognize that programs they administered had a substantial impact on the poor, and that even when agencies recognize this impact, they usually do not seek out the views of those affected by the programs.

A study completed for the National Product Safety Commission last month analyzed scope and adequacy of the automobile safety, flammable fabrics, toys, and hazardous substances programs of the Departments of Transportation, Commerce, and Health, Education, and Welfare. It found that the consumer's interests were being frequently ignored in the administration of those programs and concluded:

To counter industry arguments and institutional constraints limiting vigorous agency action, an independent voice speaking for the generalized consumer interest should be heard in the critical phases of standard setting before specific proposals are published, and later, when formal proposals have been formulated. The ubiquitous presence of the consumer spokesman should stiffen the spine of the most timid official.

Although there are a number of bills presently before Congress to provide for consumer representation within the Federal structure, I do not believe that the public's advocate should be within the traditional framework of Government. There have been experiments with consumers' counsels in the Bituminous Coal Commission, the Departments of Agriculture, Labor, and Interior, and more recently in the Department of Justice. These have all atrophied and disappeared probably because they were ineffective. Thus, I have chosen a vehicle of an independent Public Counsel Corporation, with a primary responsibility for advocacy in representing the views of the average citizen before the Federal agencies.

Yesterday our witnesses discussed generally the need for greater public involvement in agency proceedings. They pointed to the subgovernment, made up of spokesmen for large regulated corporations, law firms, the trade press, trade associations, and other groups who specialize in advocating narrow interest in the halls of Government and who have been successful in locking the public out of the decisionmaking process.

Today I hope we can concentrate on the present efforts of those who are advocating the public interest in Washington. Our participants in this morning's roundtable are all familiar with many of the problems of public representation before agencies these days. They are associated with foundation-funded and self-supporting public interest law firms, the public interest section of a private law firm, and the

Office of Economic Opportunity's legal services program. We are interested in finding out a little about each of their organizations, including the structure and funding. But we are especially interested in their experience with Government agencies and the obstacles they have run up against as a representative of the interest of the consumer and average citizen. This way we can get the idea of specific areas where the Public Counsel Corporation's activities might be directed.

We are interested today in listening to you gentlemen and ladies about our legislation which is before us, and I think many of the people here understand the importance and significance of the legislation. We have had some interesting testimony yesterday from Commissioner Nicholas Johnson and Mr. Ralph Nader, two individuals who have over the period of recent years devoted as much energy to pressing for recognition of the public interest in administrative decisionmaking as anyone here in Washington—Mr. Johnson, in the FCC, as well as in the Maritime Administration, and Mr. Nader in a whole wide spectrum of different activities. I think the record has been quite clearly made in terms of the need for this type of legislation.

We pointed out yesterday to some extent the differences between this and an ombudsman kind of program, the different roles and different areas in which both kinds of efforts may very well be needed. We distinguished as well between this proposal and the consumers' counsel within the Government framework, whether it is in the Department of Justice or any of the other agencies.

So, I think the need for some legislation in this area has been substantiated to a great extent by those who are interested in the whole problem. We are interested today in hearing from you in greater detail, and with some greater precision as to what you think can be achieved and accomplished by a Public Counsel.

I know that many of you have given a good deal of careful thought, and have a good bit of expertise, and so we will focus today on the general kinds of themes and reasons for it. If you have additional technical comments to make, we would welcome those in writing if we cannot get to them today.

So with just that comment, maybe we could go around the room initially and have a word about your organizations, and your own resources, and interests, and particular problems you have had in representing the public before the various Federal agencies.

Perhaps we should start with Mr. Terry Lenzer, the Director of the OEO legal services program, who has been studying the problems of representing the public for some time now from OEO's vantage point.

STATEMENT OF TERRY LENZNER, DIRECTOR OF OFFICE OF LEGAL SERVICES, OFFICE OF ECONOMIC OPPORTUNITY; ACCOMPANIED BY MICKEY KANTOR

Mr. LENZNER. Senator.

Senator KENNEDY. Tell us of your findings, and we welcome you.

Mr. LENZNER. I do not have a formal statement, but we see as one major problem the fact that the poor, who are our clients, do not have the traditional representation before Government regulatory agencies or bodies at the State or Federal level that other people

have. The poor people do not have the economic groups, they do not have social groups that represent their interests here in Washington. The Legal Services lawyers have provided some form of enfranchisement through suits brought against the Federal agencies and State agencies and the courts, but those are always after the fact, after a decision has been made that affects the poor. We feel that it is very important and absolutely necessary that the poor have representation before those decisions are made and during the decisionmaking process, so that crises that develop at least have a determination of what are the interests of the poor in that decision.

We are doing some things in that area, but obviously there is a great deal that needs to be done, a great deal more. We have started an Appalachian program for the first time, which is a multistate operation which is to represent the poor in Appalachia, Kentucky, and West Virginia, on environmental problems, mine safety problems, pollution, and health safety problems.

Also, we are considering a public interest law firm here in the District of Columbia to provide the poor with representation at all levels of the Federal Government and agencies. We have an ombudsman program in Dayton, Ohio, which is to represent the poor students and their parents before the Dayton School Board in educational problems.

We have seen in many of the cases that we have brought against Federal and State agencies, against the Department of Agriculture, and against the Department of Health, Education, and Welfare, that those processes are time consuming, and while these provide a kind of quasi-enfranchisement after the fact, they are lengthy and they are costly to the poor. What is in essence a grievance gap between the poors' interest and the decisions by the Government agencies could be, I think, closed substantially by an institution that could represent the poor while an agency, while HUD, for example, is making a decision on the workable programs, and have citizen participation, rather than have them bring a suit after the fact.

Regarding the issues in the legislation itself, very briefly, I would want to insure that any legislation would include more than just the ability for representation before an agency that would do more than just make rules, but also before agencies that deliver food or build houses, that would provide education and welfare facilities for the poor.

Senator KENNEDY. What do you see as your role in being able to represent sort of the poor before various agency decisions, prior to the time these agency decisions are made that will directly affect them? Do you have this opportunity to do so, and if not, do you think it would be useful to have it, and if so, do you not really run contrary to some of the other agency directions and authority? Are you not really sort of running contrary, perhaps, to some of the agency decisions?

Mr. LENZNER. We are running contrary to some of the agency decisions because we have about 100 suits pending against various agencies now in Washington, so I think it is absolutely essential. We do not have a resource in Washington now to provide that kind of representation for the poor. We do not have lawyers here who will do nothing other than represent clients before decisions are made. We ourselves have talked to agencies recently about decisions they are

about to make that we think would have an adverse impact on our clients, but we need to do that on a continuing basis, with much greater resources than my office can provide, and one of the reasons I think we have so many suits pending is because we did not have the right resources to get in and present the position of the poor to these agencies before decisions were made.

Senator KENNEDY. Do you support the legislation?

Mr. LENZNER. Well, we have some questions about whether it would include the right for the poor to be represented say before the Agriculture Department on a decision of whether they are going to put food stamps into a particular county, or whether it would include the right to go into HUD and say that this is not adequate citizen participation, or not an adequate workable program in particular areas in the country.

I am concerned about the conflict of interest that would arise if the power to make grants were lodged in the Department of Justice, for example, because I think that would raise a conflict of interest between the department that represents the various agencies here in Washington and the clients in the clients' communities whose interests ought to be protected without that apparent conflict of interest.

Finally, I think that there ought to be some concern about the clients being represented in the institutions that would represent them, whatever it is, a board of directors, or whatever quasi-public corporation would emerge, that the client community, particularly the poor-client community, would have representation in determining who would work for that corporation, and how and what resources they would provide in various areas that they would be engaged in.

Senator KENNEDY. You are suggesting an even broader mission for the Public Counsel than is provided by this legislation. I think obviously that your comments have a good deal of weight in reflecting the need for representation of the poor before the various agencies. Is that the principal reservation you have?

Mr. LENZNER. Yes. Any proposal that would provide representation for any people who are not getting any kind of influence on these decisions is obviously going to help our problems, our lawyers, and our clients.

Senator KENNEDY. Before which two or three agencies, if you had to identify them now, do you feel that the poor are in need of the greatest need of representation?

Mr. LENZNER. Well, I do not think that we have by any means anything close to what we need at the State levels, for one thing. In Washington——

Senator KENNEDY. You mean in State decisions relating to programs for the poor, is that what you are suggesting?

Mr. LENZNER. I mean in decisions at the State legislature and State agencies that are involved in that they affect directly our clients in these communities, at all levels, and anything from environmental issues to rate increases for carriers that would ultimately mean an increase in prices for those who live in the communities we are serving, to educational decisions, welfare, across the board.

Senator KENNEDY. Thank you, Mr. Lenzner. We will come back to you as we move along. I think that we should recognize Marian Edelman next, our lady here, from the Washington Research Project.

STATEMENT OF MRS. MARIAN EDELMAN, WASHINGTON RESEARCH PROJECT

Mrs. EDELMAN. I think I would like to make some broad comments initially regarding the problems of representation of the poor and minorities are before this Government.

One of the things that has become clear in a number of years of experience is that you still have an attitude on the part of the Government agencies, mainly the old line agencies, such as HEW, Agriculture, Labor, that the poor are not an important constituency, and they are still not given the kinds of recognition in policymaking that other special interest groups are.

As a matter of deference and political expediency, HEW would not pass a new rule or draft new guidelines without consulting with, say, social workers or the educational bureaucracy or other similarly established interest groups. Yet, the poor have to struggle to get heard and to initiate inquiries about what is being done that concerns their interest. There is simply a continuing attitude that the poor are not important, that minorities, black and brown, are not important, and a failure as a matter of course to consider them as is done with other established special interest groups.

So we have to somehow break down this attitude.

Second, one of the big problems is that there is simply a lack of a system of enforcement in most of these agencies. We go in with complaint after complaint after complaint, but that is not getting at the heart of the problem of having adequate enforcement mechanisms within agencies. I think the Congress has a big obligation in this in terms or monitoring how its own money is spent, monitoring how the legislative intent is carried out, and in making agencies come up with means of effective enforcement of laws. They simply have not done this to date.

We have been coming year after year, with suit after suit, complaint after complaint, and we solve this complaint, or we win that suit, but that is not going to help a number of people and cannot substitute for a system of enforcement that is going to help.

Senator KENNEDY. Why don't you be as specific as you can about the kinds of needs you see?

Mrs. EDELMAN. Again, let's take the food program in the Department of Agriculture or title I in HEW, which I think is a better example. Title I, the report we did in conjunction with the NAACP Legal Defense Fund, consisted 80 percent of data we lifted from the audit reports of HEW. They had clearly all of the information about the misuse of funds and fiscal irregularities in spending of Federal money under their jurisdiction, but they had no system or will to correct it. There is no agency pressure or internal agency way to go about correcting the fiscal abuses that they find.

It seems to me again that if the Congress were to hold regular oversight hearings, or if you would begin to call agencies in to question about what they are doing in terms of systems to monitor the spending of Federal money, to evaluate the spending of Federal money some years before, that we would not continue with the same kind of problem, and we would be a long way along the road to lessening the need for and role of the public interest firms. We have to create a

system of monitoring and evaluation to make sure that the money and the programing gets to the beneficiaries that they are intended for.

You run into a huge problem of encrusted bureaucracy and bureaucratic defensiveness. Even after the fact of hunger was established and recognized, the Department of Agriculture somehow just could not get over the way of doing things the way they have always done. There was not enough consistent pressure to bring about the major reforms that had to be brought about, and we still do not have the resources or the will to provide adequate food programs for the poor. What we get from USDA will only come from forcing action and we are going to have effective systems of monitoring and evaluation of what it's for and programs, in fact do.

The Department of Agriculture has what it calls a compliance operation, which allows individual departments running individual programs to evaluate their own problems. They seldon find anything wrong. There should be some kind of separate organization within an agency to evaluate the various programs being operated with authority to ride head and correct abuses. There should be again some continuing oversight by the Congress to see that the programs are working the way they are supposed to work.

The biggest problem of groups like mine are that there is too much work, too little resources, and too many restrictions. And I would like to make two broad comments about public interest law firms, or groups who are concerned with representing the unrepresented public.

People seem to misunderstand us. In a sense we are the most conservative kind of operation working within the system and attempting to keep others working within the system by using legal processes. Yet I find it surprising to think that with the new tax law and the attitudes of foundations that we are running into a great many problems just surviving, and we spend most of our time simply trying to find money to keep going.

I think somehow the attitude has to be broken through that these are radical groups, that we are trying to overthrow the system. We are simply trying to make the system work the way it is supposed to work.

Second, what we are able to accomplish is a drop in the bucket of what the need is. All of us sitting around the table are able to handle individually one or two issues well a year. For instance, on title I, to write a report, gather the facts to present it to an agency, to present the problem to the Congress, and to follow through the implementation stages, in order to bring about any kind of a reform, it is a long-term, tedious, full-time job.

Senator KENNEDY. Why don't you elaborate, for example, with regard to the Poor People's Campaign. You were their attorney and know what committments were made. Here we are, over 2 years later, and I would be interested in knowing what has happened.

Mrs. EDELMAN. Well, Senator, most of the demands of the Poor People's Campaign were made as detailed demands in each of these agencies, all in the enforcement area where they had clear authority under the law to act. We got nice paper responses on most, many of which were evasive, and some commitments to provide some concessions including poor advisory boards of the poor for agencies to involve them in policymaking decisions. [See appendix VI.]

Somehow, Government has not quite gotten around to establishing these boards or to carrying out other promised reforms. They have never in Agriculture quite gotten around to a consistent consultation with the poor. HUD has never gotten around to establishing the advisory boards they have promised. Many of the reforms, in fact, that they have promised in food, employment, schools, and health have simply not occurred because a group like us lack the resources to follow up with those agencies on a day-to-day basis. And what it takes to effect decisions is to somehow stay on the phone, day after day, with that second- and third-level bureaucrat, who is drafting up a decision, and make him move.

I mean it is just persistence, of being a pest, without which you do not get things done; and unfortunately, one of the problems of the poor people's campaign was we were dealing across the board with many agencies, and we tried to resolve that by picking out one or two priority issues a year with which we would hopefully follow up and effect reform. It requires a tremendous amount of specialization and a tremendous amount of time, so we have picked out education and are going to try to follow through on some of these demands.

We have a continuing battle with title VI. We are having a continuing running battle with title I. We are following carefully the agency response to title I in the Office of Education. They are now doing a year-long internal agency evaluation. We are working with them on that evaluation, and at the end of that we will determine whether they have met the basic problems we have outlined in our report, and then I think if they have not that we will have to figure out other steps.

In title VI we are launching a full-time monitoring operation with a full-time staff to police decisions in desegregation throughout the South. We are having some difficulty getting information out of agencies on the state of desegregation, but we are going out in the field to see if the paper plan of HEW are being implemented by school districts in the fall.

It is again a concentrated effort and is going to take much of our full staff time in the next 4 months to do it well, and to follow up, and to bring reforms. We are concentrating on that.

We are working still on contract compliance and employment discrimination. The textile mills are a case in point. You have had hearings, new contracts were entered into, but they recently released the textile firms from their reporting requirements. We are now, because we have been out through the communities gathering new data on the status of discrimination within textile mills, filing suits against Dan River Mills and J. P. Stevens because, in fact, they have not eliminated basic discrimination in salaries and promotion and so forth. And, secondly, since the government has new taken the position that affirmative action plans are confidential and we do not have access to the results, we have to determine compliance through independent investigation. That significant problem we have to deal with in determining whether or not the textile mills of other companies are complying with the Executive order results because we do not have access to that information and are having to go the circuitous route of litigation.

Senator KENNEDY. When did this come up?

Mrs. EDELMAN. That has come in the last several months when we requested the affirmative action plans for the shipbuilding companies.

Senator KENNEDY. Were the affirmative action plans always available and open before?

Mrs. EDELMAN. Generally. It was never clear, but generally we could get them, we had access to them, and we had the affirmative action plans for the textile mills that were entered into earlier when you were holding hearings. We have not been able to secure the recent affirmative action plans. We have not been able to secure ourselves directly the reports from the textile mills, but we have been shown noncompliance through this information gathered from the community.

Senator KENNEDY. Then in terms of the Public Counsel Corporation, it would still be extremely difficult to obtain access to a good deal of this information unless you gave it some additional powers relating to the availability of information on administrative decisions.

Mrs. EDELMAN. That is right, and I think that you have to clarify again some of the things in the public information act, what things are clearly public documents, and we cannot continue effectively without access to basic information. You are also going to have to give us——

Senator KENNEDY. You asked for these materials under the Freedom of Information Act?

Mrs. EDELMAN. Yes, sir.

Senator KENNEDY. What was the response?

Mrs. EDELMAN. Generally you get no responses back. You either do not get a response for a long time, or you get responses back that these are confidential documents, or internal documents, and you carry on a running battle for month after month while you informally try to get at these plans out of the various agencies, and I have recently written formal letters requesting these documents under the Public Information Act after being turned down by various agency people who heretofore have been giving us these plans.

Again, my point in the textile mills, even though you have a lovely plan on paper, the big problem comes up in following through on the plan and seeing that the agency does carry those out.

In terms of comments on the bill, I associate myself with what Terry Lenzer has said, that it has to be broadened. I had three lawyers in my office read it, and we all read rather narrowing the rulemaking thrust of the bill. We think that it ought to be clarified to make sure this is broadened as rulemaking is not the most important issue, it is what happens to the rules after they are made.

We would like some input in rulemaking procedures, and at the early negotiation stages, but again, it should be clear on support of enforcement, licensing reversals before the FCC, which is more important than the rules that are made, and that grantmaking, for instance, to poor people will be included. We have a huge problem simply getting protection for programs and grants to local community groups. Public Counsel could help people expedite proposals through the bureaucracy, so that, for example, when refunding for good legal services comes up, they would have access to lawyers to help them expedite that process to protect their interests when there are negative pressures on the other side.

Senator KENNEDY. Could you comment, and maybe the rest of you would, too, on the availability of funding for public interest activities? Is it much more difficult now?

Mrs. EDELMAN. It is terribly difficult.

Senator KENNEDY. Are the law firms themselves getting into this to a greater degree? Some of this will come out later on, but——

Mrs. EDELMAN. Law firms are moving in to some extent toward this by setting up pro bono time allotments for lawyers that are willing to do pro bono work. In Baltimore, Md., Piper & Marbury, a private law firm, has set up a ghetto law firm. There is a great deal of debate about the validity of these two approaches, and a great deal of debate among the public interest lawyers themselves on the conflict of interest problem posed by private firms representing the poor. But nevertheless I think it is a welcome opening and a welcome movement, because one of the points that ought to be made is that the poor need as large a network of represenation in law firms as there are private law firms in Washington representing other special interests, and again we are merely scratching the surface of need.

Foundations, you have scared them by the tax bill, and they are very reticent about funding, and, again, I hope this will not last. This is, I hope, an initial reaction to the law, and that money will loosen up for this work, because I think again that this is the most important way of keeping many people within the system, and that way ought to be protected by the Congress.

The last thing I would say, Senator, the last two things, is that there is very limited standing for poor people to protest many of the problems in various agencies. In title VI, for instance, it is not clear, and we do not think we have the right to intervene in title VI administrative proceedings. It would be helpful if we did, and I think this is one of the things that ought to happen, and that your committee should review all the agency statutes and regulations to see whether or not there is formal legal standing under the law, for adequate access to decisions by the poor and perhaps correct the situation where it does not list so that we do not have to go on a case by case basis, and challenge each agency's practices, and will be allowed access into agency proceedings at the early and important stages.

Secondly, in terms of your bill specifically, if it were broadened to make it clear that rulemaking does mean enforcement, and licensing, and grantmaking proceedings, one might also consider the alternative of strengthening private-public interest law firms rather than having an exclusive commission of this kind, because one of the problems posed is the constituency problem, and the interference with the traditional kind of lawyer-client relationship. I do not trust myself or any lawyer to make a policy for people with whom we do not have access on a continuing basis. You have enough of a problem being here in Washington, and I find constantly, week after week, that I may not be representing adequately or honestly the views of the people I say I am representing, unless I have this constant contact.

One of the problems posed by your bill is that the board of directors, who may or may not be poor people, they are the ones to determine policy and law suits. When and if they are out of touch with the interest group represented then the question of what quality representation can come in the absence of a continuing lawyer-client relationship with

the groups affected. One might consider as an alternative broadening the basic representation on the board, or funding private groups so that both private law firms who need money and want to serve the public interest, and other groups can be funded under this process so that the lawyer-client relationship would be more effective than it would be under the current bill.

I think we are going to have to grapple with the constituency problem here which I do not think is adequately addressed.

Senator KENNEDY. We are completely open to any ideas relating to the board of directors. We have outlined this in the legislation trying to achieve what you have suggested here, and if you have some ideas on how we can do it better, legislatively, we would welcome them.

We have gotten into the role of the private law firm, and perhaps Mr. Montgomery, who is completing his year as pro bono partner with Arnold & Porter, would like to pick up the discussion at this point and then develop whatever points you have.

STATEMENT OF BRUCE MONTGOMERY, ESQ., ARNOLD & PORTER

Mr. MONTGOMERY. Fine, Senator. I certainly join with what Marian has said about the debatability of the private law firm, how much private firms can do and are going to do in the field of public interest law. There is obviously a built-in problem of conflict of interest in any situation which a private firm is undertaking to represent clients whose interests may well be directly opposed to clients of the law firm. This has held back many firms from getting into the field of public interest law, despite the pressures that are coming more and more to all of us in private practice, both from our own associates and partners, as well as from the law students, that all firms must contribute in order to continue to survive and grow.

I have, this last year, been in charge of an experiment that our firm has undertaken in seeing just how effective we could be, and how difficult the problem is, the conflict problem is for a private firm. I must say that after my year, and it is just about up at the end of this month, and another partner will assume my responsibilities, I am guardedly optimistic about what we, at least, can do. I think our firm's problems are somewhat unique, both because we are in Washington, which means that we do not have the symbiotic kind of really close relationship with clients that many firms in other cities do. Our clients tend to come to us through other lawyers who are located in other cities, and they do not seem to require us to adopt their social and political viewpoints the way that many clients do in smaller, perhaps closer knit communities than Washington is. But that gives us a certain amount of freedom, and we have been able to get into some areas after some pretty hard, heated debates, I must admit, in the firm, that I probably would not have believed that we would get into at the beginning of it. The conflicts have been resolved to my satisfaction in most cases.

I have been pleased at the firm's response. So, if we are a guide, I am hopeful that other firms will be able to make a greater contribution than they have done in the past.

Now, I am very much in favor of this bill. I agree that it should be broadened in the framework, the framework of rulemaking, and it

seems to me that now it is a narrow one, although I must admit that it is one that I think most of the people sitting at this table have not gotten into as much as we have in the area of more traditional litigation. That certainly has been the area we have worked in, doing very much the kinds of work we do for commercial clients, and that is appearing in more adjudicatory arenas in court, before Federal agencies, and I have been astonished at what seems to be a growing receptivity in the courts to citizen representation. Perhaps the courts were receptive all along and the problem was simply that there were no lawyers to present the arguments to them. But I think Charlie Halpern will address that, because we have been associated in a couple of very interesting cases, and the success that we have been able to obtain in these actions on behalf of people who ordinarily have not been represented has surprised us all.

Senator KENNEDY. You have indicated recently that the work in which Arnold & Porter is involved costs the firm around $200,000 a year. Do you consider this to be an outside limit, or would you tell us what you think?

Mr. MONTGOMERY. That is a very vague figure, Senator. My year is not up yet, so I really do not know what our total expenditure is going to be. The policy that we adopted in September was that each member of the firm, partners and associates, was to contribute up to 15 percent of his working hours to our pro bono cases.

Now, I have not succeeded in obtaining that 15 percent from everyone. Some lawyers are simply not interested, others are too busy, but I do my best to get everyone involved. I think I have succeeded perhaps in involving 60 to 70 percent of a 65-man law firm, and probably a total of 10 percent of our time has been achieved rather than 15 percent. But that amounts to a rather significant amount of time over a year's period, and, you see, a lawyer can come under that procedure, can work full time on a case, say, for several weeks, or a month, and then go back to commercial practice. So it is not a 15 percent everyday proposition. He is able to make a contribution.

Senator KENNEDY. Well, if this legislation passes, and is modified, do you think it will bring a diminution of effort by the various private firms, or should it encourage an expansion of it?

Mr. MONTGOMERY. That is hard for me to predict, Senator. As I read it, there is no reason why the Public Counsel Corporation could not contract with a private law firm, perhaps on a nonprofit basis, to represent the clients coming through the public corporation. And in that sense, perhaps it would be a stimulus, it would make respectable, for some firms, the public interest practice in a way that would help, I think. And it certainly contemplates, as I read subsection 5 on page 9, that the corporation could accept voluntary pro bono legal services from firms.

I frankly do not know whether I personally would like to get involved with the possible redtape and regulations of dealing through a public corporation. One of the advantages, I think, of being able to work in a private firm is that we do not then have the kind of redtape that some of these gentlemen have when dealing with foundation funding. We have our own problems, but we do not have that one.

Senator KENNEDY. Would you tell us what some of the other firms are doing in the city that you know about?

Mr. MONTGOMERY. Yes. Covington & Burling has far many years made a substantial contribution in the way we formely did also, which is simply individual lawyers becoming interested in a problem, and getting involved in it, and working in it, particularly in the field of civil rights, and civil liberties. They have more recently contributed two associates to the neighborhood legal services project here in Washington on a period of 6 months' leave of absence, and those people funnel cases back into Covington & Burling, and Terry perhaps could comment on how effective that has been. I get the impression that it has been fairly effective.

Hogan & Hartson has very recently hired a young lawyer from the public law office of Harvard Law School who is now in Washington, and he is going to be a full-time public interest lawyer for them, with the assistance of one or two associates full time.

Other firms, such as Wilmer, Cutler & Pickering, have made a substantial contribution in their own way, also on an individual basis without any formal structure. I think Piper & Marbury have been mentioned—the Baltimore firm that is trying the ghetto office approach. There are a few scattered experiments in other cities across the country, one in Chicago, one in Los Angeles, something is going on in Boston more as a collaborative effort of a number of law firms devoting associates to a community law office, and the same approach in New York.

A lot of these efforts, I think, are more, I am afraid, more window dressing to attract law students than anything else, and we have to be rather skeptical about them and keep asking these firms what they have actually done. But I hope, if the pressure continues, that they will be forced to actually do something real in all of these cities.

Senator KENNEDY. Let me ask you, we heard some testimony yesterday from Mr. Nader concerning the obligation of the law firms and lawyers individually in terms of the public interest. He discussed the results of representation of special clients, which when carried through could very well bring about disservice to the public interest as a whole. He mentioned the conflict of responsibilities from an ethical point of view for individuals in law firms.

You are certainly doing laudable work at Arnold & Porter in attempting to move into this whole public interest field. On the other hand, you know Ralph Nader has said that corporate law firms such as Covington & Burling, Hogan & Hartson, and Arnold & Porter, and the gentlemen who run these operations are "eminent specialists in cutting down consumer programs in their insipiency, or undermining them if they mature;" they are "masters of the ex parte contracts, the private deals and tradeoffs, the greasing of the corporate wheels and the softening of the bureaucrats' will." Did you ever find that you were running contrary to what is happening further down the corridor?

Mr. MONTGOMERY. Constantly, Senator.

Senator KENNEDY. Who wins out?

Mr. MONTGOMERY. Ralph's attack, and I think that was testimony you read from, what was it, Senator Jackson's committee?

Senator KENNEDY. Ribicoff.

Mr. MONTGOMERY. That was wonderful advertising for us and for all of the firms he mentioned, because that is exactly what our clients want us to do, is to soften the will of all of the bureaucrats we can get to, and there is no question that there is a problem, if you have viewed the lawyer's role as Ralph does. I think it is a debate that all of us here participated in. I know I have in our own firm.

First of all, you have a problem of defining the public interest. Of course, Ralph Nader's public interest is not everybody's public interest, although I tend to find most often, more often than not, it is my own view of the public interest. The problem of debate about the lawyer's role is whether the lawyer can soften his representation of the client if he personally feels that the client is doing something that is not in the public interest.

Now, obviously, there is a point at which all lawyers do erect that kind of a barrier. None of the firms I have mentioned would sit still for a minute with a client who walked in with a bag of money, and said this is what I want you to do, to fix this for me by paying the appropriate bureaucrat. Obviously, you kick the guy out of your office, so there is a limit to what you do with them. But Ralph pushes the line pretty far back toward what most lawyers in the city consider completely appropriate advocacy, such as seeking to delay an administrative injunction, seeking to soften legislation. That is the sort of thing that people in my firm do all of the time, obviously, and so do lawyers in all other firms we have talked about.

It is a problem because the canons are somewhat conflicting in the lawyers general responsibility to the public interest, and his responsibility on the other hand is to his client and his client's interest. I do not think that Ralph has the answer, and I certainly know that I do not.

Senator KENNEDY. Mr. Robertson, with the Center for the Study of Responsive Law.

STATEMENT OF REUBEN B. ROBERTSON III, CONSULTANT, CENTER FOR STUDY OF RESPONSIVE LAW

Mr. ROBERTSON. Thank you, Senator. I am a consultant and attorney with the Center for Study of Responsive Law, and since we are not exactly a law firm and do not engage in litigation or the representation of clients as our primary activity, I would like to explain briefly, if I could, what we are, and what we do.

Senator KENNEDY. Yes.

Mr. ROBERTSON. We are a nonprofit, interdisciplinary institution engaged primarily in promoting research, education, and citizen participation in public policy issues. We have two primary goals.

First, we want to make substantial contributions to the analysis of public policy in areas such as consumer protection, environmental health, occupational safety, alleviation of rural poverty, transportation, and so forth.

Second, we want to alert promising young doctors, lawyers, engineers, economists, and other professional people, as well as students in each of these fields, to social and consumer issues which have a special need for their professional skills. These goals are pursued through research projects and publication of reports which are widely disseminated to the public and the press.

Right at this time we are conducting research on such diverse topics as the Federal regulation and control of pollution, the use and abuse of Federal lands and waterways, medical care quality, and consumer protection in a variety of industries. We are also engaged in several case studies of corporate and professional accountability to the public interest.

The administrative actions and litigation which we have been involved in are basically ancillary to our general researching and reporting goals. Some of the reports that we have issued relate to topics of, for example, tractor safety and farm safety, the regulation of surface transportation by the Interstate Commerce Commission, regulation of food additives by the Food and Drug Administration, the whole problem of environmental contamination and air pollution, the consumer protection functions of the Federal Trade Commission, and crash safety standards in general aviation aircraft.

We have currently four attorneys and a physician and a political scientist on the full-time staff of the Center. Ralph Nader is the Chairman of the Board of trustees of the Center.

One of the means by which we pursue these goals is to bring to Washington from 100 to 200 students from professional and graduate schools all over the Nation, to bring them to Washington to work on a variety of research activities.

I think it might be of interest in the consideration of this legislation if I can tell you about a few of the cases which we have necessarily gotten involved in, pursuant to our basic research goals.

Under the Freedom of Information Act we have found that the act has required a lot of litigation to open up some of the loopholes and inadequacies in the basic draftsmanship of the bill. Although it is a great help, more litigation is still necessary.

Among the actions which we have initiated, for example, is a suit against the CAB to compel disclosure to student investigators of complaints filed by citizens with the board about airline service, and a special study which was made by the board of the airlines' in-house complaint handling, and that suit was terminated when the CAB produced the documents without further explanation. (See exhibit 1, above.)

Again, a suit was filed against the Department of Agriculture to compel disclosure to our investigators of records of the USDA Meat Inspection Division, including letters of warning sent to intrastate meat and poultry processors suspected of doing business across State lines, as well as information concerning detention of meat and poultry products shipped by interstate packers.

Very recently in a landmark decision by the U.S. district court in Baltimore, the Department of Agriculture was ordered to release this vital consumer information (See appendix VII.)

We have also filed a suit against the Secretary of Labor to compel the disclosure of occupational health and safety records, and records of enforcement of the Walsh-Healey Employee Safety Act.

We have filed a suit against the Farm Credit Administration to compel disclosure of the records of recipients of loans of over $100,000 so that we can determine whether race, income class and geographical distribution is patterned in such a way that there is evidence of illegal discrimination in making these government loans.

We filed a suit against the Department of Agriculture's Pesticide Regulation Division to compel disclosure of technical information which we need to determine the adequacy of safety data submitted by manufacturers of pesticides who are seeking to have their products registered by the Department of Agriculture.

We have engaged in some other litigation on a more substantive basis, and I think all of this type of litigation would be very appropriate for activities by the corporation, should this bill pass.

Senator KENNEDY. How do you decide which areas you are going to get into?

Mr. ROBERTSON. How do we decide? We decide only on the basis of the most pressing type of information.

Senator KENNEDY. How do you get that information?

Mr. ROBERTSON. Often it is developed in the course of our studies and investigations. Often it is sent to us by consumers and citizens who are seeking our assistance. We do not represent them as clients, but we do move ahead in administrative actions and litigation if appropriate and necessary in our view to protect the public on the most basic and elementary level of safety and health. If I can give you just a couple of examples.

Senator KENNEDY. Sure.

Mr. ROBERTSON. We have recently filed a motion in the U.S. Court of Appeals for the District of Columbia for a summary reversal of the Agriculture Secretary's refusal to ban the use of the pesticide 2, 4, 5–T for any uses where it comes in contact with or may endanger the health of human beings. We have filed an action to compel the administrator of the Federal Aviation Administration to ban in-flight smoking of cigars, pipes, and cigarettes in airliners, on the grounds that it presents a danger to air commerce and to the passengers, as well as a substantial inconvenience to numerous passengers who object to smoking.

We have filed a suit in the district court to compel the Secretary of Transportation to order manufacturers of certain automotive products, trucks particularly, to issue notices of defects in the design and construction of wheels on the trucks. These wheels are subject to disintegration when they are in use, which presents an obvious hazard to not only the drivers and passengers but other people as well.

Cases in the agencies which might be of interest where we have not yet gone to court, and we hope that the agencies will take actions to eliminate that necessity, include a petition to the FAA to upgrade existing standards of occupant protection for light aircraft in the case of a crash. After 5 months no action was taken whatsoever by the FAA on this vital safety issue. We have not heard any dispute from the safety authorities that our petition is within the realm of existing technology and the state of the art. It is just a lack of action, even to to set up a rulemaking proceeding to determine whether or not the FAA should pass higher, more stringent qualifications for safety design in these light aircraft. (See appendix VIII.)

We have filed a petition with the ICC and the Department of Transportation asking a ban on smoking on intercity buses. We have petitioned the Department of HEW to require sanitary and modern disposal of human waste from railroad cars, instead of dumping this waste on the tracks in the middle of cities and elsewhere.

We have filed a petition with the Federal Trade Commission to issue regulations or rules on the hazards of enzymes in household products in use in the home, and to undertake a thorough public investigation of that issue.

Finally, we are now preparing a petition to all of the regulatory agencies to have them establish uniform rules for citizen participation, to encourage citizen participation and make it easier, to reduce the costs which now we believe are quite excessive, and we hope to move on ahead with that petition in the very near future.

Senator KENNEDY. Do you try and exhaust your administrative remedies first?

Mr. ROBERTSON. Yes; that is always our first avenue. I think there could be a possible exception in the case of an extreme and immediate hazard to safety where we found that the statute governing the operation of the agency was mandatory, and the agency had simply not performed a duty, an express, explicit duty which Congress imposed upon it. In emergency cases such as that we might go directly to the court for mandamus or an emegency order of some kind.

Senator KENNEDY. How many do you have working with you?

Mr. ROBERTSON. We have six full-time staff members who are professionals. We have approximately 15 young people who are assisting these full-time consultants, and we have about 180 students working on projects both in Washington and other parts of the country.

Senator KENNEDY. Where do you get your funding from?

Mr. ROBERTSON. The funding is basically derived from royalties and income from the sale of our reports and books, and which is all turned back to the center to finance further projects.

Secondly, we have some grants and contributions from foundations, for specific studies, and donations from individuals.

Senator KENNEDY. Which of the agencies do you think are in the greatest need of greater public-interest representation?

Mr. ROBERTSON. Well, Senator, that is a difficult question. Every agency I have seen could use a great deal more public participation. In some agencies there is none at all, and these are the ones that I think primarily we need contact with, and particularly in the transportation field. Let us, as an example of what a consumer representation corporation such as proposed in this bill could do, look at a case in which clearly the public interest is very seriously jeopardized, and I am referring to the financial crisis of the Penn Central, in which today we are petitioning the bankruptcy court in Philadelphia to appoint a special committee to represent consumer interests.

This is a step which obviously should be taken in every railroad organization, but we have never seen it done before. We are moving into the bankruptcy court because, in our view, the Interstate Commerce Commission let this railroad deteriorate to such a condition that we now have on our hands a massive transportation crisis in the whole Northeast United States. (See appendix IX.)

Now, in recent hearings before the Senate Commerce Committee, it was brought out that in October of 1969, the ICC approved the issuance by the railroad of short-term notes, despite the fact that the ICC was fully aware at that time of the railroad's precarious financial condition, and despite the fact that the ICC itself acknowledge that this form of financing was highly imprudent.

That, in my view, is the type of technical, corporate, and regulatory level at which a massive infusion of public representation is needed, before things deteriorate beyond the state that they have already reached.

(See exhibit 8, which follows:)

EXHIBIT 8

WASHINGTON, D.C., *July 22, 1970.*

Senator EDWARD M. KENNEDY,
Chairman, Senate Subcommittee on Administrative Practice and Procedure, Washington, D.C.

DEAR SENATOR KENNEDY: During the hearing this morning on proposed legislation to provide for improved representation of the public interest in federal administrative proceedings, by establishment of a public counsel corporation, you invited submission of documentation relating to the need for such legislation and the kinds of actions the counsel might engage in.

I believe that the question of nondiscriminatory hiring practices in regulated industries provides a clear example of the need for effective public interest advocacy before the regulatory agencies. Today there can be no doubt that elimination of employment discrimination by race in all industries is a national policy of the highest priority. Certainly regulatory agencies charged with exercising their duties to promote "the public interest" or "the public convenience and necessity" have the power and duty to take action to eliminate discrimination in the industries they oversee. Yet the agencies with few exceptions have done nothing and blatant job discrimination is rampant in many of these industries.

One possible exception is the Federal Communications Commission which has issued a regulation, effective July 14, 1969, requiring licensees of broadcast stations to establish equal employment opportunity programs. A copy of the FCC order is enclosed for the record. [See Appendix X.] This case demonstrates, first, the kind of rulemaking action which each agency with licensing powers should take on this issue; and second, it demonstrates the importance of effective public interest advocacy—in this case that of the United Church of Christ which petitioned the FCC in 1967 to enact a nondiscrimination regulation.

In contrast, one may consider the inaction of the Federal Power Commission which licenses and regulates the electric power industry. In a recent address to industry members, William H. Brown, III, Chairman of the Equal Employment Opportunity Commission, stated that "the electrical power industry has had one of the worst equal employment records of all industry groupings in America," and that "the most effective methods of discrimination and exclusion are being practiced in your industry." [See Appendix X.] The continuation of such illegal and disgraceful hiring practices in this major industry should be a major embarrassment to the federal agency responsible for its regulation in the public interest, but apparently is not. What has the FPC done to assure equal employment opportunity among electric utilities? Very litle or nothing. A lengthy report prepared a year ago by the FPC's legal staff, outlining the Commission's powers and duties to outlaw job discrimination in the power industry, has been suppressed and forgotten.

The FPC's contacts with public interest advocates have been minimal and usually unsatisfactory. One such group, California Rural Legal Assistance, sought to intervene last year in FPC licensing proceedings, to challenge the right of Pacific Gas and Electric Company of San Francisco to hydroelectric licenses because of alleged discriminatory hiring policies. The FPC turned down the group in one case on the grounds that its petition was filed too late—even though it has been a frequent practice of the FPC to ignore lateness in filings on behalf of industry and other petitioners. The FPC did permit CRLA to intervene in one case, but as of a year later the case still has not come up for hearing and no action has been taken by the FPC on the discrimination problem. The then-Chairman Lee C. White urged initiation of a rulemaking proceeding to deal with the employment issue, but nothing has been done and apparently nothing is planned. (Copies of pertinent materials relating to this problem are enclosed for the record.) [See Appendix X.]

Action recently taken by the District of Columbia Public Service Commission to eliminate discriminatory hiring by utilities stands in stark contrast to the

inaction and lack of concern at the federal level. In a proceeding to consider proposed rate increases for retail electric service, the D.C. Commission considered the problem of minority hiring and ordered a sweeping and specific affirmative action program to be instituted. (Excerpts from the Commission's order are enclosed.) [See appendix X.] The Commission specifically found that "we have both the power and the responsibility to take action ourselves." One well might ask why such a duty exists at the local level but not, as far as the FPC is concerned, with respect to nationwide patterns of discrimination throughout the utilities. It should be noted that effective public interest advocacy by the Urban League and other groups may have had a substantial impact here.

Similar patterns of discriminatory hiring and employment exist in other major regulated industries. One such example is the trucking industry where hiring, job assignment and promotions are typically discriminatory by race and ethnic origin. Again the federal agency responsible—here the Interstate Commerce Commission—has done nothing to alleviate this problem through effective industry-wide regulation.

This is one example of an issue where publicly funded advocacy could do much to press the development of more effective and responsive agency rulemaking.

Sincerely,

REUBEN B. ROBERTSON III.

Senator KENNEDY. Good. Mr. Kass.

STATEMENT OF BENNY KASS, AD HOC COMMITTEE ON CONSUMER PROTECTION

Mr. KASS. Thank you, Senator. It is a pleasure to be on this side of the aisle. For 4 years, as you know, I was counsel to the subcommittee under your predecessor when we looked into the areas of freedom of information, and the ombudsman, and I am certainly delighted that the subcommittee is continuing in the logical extension in the area of trying to seek ways to make the Government more responsive to the citizens.

Since Mr. Montgomery was talking about advertising, I might do a little advertising of my own firm, which is new, Boasberg, Granat & Kass, which just got started. I am Washington counsel for the National Legal Aid and Defender Association, but really I am not speaking of them at this point. But I am prepared to submit a full statement on behalf of the association on S. 3434 and S. 2544, and we will get that in the record.

(See exhibit 9, which follows:)

EXHIBIT 9

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION,
AMERICAN BAR CENTER,
Chicago, Ill., September 17, 1970.

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: At recent hearings on S. 3434, your bill to create a Public Counsel Corporation to insure full participation by or on behalf of unrepresented citizens in administrative rulemaking proceedings, Mr. Benny L. Kass, our Washington counsel, promised to provide your subcommittee with the views of the National Legal Aid and Defender Association.

We wish to commend you for your deep concern for the rights of the unrepresented poor. As you so aptly stated at the August 11 Legal Aid Anniversary Luncheon in St. Louis, the growth of legal services "means a new source of hope in hunderds of communities." Fifty-nine years ago, when NLADA was founded, no one could predict the phenomenal success and impact that legal aid services enjoy today. And no one can today predict the impact that "citizen advocacy" will have on our society during the decade of the "70s" and beyond. Thus your con-

cern—evidenced through S. 3434 and your recent subcommittee hearings—is a vital step in the continued development of the "citizen advocate", whose necessity was recognized by NLADA so long ago.

We are pleased to endorse the principle of S. 3434 which we believe will provide representation for those who now have no spokesman.

Not only do the poor lack the resources and political power of other unrepresented groups, but their cause lacks the charismatic qualities needed to keep lawyers and politicians working for solutions. The burning social issues of today may or may not be the same tomorrow; they certainly are not the ones we labored on last year. Hunger, for example, is still very much with us, yet it may be overshadowed by "pollution." The inner-city dweller shares some of the concern over air pollution with his suburban neighbor, and in many instances he is hurt the most. (He cannot relocate easily, nor can he afford air conditioning.) Further, his empty stomach and malnutritious diet are not immediately relieved through new environmental programs.

Thus, agreeing with our nation's efforts toward curbing pollution, NLADA must continue to address itself to the direct, unique problems of the poor. Whether in the field of consumer affairs, landlord-tenant, or welfare rights, to name but a few, poor people need constant and capable representations—at all levels of government and in all branches.

You are so correct in pointing out that "our emphasis on the 'test case' as the key element of 'reform' in the field of citizen advocacy—especially for the poor—may soon become obsolete." While many of our lawyers are still actively engaged in the litigation needs of the poor, we are finding out more and more that our efforts and legal skills are needed in helping to formulate agency opinions and regulations. Professor Arthur Bonfield, in his report to the Administration Conference, states:

The fact is that government administrators are too often inadequately apprised of the poor's views respecting the desirability of existing or proposed rules. (Bonfield, "Representation for the Poor in Federal Rulemaking," 67 *Michigan Law Review* 511, 512 (1969)).

Recognizing this fact, NLADA has supported plans to provide a mechanism for relief—at least at the federal level. In both the 89th and 90th Congresses Congressman Feighan and Senator Hart introduced bills which would provide greater participation in rulemaking on behalf of persons of limited means. These bills direct the Attorney General to contract with or to make grants to such nonprofit organizations as NLADA to represent the poor in federal rulemaking proceedings which will affect them. These bills—which we are pleased to note received your co-sponsorship in 1969—also authorize the Attorney General to arrange for representation of the poor before federal departments and agencies on questions affecting the poor. As Senator Philip Hart stated when he introduced S. 2544 with you on July 2, 1969, "this would enable people of limited means to have the same opportunity to express their views to federal departments as others now do." According to the Senator:

"This is not to say that the poor will always be correct, but rather that the poor, right or wrong, have the right to be heard."

The corresponding bill in the House this Congress is H.R. 1776, introduced by Congressman Feighan.

Needless to say, we support S. 2544, which is presently pending in your subcommittee. But this measure is not exclusive of S. 3434; in fact, we believe they are quite complementary in that S. 2544 could—and perhaps should—be incorporated into the Public Counsel Corporation bill. As we read § 588 of S. 3434, the corporation is authorized to "(1) represent, either directly or by contract with appropriate individuals or private organizations, the interests of the unrepresented public . . ." We submit that NLADA is one such private organization devoted exclusively to representation of the poor.

Turning now specifically to S. 3434, we respectfully call your attention to the fact that the Administrative Conference recommendation advanced simply as a possibility "deserving of consideration" the creation of a body patterned on the Public Broadcasting Corporation. With the recent development of a number of additional institutions concerned with representation of the unrepresented—such as the Center for the Study of Law and Social Policy, the Center for the Study of Responsive Law, and the National Welfare Rights Organization, to name but a few—it may well be worth considering whether yet another institution is needed. In our opinion, the form is not as important as the statutory and the funding authorizations.

As a matter of fact it should be observed that under the existing Economic Opportunity Act, without amendment, OEO is empowered to fund an agency or agencies to perform, for the interests of the poor, the kinds of functions envisaged by S. 3434 and a good deal more. Indeed, the NLADA has had on file with OEO for more than a year an application for the funding of precisely such a project. It is regrettable that at this point no final action has been taken on the NLADA application, though we are given to understand that it has received strong endorsement from the OEO staff and has been cleared by OEO's general counsel as coming within the scope of OEO's authority.

We appreciate this opportunity to comment on S. 3434, and certainly hope you will continue to press for full representation of all Americans before governmental agencies. If we can be of any assistance to you, please do not hesitate to call upon us.

Sincerely,

MAYNARD J. TOLL.

Much has been said already, and I do not want to repeat. I would just like to give illustrations of some of the areas and agencies that either NLADA has gotten into, or myself on behalf of the Ad Hoc Committee on Consumer Protection, which is a local consumer group here in the District of Columbia.

One area that we got into and were surprised to find that we were the only and the first consumer representative to participate in ICC rate requests. The railroads requested a rate increase on vegetables and melons last year. We protested. We were the first consumer organization to ever protest before the ICC and, in fact, the ICC permitted us full representation as a party to the proceedings.

As I testified before Senator Hartke's subcommittee a couple of months ago, the ICC literally bent over backward to thwart the representation of the public interest, even though they let us participate as a party. Rather than go into all of the details I do have a copy of my testimony for Senator Hartke's subcommittee, and I would like to submit it for the record. [See appendix XI.]

Senator KENNEDY. Fine.

Mr. KASS. The rates were increased and the ad hoc committee brought the ICC and the Penn Central Railroad to court, where the case is now pending. We have received a temporary restraining order, and a preliminary injunction was denied, and we are now proceeding in court against the ICC. To our surprise, and we feel only because of the consumer representation that was present, the Justice Department admitted error just about 3 weeks ago in the matter, and we frankly do not know what is going to happen now with the case. I cannot comment further than that. But I do submit, based on my testimony before Senator Hartke, my own experiences in behalf of the ad hoc committee, that the Interstate Commerce Commission literally bent over backward to thwart consumer representation. We sought such things as to obtain free legal counsel, such as free transcripts, and in forma pauperis status, which was denied us in the ICC.

Senator KENNEDY. What would be the kinds of things that you think that you would like to see the ICC doing in terms of the public interest that they are not and should be?

Mr. KASS. Well, Senator, there was in the one instance the request that was made by the railroads to raise the rates on vegetables and melons from the west coast to the east coast, which significantly affects the consumer, and especially the low-income consumer on the east coast. No studies were made by the railroads or the agencies as to

whether there was justification for raising the rates, no studies were made by the agencies as to what effect it would have on the American consumer, especially in light of the inflationary period that we are now in, and in light of the growing complaints around the country of rising prices in food. This is one specific example where I think the ICC should have gotten into, and certainly did not.

Another agency with which we are involved, one agency is the Bureau of the Budget, which has advisory committees, industry advisory committees, but no consumer advisory committees, or no consumer representation on these committees. These are on the very vital statistical reports the Government agencies make to Congress and the public.

Senator KENNEDY. What sort of industries? Can you give us the industries at a later time?

Mr. KASS. I will submit an exact list (see exhibit 10), but, for example, the one I was involved in was a questionnaire going out to all of the pipeline people as to whether they could meet certain requirements of the proposed pipelining that the Department of Transportation was to propose. There was no consumer representation.

(Exhibit 10 follows:)

EXHIBIT 10

ADVISORY COUNCIL ON FEDERAL REPORTS

(Roster for 1969, updated as of Sept. 23, 1969)

Chairman: Charles W. Stewart.
Vice Chairman: Leo V. Bodine, Carl H. Madden, Robert H. North.
Treasurer: G. H. Gaynor.
Executive Secretary: Russell Schneider.

AMERICAN RETAIL FEDERATION

A. Arthur Charous, Manager, Division of Economic Research, Sears, Roebuck and Company, Chicago, Ill.

Eugent A. Keeney, Executive Vice President, American Retail Federation, Washington, D.C.

Herbert S. Landsman, Executive Vice President, Federated Department Stores, Inc., Cincinnati, Ohio.

AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES

William E. Dunn, Executive Director, Associated General Contractors of America, Washington, D.C.

James G. Ellis, Washington Office, Automobile Manufacturers Assn., Washington, D.C.

Robert H. North, Executive Vice President, International Association of Ice Cream Manufacturers, Washington, D.C.

CHAMBER OF COMMERCE OF THE UNITED STATES

G. H. Gaynor, Executive Assistant, United States Steel Corporation, Pittsburgh, Pennsylvania.

Carl H. Madden, Chief Economist, Chamber of Commerce of the U.S., Washington, D.C.

Albert G. Matamoros, Chief Economist, Armstrong Cork Company, Lancaster, Pennsylvania.

FINANCIAL EXECUTIVES INSTITUTE

Carl M. Blumenschein, Senior Vice President, Finance, Container Corporation of America, Chicago, Illinois.

Daniel W. Potter, Treasurer & Secretary, Raymond Engineering, Inc., Middletown, Connecticut.

James J. Rutherford, Managing Director, Financial Executives Institute, New York, New York.

NATIONAL ASSOCIATION OF MANUFACTURERS

Leo V. Bodine, Executive Vice President, National Association of Manufacturers, Washington, D.C.

Wayne E. Kuhn,Omark Industries, Inc., Portland, Oregon.

Robert H. Stewart, Jr., Manager, General Economics, Planning & Economics Department, Gulf Oil Corporation, Pittsburgh, Pennsylvania.

Members-at-large

Burton N. Behling, Vice President, Association of America Railroads, Washington, D.C.

William H. Finigan, Director, Marketing Research, The National Cash Register Company, Dayton, Ohio.

E. W. Gaynor, Comptroller, Parts Division, Chrysler Corporation, P.O. Box 1718, Detroit, Michigan.

Robert S. Quig, Vice President, Ebasco Services Incorporated, Two Rector Street, New York, New York.

Charles W. Stewart, President, Machinery & Allied Products Institute, Washington, D.C.

Vincent T. Wasilewski, President, National Association of Broadcasters, Washington, D.C.

N. R. Wenrich, Manager, Business Research, Merck & Company, Inc., Rahway, New Jersey.

Active past chairmen

T. M. Brennan (1962–1965), 47 Dogwood Lane, Rockville Centre, New York.

Jos. F. Miller (1965–1968), Executive Vice President, National Electrical Manufacturers Association, New York, New York.

T. G. Redman (1959–1961), Vice President, Swift and Company, Chicago, Illinois.

T. E. Veltfort (1950–1952), Managing Director, Copper & Brass Fabricators Council, Inc., New York, New York.

Merrill A. Watson (1956–1958), President, National Footwear Manufacturers Association, New York, New York.

COMMITTEE ON AIR TRANSPORTATION

Scope: To advise the Bureau of the Budget with regard to opportunities for paperwork reduction in reporting and record keeping requirements of Federal agencies and on any opportunities to effect improvements in the accuracy and usefulness of Federal statistics.

Budget Bureau Staff Assigned: Harry B. Sheftel.

Membership being revised.

COMMITTEE ON BANKING

Scope: To advise the Bureau of the Budget on Federal reporting and record retention requirements for the purpose of reducing the burden imposed upon the banking industry and to improve statistical and other information to be collected by Federal agencies.

Budget Bureau Staff Assigned: Edward T. Crowder.

Chairman

Charles A. Agemian, Executive Vice President, The Chase Manhattan Bank, New York, N.Y.

Secretary

Franklin A. Gibbons, Jr., Vice President and Comptroller, The Riggs National Bank, Washington, D.C.

Members

Thomas R. Atkinson, Deputy Manager, The American Bankers Association, New York, N.Y.

C. H. Baumhefner, Executive Vice President, Bank of America, NT&SA, San Francisco, Calif.

Frank Forester, Jr., Vice President and Comptroller, Morgan Guaranty Trust Company, New York, N.Y.

Denton A. Fuller, President, Liberty Trust Company, Cumberland, Md.

Saul B. Klaman, Director, of Research, National Association of Mutual Savings Banks, New York, N.Y.

Wesley Lindow, Executive Vice President and Secretary, Irving Trust Company, New York, N.Y.

Arthur Ringler, Executive Vice President, Chemical Bank New York Trust Co., New York, N.Y.

Edward T. Shipley, Comptroller, Wachovia Bank & Trust Company, Winston-Salem, N.C.

Mr. Paul L. Smith, Senior Vice President, Security First National Bank, Los Angeles, Calif.

Walter F. Thomas, Executive Vice President, Manufacturers Hanover Trust Company, New York, N.Y.

Wm. T. Heffelfinger, American Bankers Association, Washington.

COMMITTEE ON CHEMICALS

Scope: To advise the Bureau of the Budget in regard to opportunities to reduce the paperwork burden on industry resulting from the reporting and record-keeping requirements of the Federal agencies, and to make recommendations to improve the accuracy and usefulness of Federal statistics.

Budget Bureau Staff Assigned: Harold T. Lingard.

Chairman

N. R. Wenrich, Manager of Business Research, Merck & Company, Inc., Rahway, New Jersey.

Secretary

Marjorie V. Campbell (Miss), Director, Information Service, Manufacturing Chemists Association, Washington, D.C.

Members

Crayton K. Black, Manager—Trade Relations, Dyes & Chemical Division, Organic Chemicals Departments, E. I. du Pont de Nemours & Co., Inc., Wilmington, Delaware.

Morse G. Dial, Jr., Regional Vice President, Union Carbide Corporation, Washington, D.C.

Dr. Jack D. Early, Monsanto Company, Washington, D.C.

Dr. Aimison Jonnard, Manager—Long Range Planning, Esso Chemical Co., Inc., New York, New York.

W. D. Kavanaugh, Manager, Washington Office, American Cyanamid Company, Washington, D.C.

Lewis E. Lloyd, Economist, The Dow Chemical Company, Midland, Michigan.

John J. O'Donnell, Tax Attorney, Allied Chemical Corporation, New York, New York.

COMMITTEE ON EQUAL EMPLOYMENT OPPORTUNITY SURVEYS

Scope: To advise the Bureau of the Budget on problems which will arise in connection with equal employment opportunity reporting and record keeping requirements and special surveys, and to make recommendations as to ways of avoiding or minimizing such problems.

Budget Bureau Staff Assigned: Karen Nelson.

Chairman

G. H. Gaynor, retired, not replaced.

Members

W. L. Barnes, Assistant Director, Personnel Services, North American Aviation, Inc., El Segundo, California.

Joseph E. Baudino, Vice President, Westinghouse Broadcasting Company, Washington, D.C.

Harry S. Benjamin, Jr., Director, Legal Staff, General Motors Corporation, Detroit, Michigan.

Charles G. Gaffrey, Washington Representative, American Textile Manufacturers Institute, Washington, D.C.

David D. Doughty, Counsel, Personnel Relations Conference, Air Transport Association, Washington, D.C.

Paul M. Hawkins, Counsel, Health Insurance Association of America, Washington, D.C.

Arthur F. Hintze, Director, Government Labor Relations Service, Associated General Contractors, Washington, D.C.
Alfred E. Langenbach, Vice President, First National Bank, Chicago, Illinois.
W. R. Hill, Jr., Manager, Payroll Administration, Public Service Electric & Gas Co., Newark, New Jersey.
S. W. Mahon, Westinghouse Electric Corporation, 3 Gateway Center, Pittsburgh, Pa.
Donn R. Marston, Machinery & Allied Products Institute, Washington, D.C.
Lambert H. Miller, General Counsel, National Association of Manufacturers, Washington, D.C.
Charles F. Mulligan, Senior Statistician, Eastman Kodak Company, Rochester, New York.
Eugene F. Rowan, Director, Personnel Relations, J. C. Penney Company, Inc., New York, N.Y.
Melvin Sandler, Director, Employee Relations, American Hotel & Motel Association, New York, N.Y.
S. W. Seeman, Assistant Vice President, Personnel Administration, Penn Central Company, Philadelphia, Pa.
Mrs. Jean Sisco, Divisional Vice President, Personnel & Industrial Relations, Woodward & Lothrop, Washington, D.C.
Robert H. Stewart, Jr., Manager, General Economics Planning & Economics Department, Gulf Oil Corporation, Pittsburgh, Pa.
N. R. Wenrich, Manager, Business Research, Merck & Company, Inc., Rahway, New Jersey.
Don White, Employee Relations Counsel, American Retail Federation, Washington, D.C.

COMMITTEE ON FATS AND OILS

Scope: To advise the Bureau of the Budget concerning opportunities to reduce the paperwork burden imposed upon establishment engaged in the production, processing and consumption of oils, and to advise the Bureau on ways to improve Federal statistical programs to better serve the needs of government and industry users of Federal statistics.
Budget Bureau Staff Assigned: Harold T. Lingard.

Chairman

T. J. Totushek, Cargill, Incorporated, Minneapolis, Minnesota.

Members

Charles R. Bergstrom, Anderson, Clayton & Co., Inc. Houston, Texas.
Arval L. Erikson, Economic Advisor, Oscar Mayer & Company, Madison, Wisconsin.
Herbert Harris, Treasurer-Controller, National By-Products, Inc., Des Moines, Iowa.
Martin Hilby, Vice President, Riverside Industries, Marks, Miss.
C. H. Keirstead, The Glidden Company, Cleveland, Ohio.
Malcolm R. Stephens, President, Institute of Shortening & Edible Oils, Inc., Washington, D.C.
Harold V. Knight, Lever Brothers Company, New York, N.Y.
Harry H. Kriegel, J. Howard Smith, Inc., Port Monmouth, New Jersey.
R. E. Miller, Buying Dept.. Procter & Gamble Company, Cincinnati, Ohio.
J. W. Moore, Vice President, A. E. Staley Manufacturing Co., Decatur, Illinois.
Boardman Veazle, Commercial Research Dept., Swift and Company, Chicago, Illinois.
Donald B. Walker, Ralston-Purina, St. Louis, Missouri.

COMMITTEE ON MEAT PACKING

Scope: To advise the Bureau of the Budget on reporting, statistical, and record keeping problems arising from the requirements which Federal agencies propose for issuance to the meat packing industry, and to assist the Bureau of the Budget in developing needed statistical programs relating to the meat packing industry.
Budget Bureau Staff Assigned: Harold T. Lingard.

Chairman

T. G. Redman, retired, not replaced.

Secretary

J. Russell Ives, Director, Department of Marketing, American Meat Institute, Chicago, Illinois.

Members

A. C. Bruner, Treasurer, East Tennessee Packing Company, Knoxville, Tennessee.

Howard Dexter, Controller, The Rath Packing Company, Waterloo, Iowa.

Earl R. Frank, Comptroller, The E. Kahn's Sons Company, Cincinnati, Ohio.

J. W. Kelly, Office of Controller, Armour Foods, Armour and Company, Chicago, Illinois.

E. A. Holloway, Controller, Cudahy Company, Phoenix, Arizona.

Robert B. Hunter, Vice President & Treasurer, Tobin Packing Company, Inc., Rochester, N.Y.

J. B. Kilgore, Controller, Wilson & Company, Inc., Chicago, Illinois.

John Killick, Exec. Secretary, The National Independent Meat Packers Association, Washington, D.C.

L. J. Kurkowski, Controller, John Morrell & Company, Chicago, Illinois.

L. Blaine Liljenquist, President and General Manager, Western States Meat Packers Association, Washington, D.C.

Leonard H. Pedersen, Assistant Controller, Oscar Mayer & Co., Inc., Madison, Wisconsin.

Robert F. Potach, Controller, George A. Hormel & Co., Austin, Minn.

James W. Seifert, Controller, The Wm. Schluderberg-T. J. Kurdle Co., Baltimore, Maryland.

Jack B. Sullivan, Comptroller, Stark Wetzel & Company, Inc., Indianapolis, Indiana.

Wm. G. Torrace, V. P. & Controller, Hygrade Food Products Corp., Detroit, Michigan.

COMMITTEE ON NATURAL GAS PIPELINES

Scope: To advise the Bureau of the Budget on report forms and related record-keeping requirements issued by the federal agencies to companies in the natural gas pipeline field in order to improve such forms and to make recommendations to simplify reporting requirements and reduce the burden of reporting.

Chairman

E. H. Hasenberg, Natural Gas Pipeline Company of America, Chicago, Illinois.

Members

W. Page Anderson, Director, Rates and Certificates, Panhandle Eastern Pipe Line Co., Kansas City, Mo.

Daniel L. Bell, Jr., Columbia Gas System Service Corp., New York, N.Y.

I. D. Bufkin, Texas Eastern Transmission Corp., Houston, Texas.

William F. Cummer, United Gas Pipe Line Company, Shreveport, Louisiana; Alternate: J. D. McCarty, United Gas Pipe Line Co.

Robert L. Cramer, Florida Gas Transmission Co., Winter Park, Fla.

Theodore I. Gradin, American Gas Association, New York, New York.

B. K. Hoeldtke, El Paso Natural Gas Company, El Paso, Texas.

Harry A. Offutt, Treasurer, Consolidated Gas Supply Corp., Clarksburg, West Va.

C. W. Radda, Northern Natural Gas Company, Omaha, Nebraska.

Walter E. Rogers, Executive Director, Independent Natural Gas Association of America, Washington, D.C.

Robert H. Stewart, Jr. Manager, General Economics Gulf Oil Corporation, Pittsburgh, Pa.

COMMITTEE ON PETROLEUM AND NATURAL GAS

Scope: To advise the Bureau of the Budget on report forms relating to the petroleum and natural gas producing and processing industries: to reduce the burden imposed upon these industries as a result of Federal reporting and record-keeping requirements: and to advise the Bureau in connection with opportunities to improve Federal statistical programs to serve the needs of both government and industry.

Budget Bureau Staff Assigned: Harold T. Lingard.

Chairman

Robert H. Stewart, Jr., Manager, General Economics, Planning & Economics Department, Gulf Oil Corporation, Pittsburgh, Pa.

Members

E. W. Brindle, Standard Oil Company (Indiana), Chicago, Illinois.

C. J. Carlton, Economics Department, Standard Oil Co. of California, San Francisco, Calif.
James S. Cross, Manager, Economics Department, Sun Oil Company, Philadelphia, Pa.
Theodore I. Gradin, Director, Bureau of Statistics, American Gas Association, New York, New York.
E. H. Hasenberg, Co-ordinator of Certificates, Natural Gas Pipeline Company of America, Chicago, Illinois.
Edward R. Heydinger, Manager, Economics & Statistics Dept., Marathan Oil Company, Findlay, Ohio.
John E. Hodges, Director, Department of Statistics, American Petroleum Institute, Washington, D.C.
Melvin L. Mesnard, Economic Analyst, Independent Petroleum Association of America, Washington, D.C.
B. L. Jones, Mobil Oil Corporation, New York, New York.
Carl E. Richard, Controller's Department, Humble Oil and Refining Co., Houston, Texas.
A. J. Bradford, Comptroller's Department, Texaco, Inc., New York, New York.
Frank Young, Continental Oil Company, New York, New York.

PUBLIC UTILITIES COORDINATING COMMITTEE

Scope: To advise the Bureau of the Budget and to coordinate, as may be desirable, the work of the Committees on Financial Reports and Operating Reports to better serve the purposes of the Advisory Council on Federal Reports and the needs of the Bureau of the Budget and the gas and electric utilities industries; also to assist in the selection of special advisory panels qualified to advise the Bureau of the Budget on any reporting forms and plans concerning which the two Committees would not be adequately qualified to advise the Bureau.
Budget Bureau Staff Assigned: Mr. Harry B. Sheftel.

Chairman

Robert S. Quig, Vice President, Ebasco Services Incorporated, New York, N.Y.

Members

Miles J. Doan, Vice President, The Cincinnati Gas & Electric Co., Cincinnati 1, Ohio.
Theodore I. Gradin, Director, Bureau of Statistics, American Gas Association, New York, N.Y.
G. H. McDaniel, Head, System Operations, American Electric Power Service Corp., New York, N.Y.
John Thornborrow, Assistant Managing Director, Edison Electric Institute, New York, N.Y.

COMMITTEE ON UTILITIES—FINANCIAL REPORTS

Scope: To advise the Bureau of the Budget on financial reporting forms and related requirements issued by federal agencies to companies in gas and electric utilities field in order to improve such reporting forms and plans and where possible to simplify them and reduce the burden of reporting.
Budget Bureau Staff Assigned: Mr. Harry B. Sheftel.

Chairman

Robert S. Quig, Vice President, Ebasco Services Incorporated, New York, N.Y.

Vice Chairman

Miles J. Doan, Vice President, The Cincinnati Gas & Electric Co., Cincinnati 1, Ohio.

Secretary

Theodore I. Gradin, Director, Bureau of Statistics, American Gas Association, New York, N.Y.

Members

Robert R. Fortune, Vice President, Pennsylvania Power & Light Co., Allentown, Pennsylvania.
Arthur E. Gartner, Controller, Consolidated Natural Gas Co., New York, N.Y.
John Geiger, Head, Financial & Statistical Section, Pacific Power & Light Company, Portland, Oregon.

Robert A. Jeremiah, Controller, Long Island Lighting Company, Mineola, New York.

J. C. Johnson, Assistant Comptroller, Southern Services, Inc., Atlanta, Georgia.

Albert J. Klemmer, Auditor, Rochester Gas & Electric Company, Rochester, New York.

Frank H. Roberts, Controller, Northern Natural Gas Company, Omaha, Nebraska.

Mr. C. M. Allen, Vice President and Treasurer, Panhandle Eastern Pipe Line Company, Kansas City, Missouri.

William E. Sauer, Superintendent, Regulartory & Statistical Accounting Department, Peoples Gas Light & Coke Co., Chicago, Illinois.

Robert C. Sloan, Assistant Treasurer, Columbia Gas Systems, Inc., New York, New York.

Alfred E. Softy, Accounting Director, Edison Electric Institute, New York, New York.

William T. Sperry, Assistant to Comptroller, Public Service Gas & Electric Co., Newark, New Jersey.

Douglas M. Tonge, Asst. Secretary & Asst. Treasurer, American Electric Power Service Corp., New York, New York.

COMMITTEE ON PUBLIC UTILITIES—OPERATING REPORTS

Scope: To advise the Bureau of the Budget on utilities operating reporting forms and related requirements issued by federal agenceis to companies in gas and electric utilities field in order to improve such reporting forms and plans and where possible to simplify them and reduce the burden of reporting.

Budget Bureau Staff Assigned: Harry B. Sheftel.

Chairman

Robert S. Quig, Vice President, Ebasco Services Incorporated, New York, New York.

Vice Chairman

G. H. McDaniel, Head, System Operations, American Electric Power Service Corp., New York, N.Y.

Secretary

John Thornborrow, Assistant Managing Director, Edison Electric Institute, New York, N.Y.

Members

Fred W. Braga, Assistant Comptroller & Statistician, The Detroit Edison Company, Detroit, Mich.

Donald E. Rose, Assistant Treasurer, New England Power Service Company, Boston, Mass.

Theodore I. Gradin, Director, Bureau of Statistics, American Gas Association, New York, N.Y.

James I. Poole, Jr., Vice President-Sales & Rates, Natural Gas Pipeline Co., of America, Chicago, Ill.

Francis Quinn, Budget & Statistics Department, Transcontinental Gas Pipe Line Corp., Houston, Tex.

E. A. Willson, Vice President, Northern States Power Company, Minneapolis, Minn.

R. C. Wilson, Manager, Rate Department, Washington Gas Light Company, Washington, D.C.

COMMITTEE ON RADIO AND TELEVISION BROADCASTING

Scope: To advise the Bureau of the Budget on reporting procedures, mainly Federal Communications Commission questionnaires, issued to radio and television stations and to make recommendations towards the simplification, consolidation and improvement of such reporting.

Budget Bureau Staff Assigned: Harry B. Sheftel.

Chairman

Joseph E. Baudino, Vice President, Westinghouse Broadcasting Company, Washington, D.C.

Members

Douglas A. Annello, General Counsel, National Association of Broadcasters, Washington, D.C.

Arthur W. Arundel, President WAVA, Arlington, Virginia.

Alfred Beckman, Vice President, American Broadcasting Company, Washington, D.C.

Robert Cochrane, Assistant General Manager WMAR–TV, Baltimore, Maryland.

Joseph DeFranco, Attorney, Columbia Broadcasting System, Washington, D.C.

Georges J. Gray, Vice President, AVCO Broadcasting Corporation, Washington, D.C.

Howard Monderer, Assistant General Attorney, National Broadcasting Company, Washington, D.C.

Roger Newhoff, President, Eastern Broadcasting Corporation, Washington, D.C.

Roger B. Read, Vice President, Taft Broadcasting Company, Cincinnati, Ohio.

Robert L. Heald, President, Federal Communications Bar Association, Washington, D.C.

Daniel W. Shields, Executive Assistant to the President, Steinman Stations, Lancaster, Pennsylvania.

COMMITTEE ON RAILROADS

Scope: To advise the Bureau of the Budget with respect to federal reporting and record keeping requirements applicable to railroads and subject to review by the Bureau of the Budget under the Federal Reports Act, and to such related problems of coordination and planning of statistical and reporting programs covering railroads as the Bureau may refer to the Committee.

Budget Bureau Staff Assigned: Harry B. Sheftel.

Chairman

Burton N. Behling, Vice President, Association of American Railroads, Washington, D.C.

Members

L. W. Adkins, Vice President, Accounting & Taxation, Louisville & Nashville Railroad, Louisville, Kentucky.

P. L. Conway, Jr., Assistant Vice President, Economics & Finance Department, Association of American Railroads, Washington, D.C.

W. R. Divine, Vice President and Comptroller, Southern Railway System, Washington, D.C.

W. N. Ernzen, Vice President and Comptroller, Chicago, Burlington & Quincy Railroad, Chicago, Illinois.

J. T. Ford, Jr., Assistant Vice President & Comptroller, Chesapeake & Ohio/Baltimore & Ohio Railroads, Baltimore, Maryland.

C. E. Fuller, Comptroller and Traffic Manager, Genesee & Wyoming Railroad Company, Retsof, New York.

Charles S. Hill, Comptroller, Penn Central Company, Philadelphia, Pa.

H. A. Nelson, Vice President & General Auditor, Southern Pacific Company, San Francisco, Calif.

COMMITTEE ON RETAIL TRADES

Scope: To advise the Bureau of the Budget with respect to federal reporting and record keeping requirements applicable to the retail trades and subject to review by the Bureau of the Budget under the Federal Reports Act, and to such related problems of coordination and planning of statistical and reporting programs covering the trades as the Bureau may refer to the Committee.

Budget Bureau Staff Assigned: Paul F. Krueger.

Chairman

Eugene A. Keeney, Executive Vice President, American Retail Federation, Washington, D.C.

Secretary

Arthur Sturgis, Jr., Director Research & Taxation, American Retail Federation, Washington, D.C.

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Members

A. Arthur Charous, Manager, Division of Economic Research, Sears, Roebuck and Company, Chicago, Illinois.

S. Kent Chrisensen Vice President Natl. Assn. of Food Chains, Washington, D.C.

Don J. Debolt, Executive Director, Menswear Retailers of America, Washington, D.C.

Nathan B. Epstein, Vice President, Lerner Stores Corporation, New York, New York.

William Girdner, Melville Shoe Corporation, New York, New York.

Elias S. Gottlieb, Corporate Research Director, R. H. Macy & Co., Inc., New York, New York.

Robert C. Heller, Asst. Secretary & Treasurer, F. W. Woolworth Company, New York, New York.

Alfred E. Kuerst, Vice President, L. S. Ayres & Company, Indianapolis, Indiana.

Thomas H. Jenkins, Research Director, National Retail Hardware Association, Indianapolis, Indiana.

Herbert S. Landman, Executive President, Federated Department Stores, Inc. Cincinnati, Ohio.

Eleanor G. May, Research Director, Woodward and Lothrop, Washington, D.C.

Irving Phillip, Controllers Congress, National Retail Merchants Association, New York, New York.

COMMITTEE ON SCIENTIFIC AND RESEARCH ACTIVITIES

Scope: To advise the Bureau of the Budget on the improvement and simplification of Federal government reporting forms and related procedures concerned with scientific and technical personnel and research and development expenditures in industry, and to advise the Bureau of the Budget as to statistical programming in these fields, with particular reference to industry needs for statistical information.

Budget Bureau Staff Assigned: Margaret E. Martin, Harry B. Sheftel.

Chairman

John W. Reynard, Assistant Manager, Personnel Division Employee Relations Department, E. I. du Pont de Nemours & Company, Inc., Wilmington, Delaware,

Members

H. Dwight Blondefield, Executive Assistant, Advanced Programs and Marketing, Autonetics Division, North American Rockwell Corporation, Anaheim, California.

C. A. Church, Manager, Educational Relations & Recruiting, General Electric Company, New York, New York.

R. C. Cunningham, Director, Staff Programs, Engineering, Westinghouse Electric Corporation Pittsburgh, Pa.

Virginia A. Dwyer, Economist and Actuary, Finance Division, Western Electric Company, New York, New York.

N. O. Heyer, Manager, Manpower Planning, International Business Machines Corporation, Corporate Headquarters, Armonk, New York.

B. F. Holcomb, Executive Assistant, United States Steel Corporation, Pittsburgh, Pa.

Wayne E. Kuhn, Omark Industries, Inc., Portland, Oregon.

George E. Norman, Jr., Vice President, Burlington Industries, Inc., Greensboro, North Carolina.

David Novick, Cost Analysis Department, The Rand Corporation, Santa Monica, California. Alternate: Milton Margolis.

J. H. Pond, Personnel Manager, Employment & Personnel Department, The Martin Company, Denver, Colorado.

Victor Schneider, General Motors Corporation, Detroit, Michigan.

Robert H. Sommer, Managing Director, National Association of Accountants, New York, New York.

N. R. Wenrich, Manager, Business Research, Merck & Company, Inc., Rahway, New Jersey.

C. C. Coyne, Director, Financial & Service Department, Gulf Research & Development Corp., Pittsburgh, Pa.

COMMITTEE ON WHOLESALE TRADES

Scope: To advise the Bureau of the Budget on reporting record keeping and statistical problems arising from the activities and recommendations of Federal agencies relating to wholesale industries, to reduce the burden of paperwork imposed upon the wholesale industries by these requirements, and to make recommendations for the improvement of Federal statistics needed by Government and industry.

Chairman

James E. Allen, President, the Henry B. Gilpin Co., Oxon Hill, Maryland.

Secretary

Paul L. Courtney, Executive Vice President, National Association of Wholesalers, Washington, D.C.

Members

Gilbert Campbell, Albemarle Motor Company, Charlottesville, Virginia.
W. D. Jenkins, President, Radio Supply Company, Richmond Virginia.
Frank J. Mulvey, National Auto Service Co., Inc., Washington, D.C.
Hugh N. Phillips, President, Frank Parsons Paper Company, Washington, D.C.
Harold O. Smith, Jr., Executive Vice President, U.S. Wholesale Grocers Association, Washington, D.C.

Another illustration is on the water pollution situation. There was a questionnaire to go out to all relevant industry as to whether they could comply with proposed pollution agency standards. There were no consumer representatives involved at that particular time. I can submit a full list.

Senator KENNEDY. It comes as a surprise to me, and perhaps we should know that there are a group of advisory committees that are advising the Bureau of the Budget on a whole host of industry related subjects, and that there are no groups that are purely representing the consumer.

Mr. KASS. Senator, as a matter of fact, Senator Metcalf put in a bill for this. When requests for consumer representation were made they permitted a number of us, Mr. Berlin and I participated, and we really crashed, I would say, the meeting, and they did not permit us to even ask questions. They let us sit in as observers. So, again, the Bureau of the Budget has thwarted the representation of the public.

These are very dull, boring meetings, quite frankly. They are going over statistical reports as to whether an industry can or cannot comply with it, but we believe it is very important to the public to be present in these meetings. I might say that a representative from the Water Pollution Agency came up to me after the meeting and said that he just wanted to thank us for being there. He said our presence as a consumer representative, representing the National Consumer Law Center at the meeting, boosted or bolstered his not caving into some of the requests or demands by industry. I think that the presence and representation of consumers on these advisory panels is highly desirable. Certainly I and our organizations have gotten involved in litigation.

Mr. Robertson has talked about the Freedom of Information Act. I think it is time that this subcommittee frankly reviewed the Freedom of Information Act, because there are a number of problems.

Senator KENNEDY. Let me ask you, did you go into Virginia Knauer's office and ask that they send some people down to the Bureau of the Budget to represent consumers? Has anybody asked them, and what has been their reaction to it?

Mr. KASS. We have, Senator. We have only recently, or they have only recently started to send representation. They did not know about it until Senator Metcalf and others called it to their attention. I would think that a questionnaire or some survey from your subcommittee as to not only the Bureau of the Budget advisory committees, but as Mr. Johnson talked about, the Federal Communications Commission, many agencies have advisory committees that play a very important role in making the initial decisions the Government takes, and I would recommend strongly that this committee look into it.

Senator KENNEDY. What you are suggesting in terms of the various advisory committees for the administrative agencies is that we ought to determine what role and what participation the public or consumer should have.

Mr. KASS. Yes, sir. We also wish we could find what role was played by agencies over the past 30 or 40 years in making the determinations that have now been made.

Senator KENNEDY. A good suggestion.

Mr. KASS. In terms of the specific bills, Senator, without going into more detail, I would suggest that Congressman Ryan has introduced a similar bill, similar to your public counsel bill, where it makes specific recommendation as to representation on the Board of Directors; namely, some people from low-income areas, and also some people of older age, older citizens. I think they ought to be well represented on the board of directors.

Again, I think the bill ought to be expanded to include representation on the advisory committees. Furthermore, I would support what Mrs. Edelman said on the rulemaking.

Senator KENNEDY. I would hope that you would have some suggestions on that Board of Directors to give us. I know that Congressman Ryan tried to write into the legislation more precisely the kinds of people that would be on it. I am not sure that is the answer, but we are pretty flexible on this, and I hope you can give us some ideas.

Mr. KASS. Senator, I have given that a little thought, and I am a little concerned that if the President has the authority to make the appointments and follows the lead of the Chairman of the Federal Trade Cmmission, then there would be very little representation present. The history of the Administrative Conference that made initial recommendations pointed out the corporation approach, the public corporation approach was only one means of allowing public representation, and Mr. Montgomery, or somebody else, made the point that maybe there ought to be more consideration in assisting public interest law firms or foundations supported, or those of my own sort which are not foundation supported. Let the free enterprise system aid us in this representation of the public.

Senator KENNEDY. Mr. Halpern, I somehow went by you. You are with the Center for the Study of Law and Social Policy. We appreciate your appearance.

STATEMENT OF CHARLES HALPERN, CENTER FOR STUDY OF LAW AND SOCIAL POLICY

Mr. HALPERN. The center is a nonprofit, tax-exempt corporation in the District of Columbia under the supervision of a board of trustees

which is broadly representative of the legal profession. It was established about a year ago to provide representation to unrepresented groups, with primary focus on Federal administrative decisionmaking. The center grew out of several years of discussion among many younger members of the bar, both in private practice and the Government, who were concerned primarily about two aspects of administrative decisionmaking.

First, the fact that most administrative decisions were made with heavy input from corporations and other large, affluent interests in society, and virtually no input from the poor and from groups like environmental groups which were not organized or not sufficiently funded to afford the kind of representation that corporations have.

So agencies were clearly growing to favor the one side for more than the other. Certainly there is no worse example than the Food and Drug Administration, an agency that has steady pressure from the major drug companies, and no countervailing pressures from any other interests in society.

It was our belief at that time, and our experience has since confirmed that agencies like the FDA and other agencies which face similar problems make better decisions when their processes are adversary processes.

Another point which lay behind our thought on the center was that the definition of poverty for the purposes of administrative agency proceedings has to be greatlyy expanded. Our notion of who are poor people really is inadequate to deal with the question of what sorts of people or institutions can influence Federal administrative agency decisions. A person with an income of $10,000 or even $20,000, with a major stake in an administrative decision, is simply not in a position to influence that decision as the present structure is established, and he is not likely to belong to an organization which has sufficient resources to influence an agency decision. The primary expense is the expense of lawyers, and in the past there have not been lawyers who could represent the poor as we have to redefine it in this conflict in agency decisionmaking processes.

Our thought was to set up an institution that would provide representation for these unrepresented groups and individuals. At the same time we tried to establish an institution which would involve law students directly in our programs and provide a new kind of legal education. We established, with five cooperating law schools, a relationship whereby they send us students during their second and third year of law school, during the term, and they receive a semester's credit for a program in clinical legal education with us, working on our public interest representation.

With these two goals, representation and legal education, we began last August with a staff of four attorneys. In preparation for the establishment of the Center we discussed our proposal with a wide range of lawyers, both in private practice and the Government, and also in the law schools. I think it is significant since what we are doing bears a close relationship to what the corporation established by S. 3434 would do. There was virtually unanimity among the lawyers to whom we spoke about the need for the kind of service that we were going to provide. Lawyers are schooled to believe in the adversary process, and anyone familiar with administrative decisionmaking in Washington

knows that at the present time the adversary process simply does not exist in that context.

Our solution to the funding problem has been to look to the foundations. There has been some comment already this morning on the climate of caution among foundations today. It is a problem that we have spent long hours struggling with, and had some considerable success to date. We have succeeded specifically in surviving for 11 months with four lawyers who have been paid more or less regularly, and our prospects of getting a substantial grant that will carry us for the next year and a half looks very good at the present time.

I should say, however, that foundations are not a long-range solution to the problem that your bill is intended to deal with. First, they simply do not have enough resources to deal with the magnitude of the problem. Second, they are very cautious about the political implications of the activities they undertake, and that is going to be a continuing concern of theirs. I hope the atmosphere is going to improve over the coming months, but this will always be a problem that they will have to deal with in funding operations that are concerned with public interest representation.

Finally, foundation funding imposes the very significant constraint that organizations receiving cannot participate in any lobbying or other legislative activity, and in the kinds of problems we deal with that is a very important constraint.

On the other hand, I think we should welcome the willingness of foundations to support what Marian Edelman has correctly characterized as an important and conservative effort to make our institutions work, and I think so long as their interest and willingness to support these institutions holds out we should all welcome them and welcome the opportunity that they give members of the bar.

Our experience over the past 11 months has underlined the need for the kind of public interest representation which S. 3434 would provide. We have been concentrating our efforts in the areas of environmental problems, consumer problems, and provision of health services to the poor. Much more legal business has been brought to us than we can handle, and I am sure that just reflects the experience of everyone around the table. So, we are talking about an area where public resources must come in.

To comment briefly on some of the matters that we have handled, I would first like to underline Marian's point that we really need a change in the attitude of the administrative agencies. In all of the cases we have handled we have been treated as at best I should say bastard children. In some instances agencies have refused to meet with us in situations where I know from my experience in private practice any private litigant would certainly have had free access to decisionmakers or at least the staff.

Senator KENNEDY. Do you want to elaborate on that and give us any examples you might have.

Mr. HALPERN. Well, one case in point involved the matter of defective wheels, which Reuben Robertson had previously adverted to. This was a situation where the National Highway Safety Bureau entered into a settlement which left 150,000 trucks on the highways with wheels which were regarded by their staff as inherently defective. We went to the district court to protest the settlement, and our cocoun-

sel, I might add, in this case, was Arnold & Porter, and I think that is a very significant example of where a private law firm took a rather dramatically sensitive case. The district court ordered that one of our plaintiffs, an associate of Mr. Robertson, should be permitted to participate in the proceedings in the National Highway Safety Bureau, and they sent the matter back to the bureau for further action. We found out the National Highway Safety Bureau would not even meet with us, notwithstanding the fact that the district court had ordered them to permit us to participate in an appropriate fashion. We are now in the process of continuing to negotiate that through with them, hoping that they will take a more flexible and reasonable position.

Senator KENNEDY. Are you suggesting by that example that it is extremely difficult to get the cooperation of the agencies or does it vary from agency to agency? Does it depend upon the particular administrator himself? Could you give us some kind of a general overview of that problem?

Mr. HALPERN. Well, there is a degree of variation among the agencies, as you suggest. Our experience has been too limited, I think, to generalize broadly. I can say that agencies like the Securities and Exchange Commission have been relatively open, and we have had relatively free access to meetings with their personnel. Other agencies, such as the Highway Safety Bureau, have been startlingly recalcitrant. A common denominator has been that all of the agencies we deal with are less willing to deal with us than was my experience when I was representing clients in private practice in Washington, and it is kind of a matter of education, I think, as Marian suggested. They have to be persuaded that we are representing legitimate interests, and I think the passage of a bill like yours would go far to persuade administrators that public interests, consumer groups, environmental groups have a legitimate role in the administrative process.

I started to advert to the matter of DDT. Mr. Berlin and we have been working jointly in the Department of Health, Education, and Welfare and the Department of Agriculture to get those agencies to act against what the scientific community regards as a very serious environmental hazard. What is interesting, most interesting to me about our efforts has been the total unwillingness of those departments to give serious weight to the scientific evidence which we presented to them, until they were ordered to do so by the Court of Appeals for the District of Columbia Circuit, and only grudgingly, after the court has ordered, are they willing to give the kind of serious attention to these problems which they obviously need. The reason for these agencies' attitudes and feelings are very simple and clear.

The Department of Agriculture Pesticide Regulation Division has never had to deal with anybody in the past except pesticide manufacturers and spokesmen for farmers' groups. Environmentalists have simply not been in a position to have their voices heard in that agency. Our belief is that the public interest will only emerge when an agency like that has to deal with the many different interest groups in society who are legitimately concerned with their decisions.

With regard to the bill itself, I will submit written comments, but I would like just to make a few general comments. First, I think the bill should specifically recognize that there is no single public interest, that there is a multiplicity of unrepresented interests who should

be represented in administrative decisionmaking. I think perhaps a preamble might be added which recognizes this point explicitly and recognizes explicitly the importance of having a multilicity of organizations or law firms in Washington who could represent these interests in these administrative agencies. Having a single corporation like the one proposed in the bill is not enough, and I think the bill should be explicit in authorizing and encouraging the support of other kinds of institutions in Washington which would provide representation for other interests.

Let me give you a brief example of that. The trans-Alaska pipeline was going to, as you know, begin in late spring. Arnold & Porter represented a group of natives who had a very legitimate concern with the design and location of the pipeline. We represented a group, an environmental group, who had another and different concern about the design and location of the pipeline. Our interest did not coincide. We both sought judicial review of the pipeline plans and, in fact, we both won injunction against the building of the pipeline. I think that that is the kind of situation that is really going to be very frequent, and the bill should expressly try to foster the situation in which where there are different kinds of public interest, if you will, all will be heard, because it is only if those interests are heard that a final decision which you might say embodied the public interest in a different sense can emerge.

(Mr. Halpern's testimony concludes here.)

Mr. MONTGOMERY. Senator, I think that is an interesting example, and perhaps others could suggest other examples, of how there are conflicts of interests even in pro bono work, which is exactly the point he is making.

Mr. KASS. Senator, if I can interject, in Congressman Ryan's bill, H.R. 15909, it specifically adds that by saying corporations shall endeavor to insure that political viewpoints are represented in recognition of the fact that the unrecognized public might have diverse goals and interests, and I would encourage that language in the bill.

Senator KENNEDY. On page 7, line 22, under the activities and powers of the corporation, paragraph 1, S. 3434 refers to representation where appropriate of separate interests and distinct groups within the unrepresented public in proceedings before regulatory agencies of the United States. Perhaps we can expand on that or make it clearer.

Mrs. EDELMAN. Could I interject just one other point on the point that Charlie has made?

Senator KENNEDY. Surely.

Mrs. EDELMAN. I just wanted to make a point based on his comment, that private law firms can lobby, and Charlie points out about the fact that his Center cannot, and that leaves a very fundamental unequal representation of these different kinds of consumer groups. I would like to see explored the possibility of exempting certain kinds of public interest groups to allow us to lobby and follow through on administrative decisions, because unless we can do that we are already at a fantastic disadvantage.

Senator KENNEDY. That is a very good suggestion. Mr. Cahn is with the Citizens Advocate Center.

Mr. Cahn, we have heard a great deal about representation of the

public interest within the administrative agencies. I suppose the question comes up whether, if we do all the kinds of things that have been suggested here to insure the public voice in administrative decisions, will we not in some way handicap the administrative agencies to such an extent that they cannot fulfill their responsibility, either to the Congress or to the public generally?

STATEMENT OF EDGAR S. CAHN, EXECUTIVE DIRECTOR, CITIZENS ADVOCATE CENTER

Mr. CAHN. Let me respond in two ways. One, I think that that assumes a monolithic aspect within agencies that I think all of us have found not to be true, that there are within agencies a variety of diverse views. Ombudsmen in other countries have found that much of their information and some of their most crucial information comes from concerned civil servants who are frustrated and feel, in many respects that for a variety of reasons, whether it is redtape or the structure of the agency, that has become encrusted over the years so that the legitimate concerns are not, in fact, surfacing. I think the question of agency performance ought to be considered from the point of view of those within the agencies themselves who are concerned about assessing agency performance in the light of issues of official accountability.

Second, it is both a curious and strange proposition that this proposed agency is attached to the executive branch when I believe that really in a democratic society it is Congress' function to make the law.

Now, I consider that when an agency is delegated rulemaking power it is in effect delegated legislative power, and what concerns us is that Congress itself really, by its own admission in terms of a number of reports and the number of studies issued by congressional committees, finds that it does not have the power to see that the legislation it has enacted is carried out faithfully. Thus, in the rulemaking process itself administrative agencies, functioning as legislators, not only disenfranchise the intended beneficiary, but disenfranchise Congress and the American public, too.

You yourself have found this to be so in the context of the school lunch program where regulations were issued in 1968 that required States to submit plans that set forth eligibility requirements. There was then pervasive flouting of that very regulation which was law, so you had only two officials of something like 3,000 people who were assigned to food and nutrition programs within the Department of Agriculture reviewing those eligibility requirements. They were doing it part time. You had eligibility plans which explicitly barred children whose families were on welfare, and they were accepted without scrutiny of challenge. That to me is a flouting of the will of Congress and the will of the American people. If we are talking about rulemaking as that kind of legislation that goes on between the cracks when Congress writes, not a blank check, but a partially blank check to the executive branch, then the question is whether a body like the Public Council Corporation ought not to find a counterpart at least in congressional concern. What we find is that we are dealing, in effect, in a no man's land, where most of these issues fall below the

threshold of congressional mandate. It promotes public cynicism when you have a law passed, and you go home and tell your constituents that a law is passed and, in fact, nothing happens. It is not a matter of evil men; it is a matter that in the process of administration and rulemaking roadblocks are thrown up that, in effect, thwart the purpose for which the law was enacted. Thus, I think we are talking about the question of enfranchisement. This is why those involved in public interest law have spoken here today so frequently about the litigation oriented aspects of many of the activities. Yet, we all know the burdens that the courts face in terms of sheer overload. We are keenly aware, I think, of the broader application of the Supreme Court decision in the *NAACP v. Button* case, where litigation no longer is a matter of private disputes settlement but becomes the sole means of enfranchisement to the minority groups and the disenfranchised.

I would like to talk about the values of this legislation and then some of the deficiencies and gaps that could be filled. Among its chief values is the explicit recognition that a grantmaking agency's functions in a legislative capacity when it makes rules and, thus, there needs to be a formal mechanism for "representation" in that process. It recognizes, too, that Congress cannot presently perform that function even though it has a legislative oversight function. Thus, for instance, the GAO certainly does not (with the exception of a relatively few audits) really get into the question of whether an agency is performing its function. Yet, the Comptroller General has the statutory power to hold up money when the money is not being dispersed in accordance with the mandates of Congress. Congress itself continuously, through various congressional committees, expresses considerable frustration about going back to rewrite and rewrite laws that have been thwarted. But Congress does not have the capability to find out what is happening in the meantime, and certainly no ability to provide for retroactive remedy or insure preventive intervention prior to injury resulting from misuse by the executive of its legislative powers.

I think the second thing that is valuable about this legislation is its formal incorporation of what might properly be called the consumer prospective. By that I do not mean simply the consumer of material goods and services, I mean the consumer of social policies, regulations, of such programs such as medicare, medicaid, or education, food stamps, and commodity programs. The bill is premised on recognition of a need on the part of government to formally incorporate and enfranchise the consumer perspective. We all do reasonably well protecting ourselves as producers. We spend whatever time and effort is necessary when we are involved in protecting ourselves, whether it is producers. That is true of our own private-public interest law firms viewed as producers, corporations, of the private sector, of social workers, or teachers. All do very well in protecting their interests as producers, but we are also all consumers and as consumers, we are lazy. That is not a condemnation; it is just an observation. The only way the consumer, defined broadly, has been protected is by the creation of producer roles to protect the consumers interest. To the extent this legislation recognizes and embodies that principle—the creation of producer roles to protect the consumer's interest—it is a very important step forward as a legal principle.

I think that the third thing that is important is that it recognizes that there is such a distinction between facts which are objective and the process of factfinding, which is not neutral but which is an act of advocacy. Thinking particularly of *Hunger, USA*, and the work of the Citizens Board of Inquiry, the facts were objective, but the process of finding them was not neutral or disinterested. If nobody is motivated to dig facts up, then they do not appear; and, if no facts have been gathered, that is used to corroborate the position that hunger does not exist. Your own work and that of others in hunger, migratory areas, for example, demonstrates that the facts may be objective but that does not mean that they are neutral. I think the recognition that the factfinding process may be objective, but is not necessarily a neutral process, is a very important one.

I think, in addition, that if this bill is read broadly that it potentially goes beyond all of the victories that we have been able to win in the courts. The courts take the position that it is not their job to second guess how the Secretary of HUD or the Director of OEO or the Secretary of the Department of Transportation runs his programs. They do not fit as super secretaries to review the substantive judgment of top officials in the executive branch. One can get the right to intervene; one can get standing or rights of disclosure, but those are basically procedural. And courts have been loath to levy any substantive requirement that a program actually produce, or even to find that a policy decision is so contrary to the purposes of the act as to be illegal because it thwarts the purposes of the act. Thus, hungry people are not fed, poor children are not educated, and impoverished people do not get medical care. Judicial relief is limited because the courts do not get into substantive standards; they do not want to, and they feel that it is not within their purview.

One major possibility raised by this legislation goes to the question of whether through the rulemaking process one can get agencies to issue rules dealing not only with procedures but also with respect to outputs, evaluations, concern over whether dollars buy anything, and what the agency holds itself out as trying to do by adopting one approach to achieve rather than another. The judiciary cannot do this. Congress can only review this occasionally and on a sporadic basis. But there is a need for continuous oversight, in order to judge performance against substantive standards clearly articulated policy goals.

Finally, I think that rulemaking as set forth in this legislation must be construed to include more than policymaking. There is a crucial and neglected aspect of rulemaking which goes to levels of enfranchisement and the allocation of manpower within the department for various purposes. Right now there is an allocation of manpower within the departments that means that zero number of personnel by and large are involved with finding out whether any rule, any policy is ever obeyed. Parenthetically, I would hope there would be clarification that this legislation applies to grantmaking agencies. In the regulatory field, we are dealing with a power of the Government that has been exercised since the thirties, and you have a body of law, and practitioners, and so forth. In the grantmaking field you really have no law; you are in a no man's land; you have the Congress with occasional oversight and the courts with some steps and standard pro-

ceedings of rights to information and some procedural rights to information and to standing of a limited nature. Here I think there is a need to be explicit in the legislation at least in the legislative history. I understand that the wording can be read to include, and I understand that there is at least a broad reading of the wording certainly which would extend this bill to grantmaking agencies. But, particularly for the poor what the ICC does and what the SEC does may be important. But, with what is done in the fields of welfare or public housing or highways, these become a matter of life and death. Therefore, it becomes of critical importance to deal with the grantmaking agencies. Rulemaking in these areas does not reflect the consumer's perspective and certainly not his best interests. You can look at the school lunch program or the Bureau of Indian Affairs. You are certainly acutely aware of the extent to which even a Presidential mandate to establish Indian advisory boards was prevasively flouted by the officials responsible for implementing that mandate. So the question comes up whether or not there will be any enforcement mechanism, any followup mechanism, and I think this is a matter of congressional concern. I do not think Congress can delegate its ultimate responsibility for seeing that the laws it passes are properly implemented. That job cannot be entrusted entirely by Congress to a Public Counsel Corporation, any more than I, as a private citizen, would want to delegate my ultimate responsibility as a citizen to any person, group, representation, whether elected or otherwise.

The ultimate responsibilities of citizenship are nondelegatable, I think, but in terms of manpower, in terms of the resources, in terms of followup, in terms of the magnitude of the task, Government and Government alone can do the initial job of policing itself. The Government with or without computers put the individual citizen at an extraordinary disadvantage in making a case, for in each instance the citizen bears the burden of proof of going forth to show his complaint rather than being given access to comprehensive evaluations of a program.

Another concern stems from my participation in a rather novel rulemaking process by the Department of Transportation that was concerned with the rights of citizens on highway routes. Certainly that got to be an extensive debate, so they did issue a hearing procedure of which I think you are doubtless aware, where citizens would have an opportunity to comment not only on the initial route, but also on the corridor and design and so forth. Very frankly, those procedures do not seem to have proven effective. You can go through procedural requirements if you are really careful as an administrator; you can comply with every procedural form, you can have due process in a hearing and come out to where you want, and still thwart the purposes of the act. Thus, in specific cases, Nashville for instance, you have highways running through areas being built up by model cities money. So you have one department of government funding a program which literally destroys the area being built up by model cities, or urban renewal. And nobody comes with the question of why was there no consultation, why was the Intergovernmental Act of 1968 not enforced, what was the interagency coordinating mechanism doing to resolve these conflicts amicably and rationally, and why was this not activated?

If one wants to deal with a specific example where you have every kind of law on the books that you could possibly want, the perfect example would be relocation. Six times since 1949, five times within the past 7 years, Congress has enacted relocation requirements, each time more stringent, saying to the executive branch: "Will you please stop simply displacing people; we did not pass these programs to trade new slums for old. That was not what we meant." In terms of regulation promulgated by HUD, I would say frankly that I would be hard put, if I was intervening in HUD hearing procedure to think up one more regulation that they could dream up that would further safeguard the citizens. They have done a good job on paper, and the question then comes down to whether there are any mechanisms for monitoring and enforcement, whether the agency promulgated any rules for complaint procedures and established grievance mechanisms, whether it has promulgated any rules with respect to its own allocation of manpower resources, and whether it has created, in terms of de facto rulemaking, a separate device for processing complaints. Right now, the de facto policy is "hear no evil, see no evil, speak no evil." The result is not just social cost. Even measured by actual dollar cost, we may be worse off than without these programs. The bill represents a major step forward in recognizing certain important principles that have not been recognized to date, as a matter of law. For it is ultimately the duty of government to see that the Government has the mechanism to render itself accountable. We face problems such as decentralization. Anything you set up in Washington will have to face the fact that you have, in fact, 10 little Washingtons spread throughout the United States, which are remaking our national policies. The 10 regional offices are making rules, so you have a different policy for the Northeast, the Middle Atlantic, the Southeast, the West, and for the Great Lakes region. And so decentralization, in effect, only defeats accountability. It lessens the ability of Congress to scrutinize what is going on. It is much easier to watch what an agency does in Washington, than in the regional offices. And I can only say that the rules, either applied or written on the regional level, are different from national policy. When one gets to block grants to States or cities, the problem of accountability in rulemaking, or inspection in rulemaking, the power to thwart congressional will is even greater.

There is need for prior notice of any rulemaking procedure to be given to the Public Counsel Corporation because I guess I do not have enormous faith that there will be such notice given as a matter of course, unless it is, in fact, either written into the statute, or unless there is some provision in the legislative history.

I think there needs to be some understanding in the grantmaking field that we have a hybrid animal and that rulemaking and grantmaking are often combined. When one makes a grant, one can make a policy, so rulemaking must be construed to include specific decisions in specific cases that have broader public impact so that the right to intervene in rulemaking is not limited simply because they can say, well, this is just a grant to a given body where the grant or the denial or refusal to renew a grant, in effect, establishes a policy and a precedent.

I think there is a need for expenses to be paid and for money, so that goods come home.

I do not think that this goes to the diversity of interest that has been mentioned, and particularly the poor. I think when one talks about the public interest, one can talk about a variety of public interests, but there are some more disenfranchised than others, so among the disenfranchised one can have all virtuous causes, and yet some persons who, in fact, because they are more disenfranchised, have less access to the media, have less access to the ports, have less access to the informal mechanisms that both private law firms and citizen groups have, that there needs to be concern about allocation of resources among a variety of public interests.

Let me be explicit. If all resources here go into pollution and regulatory agencies and common carriers, and the poor remain disenfranchised, and minority groups remain disenfranchised, then I think there must be some concern over the fact that there is an immoral allocation of resources among all good causes.

The middle class and the wealthy, in their consumer capacity of citizens are all disenfranchised, but yet, it does not mean they are all equally powerless.

Senator KENNEDY. Very good. That was an excellent survey of the general problems that we face.

I know that you were very active in editing the book "Our Brother's Keeper," which concerns itself with the Bureau of Indian Affairs. Do you see a particular role for this kind of advocacy for the American Indian? Do you think that the recent suggestion made by the President, that an Indian Trust Counsel be established, can meet the requirements of appropriate representation for the American Indian?

Mr. CAHN. I would hope that it could in many respects. I think that I would want to say that I have words of great praise for that message and what it stands for, and the effects and sensitivity that it reflects. The fact that the responsibility of the trust authority is proposed by the President, illustrates that it would only deal with land and resource problems, and means that a vast area of the rights of citzens with respect to trading post franchises, with respect to the way the schools are run, there is a duty by law for every U.S. attorney to take any case involving a right, either civil or criminal and any case of law in equity, and I would say that there is no attempt to replace that law, and I am concerned over those areas.

I am also concerned over the fact that very frankly the tribal councils, the act assumes that the tribal councils have been vital, and in fact autonomous and responsive mechanisms of representation, and here I must say that whatever one says about local government, and the problem throughout the United States, when one talks about tribal councils, one must recognize one is talking about a hybrid.

In Oklahoma, for instance, one has five tribes whose chairman is appointed by the President of the United States, and I am thinking of the Osage Nation in Oklahoma, and the main vote in the tribal council lives in California, and is predominantly white, and this is because mineral rights were sold in 1920, and so I am concerned. And if you ask whether this solves, in fact, all of the problems of the Indian, even their legal problems, the answer is "No".

But, I must go beyond that and say very frankly in dealing with the law, in dealing with public interest representation, we are dealing with a profession that is about 98.5 percent white.

In the case of Indians we are dealing with a situation where there are only between a dozen and a score of Indian lawyers and, therefore, to the extent that we are concerned, not with legal representation in the narrow sense, but with justice in the broader sense, we have to begin to devise a remedy-creating institution which can function without dependency on those who carry the LLB union cards and in consequence, how can we deal with justice without a 2-year backlog in the courts, and even with extension of the courts, and appointment of judges, the process is inherently oriented toward fault finding and looking at the past rather than saying how can we live with each other in the present and the future.

There is to the degree, to the extent that this provides an alternative to litigation, an alternative to the rules of the court that provide for litigation, it provides a forum in which one can stop yelling and screaming as to who hit who first, and beginning to sort out how a society can begin to renegotiate this social contract in terms of specific policies and specific areas of law, and specific regulations in a constructive way without doing battle as we do in court, because that generates hostility.

Senator KENNEDY. Very good. That is very helpful.

Our final witness will be Edward Berlin, who is a former Assistant Counsel of the Federal Power Commission, and who has formed his own law firm and has been greatly interested in the whole field of public representation. We are very interested in your comments and appreciate your being here.

STATEMENT OF EDWARD BERLIN, OF BERLIN, ROISMAN & KESSLER

Mr. BERLIN. Thank you, Senator. Since most or many of the specifics have already been touched upon, I think I would prefer to just make some general observations, particularly about the development of the public interest sector of the bar.

I fear that from the size of the contingent that has been assembled at this table this morning, and from Bruce's very appropriate outlining of the pro bono efforts of traditional law firms, that one would be apt to misconstrue the extent to which the public interest bar has, in fact, developed.

In point of fact, I think we would be hard pressed to put together a similar assemblage in any other city in this Nation, and indeed it is questionable whether or not you could put together a similar contingent from people all over the country.

Clearly it is the case that to the extent that there is a public interest bar developing, it is developing in this city, and I think it is logical and appropriate that it should have begun here.

I think it is also significant to point out that notwithstanding the size of the movement in this city, as Marian has very correctly summarized, we have yet to even begin to scratch the surface.

To the extent that we have been active at all over the past year or two, our activity has centered on putting out fires. It has been very ad hoc, very sporadic, and I cannot see any possibility that he will in the foreseeable future, be able to practice anything approaching fire prevention.

We always jump in after it is far too late for us to be there, and as a result the problems are complicated considerably.

When we began our small effort in this area we did so with our experience as bureaucrats in a variety of Government agencies, and we left those agencies with the thought that basically bureaucrats, at least on the middle level, were honest people who, if properly educated, would perform their functions as the law seems to suggest they should be performed.

We were also persuaded that the reason that function had not been discharged as we think it should have been was because those individuals were not receiving the education that should be accorded to them, and we decided that the way to solve that problem was to develop a continued public presence before the administrative agencies that make decisions on a daily basis, decisions which a vital effect on the lives of each of us.

Unfortunately, we have done nothing in this area, and I think very little has been done among the group that is assembled here, and it is for a very good reason.

You cannot accomplish the radical kind of decisionmaking change that are really speaking about on an ad hoc basis. You have got to be before the administrative agencies and the middleline bureaucrats on a continual, everyday basis.

You have got to help mold their thinking before they even publish those proposed notices of rule makings, which all of us know are published in so-called tentative form only after they have been approved by the middleline bureaucrats, the assistant secretaries and often secretary.

The burden upon those who wish to make alterations once that process goes through the first stages is enormous. It is an impossible burden in most cases, and it will not be solved unless we have the capability of getting in there to help mold those presumably preliminary determinations.

From my experience, trying to do that in the private sector, with complete failure in those efforts, I have no hesistancy in suggesting that it cannot be done without some assistance, and I ask whether it should be done without public assistance.

My law firm represents clients who can afford to hire us. It is disturbing to me in many cases to have to take fees from private individuals to litigate and perfect public rights. There is no reason in the world why a private litigant should be forced to expend his own resources to perfect a right that each of us will benefit from to the same degree and the same extent.

Yet that has got to continue unless and until we develop the appropriate sensitivity in administrative agencies. Litigation is not the solution. Most of us around this table practice litigation to a far too great extent. The result of litigation, occasionally, is the winning of a single victory. As Charley Halpern has pointed out, even a victory, although seemingly significant when the opinion comes down, is often thwarted when the final resolution gets back to the administrative agency.

In all of the areas we are talking about it is unrealistic to expect that litigation will ever be the solution. The courts have, without exception, shown that they are not going to superimpose their judgment in the

final analysis in place of those of the so-called expert agencies created by the Congress.

We win procedural victories. Those are easy. The agencies have been too recalcitrant and so unwilling to adopt procedures that are sensitive to the public submission of divergent views that we have no difficulty in establishing our procedural rights.

The difficulty that we are facing now, having won the small battle, is that of losing the entire war, because now that we have cases remanded to the Federal Highway Administration, to the Department of Agriculture, to the Department of HEW, no one of us sitting around this table can afford to expend the time and energy required to monitor those agency proceedings, even if we are permitted to participate, which is doubtful, on a regular basis. You just cannot spend the time sitting in administrative hearing rooms, the time it requires if you are really going to achieve some final results. That is why, as far as I am concerned, the most significant thing that can be accomplished, and can only be accomplished with efforts such as the bill you have introduced, will be to develop a continual presence before administrative agencies, and I still have not lost the confidence and the hope and the expectation that if that presence were truly developed that the middleline bureaucrats would in turn develop the appropriate sensitivity to the concerns that we are articulating.

I think basically they are honest people, but they are being expected now to do an impossible task, when the lobbying efforts that they are exposed to are so patently lopsided.

Senator KENNEDY. Why not institutionalize that. Why not have within the agency someone who has the responsibility for representing the public interest in all of the agency proceedings?

Why not attempt to do it that way, internally, rather than through an outside public counsel? Or would they be complementary in nature?

Mr. BERLIN. I would strongly urge you to resist that if it were the exclusive approach.

From my experience with agencies, not only the Federal Power Commission, the Department of Agriculture, particularly in the pesticide area, and other agencies as well, my experience is that the staff of an agency tends to become captured by the industry being regulated.

I think this is inevitable when you have a situation where the agency both has the responsibility to promote that industry, and also to regulate it.

Unfortunately, this is the case in the overwhelming majority of situations that we have. We have a Federal Power Commission, and that has a deep responsibility to promote the electric and gas industry, and it is also called upon to regulate those industries.

We, of course, have the same situation in the Department of Agriculture, with the pesticide program.

Senator KENNEDY. Say that we have an Assistant Secretary of Agriculture, who is responsible, statutorially, to represent the public interest. This would not make sense, either?

Mr. BERLIN. I think not. It would make sense, but certainly it would not be the complete answer, Senator.

Attorneys are only the minor part of the necessary ingredient

that has to be built in. Let me make this one comment, because I hope it is envisioned in the bill.

Attorneys in most of these areas cannot operate effectively without expert assistance—economists, medical professionals, scientists generally. If the Assistant Secretary of the Interior Department has the responsibility for consumer or conservation representation and is forced to rely upon the same experts who within that agency are forming policy determinations for the Secretary, I think we have accomplished very little, and indeed perhaps we have even set things back to some extent.

Senator KENNEDY. Very good. Let me ask you this: As one whose principal source of income is from private clients, do you think if we develop a Public Counsel Corporation that this would dry up resources that your law firm might receive, independent of the language in our bill that would permit contractual arrangements with law firms?

Mr. BERLIN. I think not, Senator. As my law firm witnessed the evolution of foundation-supported law firm, we were concerned about this problem, and we tentatively reached the conclusion, and I think our conclusion has been borne out, and been shown to be justified in recent months, that there is a mushrooming effect. The more activity that is generated in this area, the greater the need for more activity. I think we have seen this particularly in the environmental area. As we have been able to achieve one success, we have stimulated inquiries into a whole range of other environmental problems. So far from having any retarding effect, I see your bill as stimulating the growth not only of public interest-private firms, the pro bono sector, and hopefully the continued dedication of foundations.

Senator KENNEDY. Do any of you have any brief comments on how we could make this independent of the Bureau of the Budget?

I suppose that we could model it after the General Accounting Office.

Mr. BERLIN. Many of us in testifying on consumer representation bills in the past, Senator, urged that the formulation take the shape of the GAO, that it be a congressional agency as opposed to an executive one.

Mr. CAHN. You also have the possibility of a trust fund arrangement which, in effect, which the initial trust fund would generate income, and that income would supply new appropriations.

Mr. BERLIN. May I make one final observation?

Senator KENNEDY. Yes.

Mr. BERLIN. One of the things that we should be concerned about is if this organization is developed its presence before any agency or any litigation would be very significant. I think we all recognize that we do not intend to exclude any other kind of representation, and we certainly encourage that, but I think because of the natural credibility that will attach to the decision and direction supplied by the public corporation counsel that there has got to be some mechanism developed inside of that corporation for challenging the establishment of its own priorities.

I think the establishment of a board of directors, even if there is an effort made to make sure that it is representative, is not enough.

I think I would want to challenge internally before the board its manner of determining priorities.

Senator KENNEDY. I think that is a good suggestion.

Mr. CAHN. There is one other thing that comes to mind, and that is that we have all become acutely aware of the extent to which regulatory agencies, or those departments that exercise regulatory functions, have in one manner or another been captured to some extent by the industries which they purport to regulate.

I think what has gone unobserved, and hopefully this would be a major step toward recognizing, is that the grantmaking agencies in many instances have been captured by the very interests running the very programs, that in effect would be corrected by new legislation, so that whether it is the school program, the title I, the Secondary Education Act, or whether it is educational establishments that take that over, and yet I think the value of this is insertion of the perspective, and this is less obvious here because these professions are doing good, they are sincere, and they are not tainted with private profits, but the grantmaking agencies have in many respects been captured in the same way that the regulatory agencies, without any of the visibility, and insertion of this kind of consumer perspective on the intended beneficiary. The ultimate 1 to 18 ratio, or even 1 to 1 ratio, one official to every Indian family on one large reservation, is an example of how bureaucracy charged with doing good can do well for itself.

I think to the extent that this inserts a new perspective, whether it be the perspective of the Indian, or the middle class, or the poor white Appalachian, or the black person, or the Puerto Rican, or the Mexican American, is a critical new insertion in the whole of governmental process.

Senator KENNEDY. Well, gentlemen, it has been a very interesting hearing, certainly enormously valuable for me, and I am sure it will be for the other members of the committee who will have a chance to review the record.

I can see from what has been mentioned here that we have a great deal to do in this whole field, but certainly particularly with regard to the current legislation.

I know we have touched just briefly on some of the specific recommendations. I know from the previous conversations that a number of you have more detailed observations that could strengthen this legislation, and I think from the discussion this morning that there are going to be areas where we can modify the bill to take into consideration a variety of very worthwhile suggestions that have been expressed here.

It has been enormously valuable and informative generally in pointing out areas where this subcommittee should be moving into. I am hopeful that we can make this subcommittee a much more energetic force in a lot of these areas outlined here.

We are going to call upon you from time to time, both individually and as a group, to give us some guidance and assistance in assessing performance of the agencies and in trying to make them as responsive as all of us believe that they should be.

Just before concluding I would like to recognize the attorney general of the Commonwealth of Massachusetts, Mr. Robert Quinn, who has been very interested in the whole problem of consumer affairs.

One of the things, General Quinn, that came up prior to the time that

you were here, is the great need for government agency responsiveness at the State level, and also at the local level. I know you personally have been very interested in this. You have been, as I understand, appearing before the Supreme Court earlier today on the Shay bill, which is one of many unique pieces of legislation passed in the Commonwealth and which is up before the Supreme Court now. We appreciate your coming by here and the interest that you have shown in this legislation.

Thank you, gentlemen.

(Thereupon, at 12:30 p.m., the hearing in the above matter was adjourned.)

APPENDIX I

STATEMENT OF COMMISSIONER NICHOLAS JOHNSON, FEDERAL COMMUNICATIONS COMMISSION, BEFORE THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS ON S. 2045, S. 3097, S. 3165, AND S. 3240, AND THE HOUSE COMMITTEE ON GOVERNMENT OPERATIONS ON H.R. 14758, APRIL 10, 1970

Chairman McClellan, Chairman Dawson, and members of the Committees, I appreciate the opportunity to share with you this brief statement of my separate views on these five bills dealing with consumer representation and protection. I believe that my comments are general enough to deal with all of the bills, and I have made no attempt to comment on the specifics of individual bills. Rather, I am commenting in favor of the general principle of consumer representation, a principle I feel deserves endorsement by all members of the Congress as a necessary means of preserving and strengthening our judicial and administrative system. My comments deal primarily with the consumer advocacy aspects of the bills, but this not not to be interpreted as a judgment on my part that consumer education and the study of consumer problems are unimportant or separable from the job of representing the consumer in front of agencies and courts. I dwell on this one aspect of the legislation only because it seems to me that it has received somewhat less attention than the other aspects of the bills and I have long felt it to be an integral part of any consumer protection program.

I. *The Need for Representation of the Communications Consumer*

As the communications media become more and more a major part of the lives of all Americans, they become inextricably bound up with the traditional problems of the consumer. The consumer of broadcasting—the viewer or listener—it not only affected as a consumer by false or deceptive advertising on radio and television; his interests as a consumer are directly affected by what radio and television stations tell him, or fail to tell him, about all the conditions of his society. The problems of pollution, disease and artificial food, cigarettes and lung cancer, automobile safety, improper labeling of poisons and canned foods, industrial disease and injuries, contaminated meats and other foods—to name a few—are all, in large measure, problems of communications. As former newsman Fred Friendly wrote: "What the American people don't know can kill them." The medium of telephone also presents consumer problems, not only because of the financial or mechanical difficulties possibly caused in its use, but because the absence of telephone communications fragments and frustrates social groups. The disruption of phone service due to poor service or rates too high to be borne by some members of society is a consumer problem because of the social and economic loss due to the breakdown of communications.

When a citizen's liberty is at stake in a criminal trial, we insist that he be given an attorney to represent him. In fact the Supreme Court has found it to be a constitutional requirement that a criminal defendant have representation, because it is felt that only in that manner can his case be effectively presented. The denial of information which a person needs in order to have a normal existence—or even survive—in our modern, complex society can have as important an effect on a person's life as years of imprisonment. I think that thoughtful men will agree that representation is vital to a person seeking to maintain a free flow of consumer communication—perhaps equally as vital as to the defendant in most criminal trials.

Yet private citizens who seek to present their cases before the Federal Communications Commission have none of the rights of representation accorded to the criminal defendant. In fact, they are positively discouraged in their efforts by the agency. Citizen participation in the FCC's decisionmaking process has, therefore, come to be virtually non-existent—in large part due to the complex rules and procedures and the ordinary citizen's inability to hire competent counsel to lead him through the maze. One can, of course, always find exceptions to this bleak characterization, but most observers would agree that involvement

in FCC decisions by persons who have no direct financial stake in the outcome is seriously and chronically deficient. Former Chairman Rosel Hyde, in reply to a questionnaire on the administrative process, prepared for the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, concluded: "[T]he ordinary citizen does not play a prominent role in the decision-making process" of the FCC, with the result that "in most cases, the principal input is by parties having a financial interest in the outcome of the proceeding. . . ."

The lack of public participation, due in large part to the paucity of consumer advocates, and the subsequent absence of citizens' viewpoints from Commission proceedings, is a fact in all the areas of FCC responsibility. There are over 7,500 broadcast station licenses which are renewed by the Commission every three years. In well over 99% of these renewal cases, there is no effective citizen participation. Rather the Commission simply rubber-stamps the requests of the broadcasters. The Commission also has jurisdiction over the nation's interstate common carrier services. Yet citizens groups rarely, if ever, participate in the Commission's almost daily decisions regarding the telephone company and affecting millions of rate payers. The list of the areas of FCC jurisdiction goes on—educational television, CATV, communications satellites, land mobile radio services, specialized data common carriers, and so forth—and yet there is the effective presentation of the public's views in only the barest fraction of these proceedings. The fact that only commercial interests are represented in almost every proceeding before this agency seriously inhibits, I believe, the FCC's ability to regulate the communications industries in the "public interest."

My four-year experience at the Commission has demonstrated to me, to my sorrow and regret, that the staff of the Commission is simply not able to represent effectively the citizens who remain silent, for they are aligned against private interests who are able to hire the most aggressive and highly skilled lawyers and public relations experts available. In case after case, the Commissioner's staff simply acquiesces to the industry's most extravagant demands. This is not necessarily a criticism of the FCC staff. Many of them are loyal, dedicated, and experienced. But the adversary process, which presumably operates in our courts, simply does not exist in most of the proceedings before the FCC. As a result the Commission's staff is usually given only one view. James Landis stated it well in his report to President Kennedy:

> [I]t is the daily machine-gun-like impact on both agency and its staff of industry representations that makes for industry orientation on the part of many honest and capable agency members as well as agency staffs.

That "machine-gun-like impact" can be seen in the product of the FCC.

An example may illustrate what I feel to be a breakdown of the adversary process as that concept is supposed to operate the the FCC. In a relatively minor case, *Broadcast License Renewal Applications*, 20 F.C.C. 2d 191, 195 (1969). I wrote a dissenting opinion discussing the enormous advantage possessed by industry interests in the FCC decisionmaking process. The Commission's rules provided for a 90-day period preceding the renewal of a station's license, during which time interested parties could file petitions. The industry requested the Commission to reduce this period to 75 days. After a formal rule making, in which all interested parties were invited to file comments, the FCC decided that the period should be 60 days.

But was the public given a chance to participate in the proceeding? It is true that the *pro forma* procedure contemplates that anyone—rich or poor, big or little—will be heard by the Commission. But what was the actual situation? Our Notice of Proposed Rule Making was released on March 20, 1969. We asked that comments be filed by April 11, 1969, and reply comments by April 18, 1969. These deadlines gave interested parties wishing to comment on our proposed rule only 22 days in which to find out about it—itself no easy task without a Washington lawyer to collect all Commission documents as they are released, scan them for material relevant to clients, and notify those clients of the need for submission of views—and draft comments. The response was typical of most rule making proceedings before the Commission. In support of our pro-industry rule, the Commission received comments from a vast aggregation of industry wealth and power—comments on behalf of *166* broadcast stations (67 AM's, 52 FM's and 47 TV's), three networks, and one Washington, D.C. law firm with

numerous broadcast clients. On the public's behalf, the rule was opposed by only two groups: the United Church of Christ (filing a six-page document) and the National Citizens Committee for Broadcasting (filing a one-page, three-paragraph letter).

This under-representation of the public has been the norm at the FCC for decades. Day after day the Commission is bombarded by the most sophisticated legal and policy arguments on the industry's side, and virtually nothing on the side of the public. We pretend that the FCC functions in a quasi-judicial capacity; we give lip-service to the jurisprudential notion that truth will usually emerge from the confrontation of opposing views before a neutral tribunal. I do not dispute this concept; I do not find it archaic as do some. But I am distressed by what I observe happening in practice. What happens at the FCC—and I imagine at most other administrative agencies—is far from the conceptually-satisfying theory contemplated by the advocates of the adversary process. In terms of the legal and economic talent arrayed against it before this Commission, the public is scarcely represented at all. The battle is not just uneven; it is seldom even drawn; the issue in question is not joined.

II. Government representation of the communications consumer

The United States Court of Appeals, in an opinion by now-Chief Justice Warren Burger, recognized that the public advocates who appeared before the Commission were not receiving equal treatment to their industry counterparts. *Office of Communication of United Church of Christ* v. *F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966). The court wrote:

> Unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee, some mechanism must be developed so that the legitimate *interests* of listeners can be made a part of the record which the Commission evaluates. (*Id.* at 1005.)

That "mechanism" sought by Judge Burger could be the consumer advocacy proposals in the bills before you. I believe that more may eventually be needed: a more efficient, better-staffed FCC, a change in attitude by some members of the Commission, a more effective policing of unethical practices by industry representatives. But the provisions of these bills are an important first step, and I urge their adoption.

In addition to the unequal treatment of citizen advocates when they do appear before the FCC, there is the problem of the cases where the citizens' side of the issues is never even presented. In most cases before the FCC which do not involve an adjudication of opposing *industry* views, there is only one viewpoint heard. The public viewpoint is not given to the Commission—because no one found out about the case, or because there was no lawyer, or insufficient resources, available to take the case, or because all available advocates were barred by procedural technicalities, or just because no one cared. We are faced all the time with cases which I have labeled the "unappealables": The public has definitely lost something of value; if the case were taken to a court, the public interest would be upheld and the case reversed; but for any number of reasons, the case is not appealed, the public—often without knowing it—loses something and the case stands as a precedent in future actions. Through this system law is made, not by a rational process, but by chance. Hopefully, the instituting of an organized office of consumer advocates, funded by the government and free to pursue the consumer interest wherever it wishes, will begin to rectify this situation.

While I support the general ideas advanced by all of these bills, and although I concur with the comments submitted by the Commission majority, I would nevertheless like to add a few specific suggestions of my own which I feel may strengthen the bills.

1. I agree *in principle* with the comment of the Commission majority in paragraph 4 of their comments on S. 2045, S. 3097, and S. 3165, urging that the language of the bills be changed to allow consumer agency intervention in all but those hearings classified as "purely adjudicatory under the Administrative Procedure Act." However, I do not believe that even such a broad restraint need be put on the consumer agency. I assume that the purpose of the language is to prevent intervention in those cases where only "private" rights are being litigated. I would prefer to leave such a determination up to the director or chief of the

agency. One can think of "solely adjudicatory" matters in which "private" rights are really secondary to "public" ones. It may well be important for an agency to have the benefit of a consumer voice in hearing such cases. For example, where a broadcaster faces the possibility of losing his license for failing to serve the public, or a telephone company is being forced to refund overcharges, the applicability of the limiting language is unclear. Yet it seems to me that these are precisely the kind of cases which require consumer representation by a competent agency. For the reasons I have discussed above, I do not feel that we can rely on the Commission staff for the presentation of all the issues in these cases. Given the limited resources which any consumer agency will surely have, I do not think that we need fear that a director will waste his agency's resources on unimportant "private" matters.

2. It should be provided that the consumer agency can enter a case at the appellate level after the Commission has acted, even though it was not a party at the administrative level of the case. Even if the consumer agency does not have sufficient staff and resources to challenge in the FCC a broadcaster who is not serving the public, it should be able to appeal a Commission action renewing the license of the broadcaster. As a concession to the necessarily limited scope of the agency, it should be allowed to wait and see what the Commission action is before it need act. Such a provision would avoid duplication of effort by the Commission staff and the consumer agency.

3. The legal relationship of the agency to its clients should be made more clear. Its ability to enter any case where substantial consumer interests are at stake—regardless of the law of "standing"—should be provided. The court in the *United Church of Christ* case, *supra*, broadened the law of standing to include members of the listening public. But the Commission in a recent decision, *National Broadcasting Company*, 20 F.C.C. 2d 58 (1969), ignored the direction of the courts and denied standing to a challenger of a network-owned station, because he was outside of the listening area of the station. In dissent, *id.* at 61, I argued that since the Commission has an affirmative obligation to find that the broadcaster has served the public interest before renewing its license, we should not apply the formal law of standing to exclude any member of the public who can help us in our determination.

4. I think that it would be helpful to recognize that the filing of formal legal suits is only one part of effective representation of a client. The consumer agency should, for example, be specifically empowered to enter into non-adversary negotiations with the telephone company during our "continuous surveillance" proceedings. And it should be allowed to recommend legislation to the Congress, when its actions in court are stymied for whatever reason.

5. I would not presume to comment on the specifics of the funding of the consumer agency. But I do urge the members of the Committees to give the concept of consumer advocacy a real chance by providing sufficient funding, especially during the first few years while the agency is developing. I believe that any method by which this funding can be shielded from the inevitable political pressures will produce more satisfactory results in the end.

I believe that the sponsors and supporters of these bills are to be commended for their contribution to the strengthening of the country's judicial system. Critics of the system are daily saying that the administrative and judicial process cannot produce justice and that a revolution is needed to make the government more responsive to the people. From my experience on the FCC, I must agree with them that the system is not working. But I think we need first to give this system a chance by making it work as it was intended. The drafters of the Communications Act of 1934 saw the dangers in allowing unregulated communications media, and they produced an excellent statutory framework for regulation. But the process contemplated by the statute is not working properly because of the excessive legal and economic power possessed by the regulated industries. I am hopeful that an institutionalized, permanent office of consumer advocates, operating in part in the area of communications, will serve to bring the competing sides of the adversary system more nearly into balance and restore the system contemplated by the Congress in 1934.

Appendix II

REPLY TO THE QUESTIONNAIRE ON THE ADMINISTRATIVE PROCESS OF SENATOR EDWARD M. KENNEDY, CHAIRMAN OF THE SUBCOMITTTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMMITTEE ON THE JUDICIARY, PREPARED BY FCC COMMISSIONER NICHOLAS JOHNSON

I. Citizen involvement in the administrative process

Question A: To what extent, if any, and in what manner is there an input into the agency's decision-making process from private citizens and citizen groups?

Answer: Citizen participation in the Federal Communications Commission's decision-making process is virtually non-existent. One can, of course, always find exceptions to this bleak characterization—and some of the more notable ones are listed below. Realistically, however, the involvement in this agency's decisions of persons who have no direct financial stake in the outcome is seriously and chronically deficient. I believe that Chairman Hyde correctly assessed this situation in his statement when he concluded: "the ordinary citizen does not play a prominent role in the decision-making process" of this agency, with the result that "in most cases, the principal input is by parties having a financial interest in the outcome of the proceeding. . . ."

The necessary but unhappy result is that the FCC is a "captive" of the very industry it is purportedly attempting to regulate. The Commission has, for example, recently proposed the adoption of a rule—earnestly sought by broadcasters—which would set an *earlier* cut-off date for applications filed by citizen groups for the licenses of previously authorized television stations. *Broadcast License Renewal Applications*, 16 F.C.C. 2d 858 (1969). This rule, if adopted, might significantly limit the extent to which groups of interested citizens—who are often unfamiliar with the Commission's rather technical filing deadlines—may seek to compete with established broadcasters for the use of the public airways. Comments representing the views of more than 100 broadcast stations have been filed with the Commission by established broadcasters and other media owners; yet only two opposing comments have been filed (one being of but one page in length)—both by groups recently established to represent the public in broadcasting matters. No comments have been received from any of the thousands of professionals, teachers, journalists, experts in communications, or average citizens with some interest in broadcasting. When the Commission and its staff eventually resolve the difficult issues raised by this proposed rule, they will have the benfit of all the highly trained legal competence that the broadcasters' money can buy stacked on one side. On the other side they will have the short comments of two interested citizen groups, and the deafening but impenetrable silence of citizens in thousands upon thousands of communities across the United States.

There have been a few cases in which interested parties have effectively participated in proceedings before the Commission. The most important of these was a petition filed with the FCC over five years ago opposing the renewal of the license of television station WLBT in Jackson, Mississippi. The petitioner, the United Church of Christ, alleged that WLBT had systematically promoted segregationist views, refused to present opposing views, and excluded Negroes from access to its facilities. Despite the FCC's vaunted pronouncements that it offers encouragement to citizen participants in its proceedings, the record in this case shows that the Commission first ruled that the petitioner did not even have the "standing" to appear before the FCC and present its arguments. *Lamar Life Broadcasting Co.*, 38 F.C.C. 1143 (1965). Petitioners were told, in effect, that they were not even entitled to be heard so far as the FCC was concerned. The United States Court of Appeals for the District of Columbia reversed the FCC in no uncertain terms. *United Church of Christ* v. *F.C.C.*, 359 F. 2d 994 (D.C. Cir. 1966). Although the resolution of the merits of this case is still before the courts, its early contribution to the law of "standing" paved the way for further citizen participation in Commission proceedings. See, *e.g.*, Reich, *The Law in the Planned Society*, 75 Yale L.J. 1227 (1966).

The essential point, however, is that the FCC's initial, instinctive reaction was to *oppose*, not "encourage," greater citizen participation in its proceedings, and that it took a forceful United States Court of Appeals opinion to preserve this valuable right. This bias against citizen-initiated cirticisms of the broadcasting industry has, I am afraid, remained within the structure, procedures and predisposition of the Commission.

Since the WLBT decision, the doors to greater citizen participation in the affairs of the broadcast media have been opened slightly. In Media, Pennsylvania, for example, 19 local organizations protested radio station WXUR's alleged carriage of masses of right-wing political programming. They obtained a hearing in their hometown, conducted by the FCC, and have actively pursued the proceedings to date. *Brandywine-Main Line Radio, Inc.*, FCC 68D–70, Dec. 13, 1968. An Ohio Retail Clerks Union petitioned the FCC—unsuccessfully—to deny the license of a radio station which had refused to broadcast advertisements financed by the Union advocating the boycott of a local department store, while at the same time accepting commercials urging listeners to shop at that same store. *WFMJ Broadcasting Co., Inc.*, 14 F.C.C. 2d 420 (1968).

In Los Angeles, a group of businessmen have challenged the renewal of the license for television station KHJ alleging provides inadequate local service. *RKO General, Inc.*, FCC 66–503, June 8, 1966. In Chicago, a group of good music enthusiasts ("The Citizens Committee to Save WFMT–FM") obtained a hearing in an attempt to prevent the Chicago Tribune from acquiring the most popular classical music station in the area. *Gale Broadcasting Co., Inc.*, FCC 69–25, 15 P & F Radio Reg. 2d 337 (1969). Significantly, this was another case in which the FCC told the petitioners they would not be given a hearing, and was reversed by the United States Court of Appeals for the District of Columbia. *Gale Broadcasting Co., Inc.*, 12 P & F Radio Reg. 2d 809 (1968) ; *Joseph v. F.C.C.*, 404 F. 2d 207 (D.C. Cir. 1968). From Salt Lake City, a local taxicab driver and a waitress petitioned the Commission to deny the license renewal of television station KSL, owned and operated by the Mormon Church. Again, the petition was denied without a hearing, and the "standing" of petitioners to appear before this agency was questioned. Their petition for reconsideration was denied by an equally divided Commission (3–3), relying, in part, on petitioners' failure to comply with the FCC's rule requiring typewritten, double spaced pleadings. *In re License of KSL*, 16 F.C.C. 2d 340 (1969).

In Boston, a group of businessmen and professors filed a competing application for the three-year privilege to operate a television station on Channel 5. Just a few months ago, the Commission ruled in their favor. For the first time in the FCC's history, it took seriously the documented claims of a group of local citizens who maintained they could do a better job of operating a television station in the "public interest." *WHDH*, Inc., 16 F.C.C. 2d 1 (1969). This decision, and the broadcasting industry's subsequent expressions of outrage, have now caused the introduction of legislation in Congress designed to establish a presumption that a licensee is operating in the public interest unless proven otherwise. See, *e.g.*, S. 2004 and H.R. 10668. If these bills were to become law, the FCC would be barred from even considering competing applications for existing television stations until it had *first* determined that the existing licensee was unfit. One writer has characterized this proposal as analogous to an election law providing that "no one could run for public office until the incumbent had been impeached." Lydon, "F.C.C. License Renewals," *The New York Times*, April 27, 1969, p. 92.

As significant as these examples may be, they pale by comparison with the vast number of Commission acts each year which merely rubberstamp the requests of broadcasters. There are about 7,400 broadcast station licenses in the United States which are renewed every three years. In well over 99% of these renewal cases, there is no effective citizen participation.

The Commission also has jurisdiction over the nation's entire common carrier services, dominated by ATT and the Bell System. Yet citizens groups rarely, if ever, participate in the Commission's almost daily decisions regarding the telephone company and affecting millions of rate payers. The list goes on—CATV, satellites, common carriers, land mobile radio services, educational television, and so forth—and yet there is effective citizen participation in only the barest fraction of these proceedings. The fact that only commercial interests are represented in almost every proceeding before this agency seriously inhibits, I believe, the FCC's ability to regulate the communications industries in the "public

interest." Despite the Commission's mandate to protect the public, its staff is often unable to withstand the combined weight of aggressive and highly skilled private interests, a lack of funds, and a too-often lethargic Commission majority.

Question: Does the agency encourage such inputs? How?

Answer: Given the lack of citizen participation in this agency's proceedings, one would think the FCC would make a concomitantly greater effort to obtain the views of citizens affected by the many industries that it regulates. Chairman Hyde in his reply to this question states, four times in four consecutive sentences, that the agency "encourages" the participation by citizens in its proceedings. I regret to say that my own view is that almost precisely the opposite is the case. The very right to participate at all in FCC proceedings ("standing") was only won in the WLBT case after the petitioners succeeded in persuading the United States Court of Appeals for the District of Columbia to *reverse* the FCC's previous ruling disenfranchising citizens groups from agency participation. In its earlier decision, the Commission majority said:

> [M]embers of the general public who do not show a direct causal relationship between the action being protested and some injury of a tangible and substantial nature have no standing purely as members of the general public. . . . Here petitioners, as members of a minority group, can assert no greater interest or claim of injury than members of the general public. Otherwise *any* minority group based on race, creed, color, or national origins could gain standing as a representative of the public interest despite the lack of an individual substantive right to protect or a substantial and immediate interest in the matter protested. *Lamar Life Broadcasting Co.*, 38 F.C.C. 2d 1143, 1149 n. 11 (1965).

On appeal, the United States Court of Appeals for the District of Columbia reversed the Commission. It stated in no uncertain terms:

> After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty . . .
>
> We cannot believe that the Congressional mandate of public participation which the Commission says it seeks to fulfill was meant to be limited to writing letters to the Commission, to inspection of records, to the Commission's grace in considering listener claims, or to mere non-participating appearance at hearings . . .
>
> Unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee, some mechanism must be developed so that the *legitimate* interests of listeners can be made a part of the record which the Commission evaluates. *Office of Communication of United Church of Christ* v. *F.C.C.*, 359 F. 2d 994, 1003, 1004, 1005 (D.C. Cir. 1966).

In the three years since the Court of Appeals' WLBT decision, the Commission has done little to encourage actual citizen participation in its proceedings—other than to *say* it "encourages" such participation. The Commission does not hold investigatory hearings in selected communities throughout the country, or make fact-finding tours through communities with problems vis-a-vis broadcasting stations—as Congressional Committees have done with issues concerning "hunger," Indians, welfare, national parks, civil rights, and other pressing social problems. As a result, the FCC plays only the most passive role; it waits for the relatively rare citizen to come to it and present his view (and then often ignores him)—it does not go out into the communities and solicit the comments of concerned citizens. The FCC does not supply attorneys to citizens groups when they cannot afford them, or are too inexperienced to recognize their importance.

What radio and television stations tell their communities, or fail to tell them, can affect their lives in ways as serious as many weeks, months, or years of imprisonment. The problems of war, poverty, race, air pollution, artificial sweeteners, cigarettes and lung cancer, automobile safety, improper labeling of poisons and canned foods, "black lung" disease, contaminated meats and other foods—to name a few—are all, in large measure, problems of inadequate communication. What the public is not told may, quite literally, kill them. Yet when a group of citizens feels sufficiently concerned and motivated to wish to participate in a license renewal proceeding before the Commission, or a transfer proceeding, they often lack an experienced attorney. The United States Supreme Court has ruled in numerous cases that a defendant in a criminal proceeding is entitled by the Constitution to an attorney to represent him. But the Commission has not called

for community attorneys to offer their services on a volunteer basis. Chairman Hyde, in his response to question I–A, recognizes that "it is difficult for such [citizens] groups to gather the resources and knowledge required for full and effective participation." What, then, has this Commission done to ease this difficulty? Nothing.

Chairman Hyde holds out the hope that "the staff of the Commission as representatives of the public" will effectively represent those citizens who remain silent. My three-year exeprience at the Commission has demonstrated to me, to my sorrow and regret, that this is simply not the case. In case after case—instances too numerous to list—the Commission's staff has simply acquiesced (or been forced to acquiesce) to the industry's most extravagant demands. This is not necessarily a criticism of the staff. Many of them are loyal, dedicated, and experienced. Yet the adversary process which operates in our courts, for example, simply does not exist in many of the proceedings before the FCC, and as a result the Commission's staff is primarily given only one view. James Landis stated it well in his report to President Kennedy:

> . . . it is the daily machine-gun-like impact on both agency and its staff of industry representations that makes for industry orientation on the part of many honest and capable agency members as well as agency staffs.

That "machine-gun-like impact" can be seen in the product of the FCC.

Question: Could these inputs be greater ? How?

Answer: In light of the industry orientation and bias that inevitably permeates the Commission's process, the inputs from citizen participation must be increased many-fold if they are to be felt at all. Many things could be done. In important rule making proceedings, the Commission could draw up a "blue ribbon" list of qualified professionals and citizens without economic interest in the outcome and solicit their comments. Representatives of all the normally disenfranchised groups—racial and ethnic minorities, the poor, migrant workers, the young, the old, farmers, labor—might be included. Their comments, for example, concerning the Commission's proposed CATV rules, one-to-a-market rule, conglomerate inquiry, or 75-day cut-off on applications filed for existing broadcast licenses, could be specifically solicited and considered. With respect to the renewal of individual stations' licenses, requests for comment might be sent to local established interest groups—such as the Chamber of Commerce, the NAACP, the League of Women Voters, the ACLU, or the Consumers Protection Counsel—for their evaluation of the past three years' performance of the licensee.

In particularly important cases, the Commission could ask attorneys or professors experienced in communications law to submit *amicus curiae* briefs—just as courts do. The landmark decision in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), which established the right of an indigent in a criminal proceeding to obtain the services of an attorney, was precisely such a case. In that case, the United States Supreme Court asked an attorney, Mr. Abe Fortas, to present the issues to the Court. Perhaps similar appointments by the Commission in license transfer or renewal cases, or telephone company rate regulation proceedings, or CATV rule making proceedings, might provide the presently "indigent" American public with analogous rights of representation before this and other governmental agencies.

The FCC at present has no policy planning staff unit with a title like "chief economist," "program planning," or "systems analysis." Even small industrial plants have "Research and Development" divisions. The Federal Communications Commission regulates numerous large industries—one company alone, AT&T, had gross revenues in excess of $14 billion last year—yet it has no overall policy planning staff or research facilities with which to plot the course of communications policies in years to come.

Another great citizen resource ignored by the Commission is the academic community. There is no office in the agency that has the function of liaison with the research and policy analysis efforts undertaken in the academic community. FCC case materials are often unavailable to students of the FCC, or so prohibitively expensive that only well-heeled private interests can afford to acquire them. The FCC would greatly benefit from an organized program of seeking out and encouraging those in the academic community whose interests and skills are particularly oriented to communications policy questions.

In sum, because every decision this agency makes affects the public interest to some extent, it should have some institutionalized procedure whereby representatives of the public can be heard. At the present time, this agency has done almost nothing to obtain such public participation.

Question B: Does the agency have any citizen or industry advisory groups? If so, describe briefly their functions and composition.

Answer: The Commission does have *industry* advisory groups, but it has no *citizens'* advisory groups. Chairman Hyde has listed four such groups in his response to this question. None of them are concerned with the important areas of radio and television service to the public, or CATV, or common carrier service. All are apparently dominated by industry interests. None are comprised of individuals without a financial stake in the outcome of Commission policy.

Question: Do these groups become involved in any way in the policy-making or decision-making process?

Answer: As Chairman Hyde's answer to this question clearly indicates, the answer is "no."

Question: What attempts are made to solicit views of the affected groups that otherwise would not become involved in the administrative process on their own initiative?

Answer: Very little is done to solicit views. In "adjudicative" cases, of course, "all known parties in interest" are notified. But this does not cover representatives of the public at large. Chairman Hyde stated that the comments of all interested persons are "generally solicited" in rule making proceedings. But how? By dumping a pile of "Notices of Proposed Rule Making" on a table in the Commission's Public Information Office and simply waiting for the comments to roll in? Not surprisingly, the comments the FCC receives come from organizations whose lawyers regularly pick up our Notices. I do not believe that residents of the poor in this country's ghettos are ever informed of our rule making proceedings, and it is clear that they would simply not know how to react if they were so notified. The fact that comments from interested persons are "solicited," therefore, is simply meaningless with respect to the vast bulk of this nation's population.

This process is especially unsatisfactory for an agency whose conception-of-self is that of a responsive "court," rather than an initiating agency, and whose daily actions are very dependent on the applications, brief, and pleadings before it. It is rare that the agency generates any action on its own, and even then final action usually results from a weighing of private comments and a desire to minimize everyone's dissatisfaction with the ultimate outcome. All too often the approach is not "What will best serve the broad-based American public?" but "How can we write a decision so that each of the special interests before us will be satisfied enough not to reverse us on appeal?"

Question C: What procedures are used to take account of the views and consider the needs of the poor as they might be affected by the agency's decision-making? What procedures could be used?

Answer: To quote the Chairman: "We have no special procedures for the submission of views by the poor . . ."

Many procedures could be used, but are not. With respect to a station's application for renewal of license, or a complaint filed during the license term, for example, the Commission could solicit the views of the poor by sending invitations to testify to poverty group leaders, by alerting poor citizens through the use of circulars, advertisements, and even television spots placed during popular programs. The Commission might even obtain time on the television stations in a community (as do other agencies of government) to announce to the poor and other groups that the Commission was considering, for example, the renewal or transfer of a particular station's license, announcing the date, time and place of the local hearing, and asking for the submission of comments or personal appearances. Indeed, this time should be made available to the public free of charge. After all, radio and television stations operate on publicly-owned frequencies at the suffrance of the public; the public should not have to pay to discover that hearings are being held which affect the rights of existing stations to continue their operations. (The announcements now required are ineffective.)

McGeorge Bundy, the innovative President of the Ford Foundation, after noting that only a few local governments were participating in the Commission's Inquiry on CATV policy stated: "We know that the December 13 Notice specifically invited cities to participate." But he suggested: "The Commission might wish to consider whether more should be done including . . . help by the Commission staff in explaining the issues raised, and regional seminars, conferences or hearings." This type of creative consultation with affected groups on

policy making questions could easily be extended to representatives of citizens groups, the poor, and minority groups.

Confronted with the amorphous dispersion of the poor throughout our population, the Commission should do more than simply throw up its hands in passivity. I believe the "public convenience, interest, or necessity" standard imposed on the Commission envisions that it will require licensees to seek out representatives of all segments of the public, consult with them to ascertain their needs, and that the FCC should make some attempt at urging the communications industries to conform their services to these needs. We should endeavor to give voice to those large segments of the public who remain silent. Until that happens, this Commission will remain the "captive" of narrow economic interests.

Question D: How does the agency respond to individual citizen complaints about persons, entities or activities subject to its regulation? Describe what happens to an individual complaint from the time it is received until there is final agency action on it. What is the role of the complaining party during the agency's deliberation on his complaint? Are there adequate sanctions available to deter future activities of a type which has led to past valid complaints? Explain. How frequently are they invoked?

Answer: The Commission's record on complaints is not very good. Complaints are often ignored or given unhelpful and discouraging "boilerplate" replies. The Commission has very few investigative personnel. The number of actions that are adjudicated in favor of the complainant are noticeably few.

The cigarette advertising fairness ruling is a case in point. In response to a complaint the Commission ruled that stations presenting cigarette advertising also had to present material on the hazards of smoking. The enforcement of that ruling has depended almost entirely upon the watchfulness, and complaints, of the original petitioner! The Commission has not taken one single independent enforcement action in this area. We don't even check stations' logs as they come up for renewal or write licensees to inquire about their plans for compliance.

Question E: Do those who are affected by the agency's activities know enough about it? How is citizen and industry awareness of the agency's functions, processes and decisions promoted? How can the outward flow of information be improved?

Answer: Chairman Hyde has stated his belief that "a large segment of the general public is conscious, in a general sense, of the Commission's activities." I simply do not believe this is true. Consider these examples: ATT preempts the pre-scheduled programming of NET in order to broadcast a basketball game nationwide; the Smothers Brothers Comedy Hour is removed by CBS from the air; commercials on television seem too loud or too numerous; cigarette advertisements are broadcast over radio or television, but the opposing anti-smoking point of view is seldom heard; a television station files an application for the renewal of its license, yet the station owners also own the only AM, FM, newspaper, and CATV system in the community. In all these cases, the individual citizen might very effectively participate in the Commission's decision-making process. Yet I doubt very seriously whether any "large segment of the general public" is conscious of the fact that the Commission is responsible for activities in these areas, and knows what it can do about them.

Virtually all the Commission does to notify the general public of its important regulatory powers in these many areas is to distribute "Public Notices" of its decisions and proposed decisions, often framed in impenetrable "legalese." The Commission then relies upon lawyers and the trade press to distribute its decisions and announcements to the public. It goes without saying that many groups which are substantially affected by this Commission's decisions never learn of its proposals, nor of the fact that they might participate. The FCC building in Washington, D.C., is a long way from the grape fields of Delano, or the slums of Watts, Detroit, or Harlem. I believe this Commission owes the "disenfranchised" something more than a twice-daily pile of public notices stacked on a table in its Washington office.

Question: To what extent are agency records, proceedings, meetings or opinions withheld from public view? What are the reasons for such withholdings?

Answer: The agency's records are scattered, disorganized, incomplete, and the extraction of relevant data is often very difficult. Public facilities are inadequate and duplication of materials is prohibitively expensive, except for those

who have an economic interest in a proceeding. Internal staff documents and Commission deliberations are nominally secret, but the trade press and certain privileged outside interests are often better informed than Commissioners on the total workings of the agency.

Question F: What efforts are made to make information about the agency, and access to the agency's information and complaint services, available outside Washington, D.C.? Assuming adequate funding, what procedures could be used?

Answer: The only attempt made by the Commission to disseminate information outside Washington, D.C., are to make available in its 24 field offices (roughly one for every two states) printed materials prepared by the Commission. Even assuming these materials are adequately prepared and cover all the areas of interest to the general public (which I would question), our past efforts at distribution are clearly insufficient.

Assuming adequate funding—and the will to act—many procedures are possible: radio and television time for public service announcements prepared by the Commission to inform the public of its policies and to announce forthcoming adjudicative and rule making proceedings; notices in the newspapers and other print media (*e.g.*, "The licenses of all New York radio and television stations are currently pending for renewal before the Federal Communications Commission in Washington, D.C. Your comments and views with respect to prior performance and satisfaction of community needs will be considered."); direct mailings to all publicly-oriented interest groups informing them of Commission actions, past and proposed; drafting and dissemination of FCC "primers" on how to present one's views to the Commission.

II. *Procedures for Promoting More Responsive Agency Decision-making*

Question A: Do you believe that the agency's decision-making procedures operate with reasonable speed, considering the interests and issues involved? Assuming that faster processing and decision-making are desirable, how could they be achieved?

Answer: The Commission often lacks adequate staff resources (or the willingness to commit such resources) in dealing with major policy questions. Expeditious resolution of policy matters, especially where strong industry groups oppose proposed policies, is often frustrated by the Commission's concurrence in the dilatory tactics of the regulated.

For more than a year the FCC has considered rules to deal with problems of local media concentration. The Commission has acceded to *five* extensions of time to file comments by those opposed to the proposed rules—and has granted a *de facto* further extension by refusing to act.

The classic case concerns the problem of dominance by the networks in the production of television programming. In July 1960 the Commission promised in Docket No. 12782 that, "The Commission will make every effort to expedite its consideration of the entire docket proceeding and will take such definitive action as the Commission determines to be warranted." Now *nine years later*, after three FCC staff reports and innumerable Congressional hearings, the Commission is still receiving comments from those opposed to Commission action in this vital area—and the Commission has not acted. The long-pending proposals for subscription television have shared a similar fate.

In my view, the basic problem is not a lack of jurisdiction, or legislative authority to act, it's a lack of will. The FCC's concern tends to be more with cleaning up processing backlogs and meeting industry protests and requests for action than it is in acting aggressively on policy matters, especially where some powerful interest would be offended.

Question B: What specialized human and mechanical resources such as systems analysts, computers and computer operators, testing facilities, etc., are available within the agency? Has the agency developed means of securing such resources from other government agencies or outside sources? Does the superior availability of such resources to the regulated enterprises result in agency procedures which rely on facts and information provided by them?

Answer: The Commission's computer is used mainly for low-level tasks: payroll, printing licenses, ownership data, etc., and that output is often inaccurate and dated. The agency has recently been criticized by Senator Hart for the adequacy of information contained in its computer license files and its ownership reports. So far as I know there is no direct use of computer analytical techniques by the Bureau Chiefs or Commissioners.

In the regulation of the telephone system, and other communications common carriers, the Commission relies almost solely on the input of data from those who are regulated. This is especially constraining where the industry is almost entirely vertically integrated, and dominated by a giant such as Bell.

Question C: What procedures or mechanisms does the agency have for consulting and coordinating with other government agencies with overlapping, interrelated or conflicting responsibilities?

Answer: The need to establish the Presidential-level Communications Policy Task Force is perhaps the best comment on the problems of communications policy coordination in the government. That coordinative function is simply not now being performed, except for occasional specific problems and among staff at the working level.

The Commission has found itself in the anomalous position of having to be prodded (and even opposed) by the Department of Justice on questions of competition in the mass media. The inefficient management of the radio spectrum, and especially the lack of coordination between the FCC and the Executive Branch, has been documented in many authoritative government reports and scholarly articles.

Question D: What procedures does the agency have for assessing the quality and efficiency of its own performance? How often and in what manner does the agency review the continuing relevance of its mission, goals, priorities, procedures and structure? In what ways could such review be stimulated? Would modern techniques of cost-benefit analysis and "P.P.B.S." be helpful? If so, how could they be applied? If not, why not?

Answer: This is a crucial question. The agency is virtually without a management information system. The Executive Director's office is on a bureaucratic level lower than the bureaus of the Commission it is to administer, and is weak and ineffective. There is no central policy planning staff and no real attempt is made to define goals, specify alternatives or to use cost-benefit analysis. Review of agency operations is, in fact, non-existent, except for the attention the Bureau of the Budget is able to give it. In fairness, it should be noted that some efforts have been made to rectify this situation, but they have so far borne little fruit.

Question: Are there gaps in the agency's statutory authority? What procedures are used to develop legislative recommendations within the agency for filling such gaps?

Answer: The agency is not now using the legislative authority it has. But there are numerous areas where the Commission could be of great service to the Congress simply by providing recommendations and analysis of such important public policy areas as long-term financing of public broadcasting, the regulation of broadcast networks, the management of the radio spectrum, problems of competition in the communications common carrier industry, the relationship between broadcasting and the political process, CATV, copyright, and consumer product protection. There are no present plans to undertake our responsibilities in these areas.

Question E: Do you feel that agency staff has too much, not enough, or about the right amount of impact on agency decision-making processes? Explain. How could this level of impact be changed? Is agency staff adequately responsive to the needs of individual agency members? Would agency members perform better if they had larger personal staff? Would the quality of agency staff work be improved or reduced if employees were given incentives to rotate periodically to other government agencies? Is staff quality adequate to handle the complex and sophisticated issues presented to the agency? If not, how could staff capability be enhanced? To what extent have employees of regulated or affected industries been selected as agency staff or members, and to what extent have staff and members subsequently become employed in such industries? Do you feel such selections and hiring contribute to or detract from the agency's work? What limits, if any, should be placed on such selections and hiring?

Answer: The agency staff dominates the Commission's decision-making process. Commissioners' offices are hopelessly understaffed, and it is a major under-

taking for each Commissioner to be prepared even to ratify whatever is presented by the staff. There is a positive (although understandable) desinclination on the part of the staff to present alternatives to Commissioners for *their* consideration. On those rare occasions when the staff is unable to work out their own compromises on important questions before presentation to Commissioners, the resulting disagreement is discouraged.

Nor do I feel I can call on staff for the formulation of alternatives to what they have proposed. On many occasions when I have made such requests, they have been positively refused. On other occasions, the material requested has come after great delays, in inadequate form, and with considerable complaint. (There are, of course, numerous members of the staff who are—or would like to be—quite cooperative and constructive, but they sometimes feel they cannot be completely open in providing me assistance.) An initial step in remedying this situation would be an expansion of Commissioners' personal staffs (presently two professionals) and the establishment of a central policy planning staff responsible to the full Commission.

A central planning staff could provide a useful check on operating bureaus whose procedure tends to be to first make their own decision on a matter, and then try to persuade the Commission to accept it. It is often important in policy-making for different entities or individuals to present different sides of a question—in almost an "adversary" sense. We get very little of that at the Commission.

I believe that it would be very useful for Commission employees to rotate in different Commission offices and in other government agencies. A number of our best staff members have spent considerable time in other agencies. And while we have some very high quality, dedicated and capable staff members, their numbers are fewer than one would wish. At the same time, those we do have are occasionally grossly under-utilized by the agency. For example, the few economists in the agency are sometimes systematically excluded from the regular decision-making process of the agency.

The agency is a well-known training ground for industry personnel—a graduate school for the communications sub-government. In part this is a natural result of the communications industries' ability to offer higher salaries to really outstanding staff members. But it is at least equally the result of rather depressing working conditions for young staff members, whose creative efforts are often squelched, coupled with the agency's general lack of the will to play a positive regulatory role—all in all an environment calculated to be mighty discouraging to any staff member with a spark of quality. At the same time, a number of the staff have spent substantial amounts of time working for the communications industries we regulate. This incestuous relationship cannot help but work against effective representation of the public.

III. This questionnaire

Question: How long did it take you to complete Sections I and II? Do you think the questions raised useful and relevant issues about the agency's practices, procedures, and problems? What questions would you have left out? What additional areas should have been covered? Would you have been able to answer more freely if the responses were anonymous?

Answer: The questions you have posed have enabled me to cover the matters I think generally relevant to your inquiry. I felt I was able to answer freely enough without anonymity. I don't really know how long it took to work on these responses—a working day or so total, perhaps. Whatever it may have been, it has been valuable to me to try systematically to bring together my three years of experience at the agency. The value of your broad inquiry to the American public is inestimable, since these questions go to the heart of the functioning of agencies which have such an important influence over the lives of the nation's citizens.[1]

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[1] This is a separate statement of Commissioner Johnson and does not represent the position of the FCC. The Commission majority's reply was filed with the Subcommittee by FCC Chairman Rosel H. Hyde on March 28, 1969, and should be considered together with this statement.

APPENDIX III

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., June 4, 1970.

FCC 70–597; 46926.
In reply refer to: 3300.

Mr. ALAN F. NECKRITZ,
Berkeley, Calif.

DEAR MR. NECKRITZ: This letter is written in response to your complaint received on March 9, 1970, in which you allege that station KFRC, San Francisco, California, has violated the fairness doctrine by airing "public service broadcasts" on behalf of the United States Army, Navy and Air Force and denying broadcast time for the presentation of "opposing" viewpoints. The basis of your complaint is that the armed forces recruitment broadcasts constitute the presentation of one side of a controversial issue of public importance.

In support of your complaint you assert that the "values represented by the present 'peacetime' armed services" are subject to dispute, as are the benefits and advisability of military enlistment. You state that between January 26 and March 1, 1970, station KFRC devoted 405 minutes 30 seconds of air time to armed forces public service announcements, in the form of musical programs presented on behalf of branches of the armed forces which were interlaced with recruitment messages and separate public service spot announcements. You state that "when such a large segment of our population [is] vehemently opposed to our military involvement in Vietnam and the foreign policy that it represents, the advocacy of the benefits and advisability of 'volunteering' or 'enlisting' in the military as opposed to seeking a deferment or exemption definitely constitutes a controversial issue of public importance." Thus, it would appear that you believe recruitment messages to represent a controversial issue of public importance because of the controversy surrounding the participation of the United States armed forces in Vietnam. You further appear to consider that enlistment has been presented as an alternative to selective service draft and state that deferment from military service represents another alternative to the question of discharging one's military obligation. As precedent for your request you cite the Commission's application of the fairness doctrine to cigarette commercials (FCC 67–641).

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., June 4, 1970.

FCC 70–596; 46925.
In reply refer to: 3300.

Mr. ALBERT A. KRAMER,
Citizens Communications Center,
Washington, D.C.

DEAR MR. KRAMER: The Commission is in receipt of a complaint filed March 23, 1970, on behalf of Professor David C. Green, individually and as Chairman of the Peace Committee of the Baltimore Yearly Meeting of the Religious Society of Friends (Complainant), against television stations WRC and WMAL, Washington, D.C. The complaint states that the stations continually grant air time for announcements sponsored by the Armed Forces which are designed to encourage and increase enlistment of various branches of the military services. It is contended that these announcements raise a controversial issue of public importance within the fairness doctrine and that the licensees have violated this doctrine by refusing to grant air time in the form of spot announcements for the presentation of argument against service in the Armed Forces and alternatives to, or information regarding exemptions from, military service as a means of fulfilling one's obligation to one's country. It is further contended that military recruitment via Armed Forces spot advertisements or announcements is itself a controversial issue of public importance.

The nub of the issue raised by the complaint is the assertion that "coverage of anti-Vietnam activities and sentiments does not deal with the desirability of bearing arms versus the desirability of alternative service." Complainants specifically note that the issue to which they seek time for response is the "desirability of regular military service even were there no war raging half a world away [Vietnam]."

Before filing the present complaint, Professor Green contacted stations WRC and WMAL and requested free time "to rebut the claim made by the numerous military recruitment advertisements presented on your station that a career in the Armed Forces is desirable, rewarding, and the best way to serve one's country." Both WRC and WMAL declined Professor Green's request for time to present spot announcements opposing military service. In rejecting Professor Green's request, station WMAL–TV indicated that the issue which he sought to present could not be treated through spot announcements, but should be the subject of more extended discussion within a program. The station offered Professor Green time on its "Outlook" program.

Station WRC–TV also rejected the spot announcements of the Peace Committee. In the station's opinion the recruiting announcements did not present one side of a controversial issue of public importance, since there is no substantial public controversy concerning the need or desirability of having Armed Forces or concerning voluntary recruitment. We have been informally advised that the station has offered the Society of Friends time to appear on two religious program series on which they would have an opportunity to present their views.

The first issue is whether the licensees, in broadcasting the Armed Forces recruitment announcements,[1] have presented one side of a controversial issue of public importance. Station WRC–TV has stated its judgment that the recruiting announcements do not do so, and the question is thus whether that judgment is arbitrary. For the Commission to find the judgment to be arbitrary, there must be a showing or reasonable indication that there is a significant controversy of public importance on whether the United States at this time should maintain armed forces, and, what is essentially the same thing, whether persons should volunteer for service in the armed forces. We appreciate the long-held position of the Friends concerning pacifism, but we cannot say, based on material before us, that the licensee's judgment on this score is unreasonable.

In this connection, we note that the announcement which the Friends Peace Committee seeks to have broadcast does not deal with the issue of whether there should be armed forces, but rather focuses on the draft. Thus, it states that "for every draftee that goes off to war, there is a Christina [girl] left behind—sometimes for good", and that "there are legal alternatives to military service. You may be entitled to one of a number of deferments provided by law. For information write to . . . ." As WRC–TV states, there is "substantial controversy concerning the draft . . . ."

On this draft issue, non-military and honorable alternatives to service in the military are certainly of substantial interest to the public and, in the coverage of this issue, constitute a facet of a controversial issue of public importance to which a licensee should afford broadcast opportunity, as a part of his obligation to inform the public. The licensees here are covering this issue as a part of the requirement to devote a reasonable amount of time to issues of public importance—an important aspect of a licensee's obligation under the Communications Act to ascertain and serve the needs and interests of his area. See *Red Lion Broadcasting Company, Inc.*, v. *Federal Communications Commission*, 395 US 395 US 367 (1969); *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1250 (1949). It is the responsibility of the licensee to determine the specific manner in which he chooses to fulfill his fairness obligations and the Commission will not dictate the form of the presentation—e.g., discussion or panel shows, news shows, etc. The licensee is of course expected to make judgments in good faith as to the amount of broadcast time to be devoted to any issue of interest to the public and these judgments will vary with the nature of the issues being considered. The most omportant issues will generally be afforded the most broadcast time.

Turning to this complaint against stations WMAL–TV and WRC–TV, we note that both stations, although they decline to broadcast the views urged by Professor Green and his group in the form of promotional spot announcements, have offered an opportunity for the presentation of such views in the context of substantive programming. Absent evidence that stations WMAL and WRC have failed in their overall programming to achieve fairness in their coverage of the

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[1] Promotional advertisements sponsored by the Armed Forces urge service in the military as an honorable way to serve one's country. Absent specific demonstration to the contrary, we can not accept your premise that Armed Forces announcements generally portray service in the military as the only way to honorably serve one's country.

controversial issue here involved (i.e., the draft), the Commission will not disturb the licensees' determination as to how to best inform the public of the various facets of issues of controversial public importance.

In reaching the conclusion that no fairness doctrine violation has been demonstrated, we do not mean to imply that nothing connected with a public service announcement could bear upon a controversial issue of public importance. Such announcements, in particular instances, may present one side of a controversy. Here, we simply note that there is no indication that any such announcement (i.e., one presenting one side of a controversial issue of public importance) was broadcast by any station in the San Francisco area.

In view of the foregoing, we have determined that no further action is warranted at this time. Commissioner Johnson dissented and issued the attached statement (letter to Mr. Jelinek).

By direction of the Commission:

BEN F. WAPLE, *Secretary.*

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., June 4, 1970.

FCC 70-595; 46924.
In reply refer to: 3300.

Mr. DONALD A. JELINEK,
Berkeley, Calif.

DEAR MR. JELINEK: The Commission is in receipt of a complaint filed on February 25, 1970, on behalf of San Francisco Women For Peace. The GI Association and The Resistance (complainants), against numerous radio and television stations in the San Francisco, California area. Briefly stated, complainants contend that the San Francisco stations have violated the fairness doctrine in that armed forces recruitment messages have been broadcast as public service announcements, but the stations have refused to broadcast "public service announcements opposing the viewpoints expressed in the military recruitment announcements" which complainants have offered to supply.

In support of their contention that the armed forces recruitment announcements raise a controversial issue of public importance, complainants assert that: There are many groups in the San Francisco area who do not believe it is beneficial to the individual or society at large for people to participate in the armed forces; armed forces recruitment cannot be considered without reference to the war in Vietnam since the primary purpose of the U.S. Armed Forces is to fight wars and a military recruit is very likely to be stationed in the Vietnam war zone at some time during his military career (*U.S.* v. *Sisson*, 294 F. Supp. 511 (D. Mass) 1968, at 513); and there are many groups in the San Francisco area who believe the best course of action for young men "is to seek one of the many possible deferments from military service provided for by Congress." Complainants assert that the Commission's application of the fairness doctrine to cigarette advertising (9 FCC 2d 921 (1967)) is analogous and requires application of the fairness doctrine to the recruitment announcements complained of and that the fact that the U.S. Government is the sponsor does not exclude the matter from application of the fairness doctrine. (*Report on Editorializing*, 13 FCC at 1249). Complainants also argue their point of view is entitled to exposure through spot announcements rather than news and discussion coverage because of the more effective motivating factors inherent in an "uninterrupted" "prepackaged message" which "allows the sponsor [in this case, complainants] to prepare the announcements in such a manner as to have a desired psychological effect" rather than the "straightforward manner aimed at persuading the listener's rational sense" which is the way views are presented on news and talk programs. Finally, complainants argue that the fairness doctrine applies to public service announcements because, as opposed to normal commercial announcements, the broadcaster is making an editorial judgment in choosing the particular spot announcement and must therefore be more cognizant of his fairness obligations to preserve his facilities as an "uninhibited market place of ideas" (*Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367, 390 (1969)).

Complainants' presented their request for "subtantially equivalent [free] time" to present spot announcements reflecting their views in opposition to the Armed Forces recruitment messages. Fourteen (14) San Francisco area stations formally refused complainants' request and the remainder did not reply. In view of our determination that the stations did not act unreasonably in refusing complainant's request, we need not detail all the reasons advanced by the stations.

However, we note that eleven of the fourteen stations who responded to complainants' request stated that they have presented contrasting views regarding the Selective Service System and the Vietnam War in newscasts and discussions and other programs, and that they did not consider Armed Forces announcements urging voluntary enlistment a controversial issue of public importance.

The fairness doctrine requires that when a station presents one side of a controversial issue of public importance it is obligated to afford reasonable opportunity for the presentation of significant conflicting viewpoints on the issue. The crucial question raised is whether Armed Forces recruitment messages constitute the presentation of one side of a controversial issue of public importance. We are unable to conclude that the presentation of such recruitment messages, in and of itself, involves a controversial issue of public importance.

Under the fairness doctrine, it is the licensee's obligation in the first instance to make a determination regarding the controversial nature of an issue and whether an issue, if it is controversial, is one of public importance. Unless the licensee's judgment is shown to be unreasonable, the Commission will not upset the judgment of the licensee. In short, it is not a question of the Commission substituting its judgment for that of the licensee, but rather whether, in light of the showing before the Commission, the licensee's judgment can be said to be arbitrary.

In the present case, we do not believe that the broadcast of Armed Forces recruitment messages, any more than similar recruitment messages for policemen, firemen, teachers, census enumerators, peace corp volunteers, etc., in and of itself, raises a controversial issue of public importance requiring presentation of conflicting viewpoints. We note that the power of the Government to raise an army has not been question; rather the thrust of the complaint is an objection to the use made of the army (war in Vietnam) and the manner in which manpower is conscripted (Selective Service draft).

In reaching this conclusion we also note that complaints themselves reason that recruitment messages are controversial *because* they are inextricably intertwined with the conduct of the war in Vietnam and the Selective Service draft. There is no indication that any of the stations against whom the complaint was filed have failed to treat the issues of Vietnam and the draft (both concededly controversial issues of public importance) in conformance with the fairness doctrine. Moreover, the only indication as to what complainants consider the "opposing viewpoint" to the Armed Forces recruitment announcements is one spot announcement entitled "Draft Counseling," which offers information pertaining to draft deferments. The fact that Vietnam and the draft are controversial issues of public importance does not, in our view, automatically require that recruitment messages also be considered as such, and we are unable to conclude that it was unreasonable for the broadcast stations in the San Francisco area to decline to broadcast the "opposing" spot announcements.

In reaching the conclusion that no fairness doctrine violation has been demonstrated, we do not mean to imply that nothing connected with a public service announcement could bear upon a controversial issue of public importance. Such announcements, in particular instances, may present one side of a controversy. Here, we simply note that there is no indication that any such announcement (i.e., one presenting one side of a controversial issue of public importance) was broadcast by any station in the San Francisco area.

In view of the foregoing, it is concluded that no further action is warranted. Commissioner Johnson dissented and issued the attached statement (Letter to Mr. Jelinek).

By direction of the Commisison:

BEN F. WAPLE,
Secretary.

ARMED FORCES RECRUITING SPOTS

[In re letter to Donald A. Jelinek, Esq., denying the application of the Fairness Doctrine to Armed Forces recruitment announcements.]

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

When war begins, all thinking stops.—Zechariah Chafee, Jr., *Free Speech in the United States.*

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.—*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

Today one branch of the Federal Government ignores the orderly complaints of its citizens and rules that another branch of that same Government, the U.S. Army, can propagandize without preserving for the young their First Amendment right to self-defense. The Army and Marine Corps will be permitted to harness all the seductive merchandising talents of Madison Avenue to persuade draft-age young men to enlist in the armed forces. In support of the Pentagon, the FCC has ruled that Americans have no right to talk back to their television sets—at least on this issue. Quakers, and other groups opposed to military service in general and the Vietnam War in particular, are now left with nothing but the recourse of demonstrations and draft-card burning to attract the largess of the news media's television cameras.

To put it bluntly, the majority has held that the young people of this nation must find their path to the Fairness Doctrine in the streets. I dissent.

I

No one, I think, can ignore the present mood of this country. We are engaged in a vast, officially undeclared land war in Southeast Asia—a war which has killed over 49,000 American soldiers, and in which countless hundreds of Vietnamese, Laotian, and Cambodian soldiers and civilians have lost their lives. Reputations and careers in our country (including those of Presidents) have risen and fallen on the extent to which the public has believed that our Vietnam policies have been successful. Military budgets and multi-billion dollar weapons systems are being questioned as never before. There is a movement to isolation in America in international affairs. It should be obvious, therefore, that the military has an enormous vested interest in preserving public faith in its policies and programs—indeed its very existence. And one cannot ignore the fact that the military can maintain its "favorable image" in perhaps no better way than through propaganda pumped over the radio and television stations of our country.

Senator William Fulbright has recently warned us of the tremendous machinery that the military has constructed to loose its propaganda upon an unsuspecting American public. According to Senator Fulbright, the Defense Department is spending millions of dollars to promote and justify its activities at public expense. By a conservative estimate, the Pentagon is now spending $40.5 million a year for "Public Relations"—an increase of 1500% since 1959 ($2.8 million), when the Vietnam War first began to loom larger and larger in the public eye.[1] See *Cong. Rec.*, Dec. 1, 1969, p. S–15144; Dec. 2, 1969, p. S–15306; Dec. 4, 1969, p. 15649; and Dec. 5, 1969, p. S–15804 (Daily Ed.)

We must heed Senator Fulbright's warning:

> There is something basically unwise and undemocratic about a system which taxes the public to finance a propaganda campaign aimed at persuading the same taxpayers that they must spend more tax dollars to subvert their independent judgment. I am reminded of W. C. Fields' admonition: "Never give a sucker an even break." *Id.* at p. S–15333, Dec. 2, 1969 (Daily Ed.)

I fear the Commission fails to understand what lies behind the "Public Service" announcements, supplied *gratis* by the Army, and the message they convey. Shortly after assuming office, Secretary of Defense Melvin Laird told the Defense Department that "[p]ropaganda has no place in the Department of Defense public information programs." Quoted by Sen. Fulbright, *Cong. Rec.*, p. S–15145, Dec. 1, 1969 (Daily Ed.). Yet from all accounts the Pentagon's "public information" program is aimed, not at providing the public "with unvarnished facts, but at persuading it that the programs and weapons systems of the Army, Navy, or Air Force . . . should have the first claims on public funds and are the key to peace." Senator Fulbright, *Cong. Rec.*, p. S–15333, Dec. 2, 1969 (Daily Ed.)

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[1] In a recent statement to the Senate Appropriations Committee, Senator J. William Fulbright reported that in 1959 the Congressional limit on Pentagon public relations spending was $2,775,000. (Over-all defense spending was then $43 billion.) By 1970, defense spending had doubled; but public relations spending had increased 15-fold! The total was $40,447,000—roughly double the entire annual appropriation for the FCC. Senator Fulbright reported defense officials maintained that public relations expenditures were $27,953,000 for fiscal 1969. Now it appears these figures may have been deliberately understated. Senator Fulbright observed, "Apparently the department was not completely candid with me since now, apparently in anticipation of the imposition of a legislative ceiling, they state that the public-relatons bill for that year was actually $44,062,000." Washington Post, June 22, 1970, p. A–15, col. 1. For further material on military-oriented public relations spending, see text at n. 2, *infra*.

I believe that this Commission, as one branch of "The Government," has a special obligation to preserve both the appearance and the actuality of fairness and impartiality when it is called to weigh Fairness Doctrine complaints by a broad range of citizens groups against another branch of "The Government." Chief Justice Burger, then a Judge of the United States Court of Appeals, has condemned this Commission's "curious neutrality-in-favor-of-the-licensee." *United Church of Christ* v. *FCC*, No. 19,409 (D. C. Cir., June 20, 1969). Yet real neutrality—by the Commission and by broadcast licensees—is indispensable where broad-based but under-financed groups of citizens attempt to debate the military-industrial complex in the public forums of radio and television.

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 396 (1969), the Supreme Court warned:

> There is no question here . . . of a *discriminatory refusal* [*by the Commission*] *to require* the licensee to broadcast certain views which have been denied access to the airwaves. . . . Such questions would raise more serious first amendment issues. [Emphasis added.]

I believe this Commission has required petitioners here to sustain a far greater burden of proof than it imposed on petitioners in its cigarette decision, *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 F.C.C. 2d 921 (1967), and therefore stands guilty of a "discriminatory refusal to require" licensees to broadcast the views of citizens opposing the "Join the Army" campaign of the military.

II

On June 2, 1967, this Commission applied the Fairness Doctrine to cigarette advertising. *Letter to WCBS–TV*, FCC 67–641. In that ruling we stated:

> The advertisements in question clearly promote the use of the particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. [Except, of course, the actual sale of cigarettes.] But we believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

See *Cigarette Advertising*, 9 F.C.C. 2d 921, 938 (1967). In reaffirming the ruling, we emphasized (referring to a June 29, 1967, Federal Trade Commission Report) that the "desirability" of smoking in cigarette advertisements "is portrayed in terms of the satisfactions engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences, and that by so doing the impression is conveyed that smoking carries relatively little risk. . . ." *Id.* at 938.

Petitioners have attached the text of 18 military service recruitment announcements to their petition. A sample of two adequately conveys the mood of these advertisements:

ANNOUNCER. It's a day you can't put into words. You try to compare it with the day you graduated from high school, but there's no comparison. Because somehow the day you graduated from high school, you were still just another guy, and on this day, you're something else. You look taller than you did because you stand taller. You look proud because you are proud. And no wonder . . . you've just gone through the toughest eight weeks a guy ever had. And if you didn't have what it takes, you wouldn't be standing with the rest of them. You wouldn't be wearing the same uniform. Ask a Marine. Ask a Marine what it means to graduate from boot camp. He'll tell you. It's a day to remember for the rest of your life. Because that day they separate the men from the boys.

REFRAIN. Ask a Marine.

ANNOUNCER. We understand you're looking for a man's job. Well, we just may have one. Who are we? We've been in business since 1775. We're located in close to 200 places around the world. We'll pay while we are training you. Give you thirty days off per year. Give you a chance to continue your education, and we'll build you a man. We'll build you a marine. And that man and that marine will be you.

REFRAIN. Ask a Marine.

I think it is clear from just these two advertisements that the "desirability" of joining the Marines is portrayed in terms of the "satisfactions" to be derived from such an experience [you'll "stand taller," you'll be "proud," etc.] and by "associating" membership in the Marines "with attractive people" [real "men," men who "have what it takes," etc.] and "enjoyable events and experiences"

[travel, on-job training, thirty days off per year, a chance to continue one's education, etc.].

As with the cigarette advertisements, there is something missing. What is noticeably absent from these advertisements is the view, widely held by many respected citizens, that "for hundreds of thousands of soldiers the pay is poor, the principal 'educational opportunity' is the opportunity to learn how to kill, and the 'travel" is to Vietnam, where the question of whether the military is making a 'really worthwhile contribution to the security of [the United States]' is a highly controversial one." Letter from Mr. Donald A. Jelinek to the FCC, Feb. 16, 1970, Appendix IV, p. 2.[2]

III

In light of the close similarity—and perhaps even identity—of the instant complaint with our *Cigarette Advertising* ruling, let us examine the majority's justification for ruling against petitioner.

In the first place, the majority begins by stating what I believe to be an oversimplified interpretation of the Fairness Doctrine: "*that when a station presents one side* of a controversial issue of public importance it is obligated to afford reasonable opportunity for the presentation of significant conflicting viewpoints on the issue." [Emphasis added.] This interpretation assumes that the licensee's obligation to present all viewpoints on issues of controversy and public importance is invoked only when one side is first presented. Were this is the case, the licensee could circumvent the Fairness Doctrine by simply refusing to present *any* view on such issues. I believe, on the contrary, that the Fairness Doctrine is invoked, not when one side of an important issue is *presented* by a licensee, but when such an issue *arises*. By my reading, this was the Supreme Court's view of the Fairness Doctrine in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 369 (1969), where it was described as the "requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage."

Next, the majority drags out the customary and familiar boilerplate recitation that the Commission will defer to the licensee's judgment on a Fairness Doctrine matter so long as it is "reasonable." ("In short, it is not a question of the Commission substituting its judgment for that of the licensee, but rather whether, in light of the showing before the Commission, the licensee's judgment can be said to be arbitrary.") Of course, everyone must know that this double talk is nonsense, and is used primarily when the Commission does not want to apply the Fairness Doctrine to a particular factual situation. Obviously at some point this Commission must decide that the licensee is wrong in his determination that the Fairness Doctrine is inapplicable, and I do not see how we can do this unless we substitute our judgment for the licensee's. Whatever may be the initial responsibility of the licensee, some agency must arbitrate disputes regarding the applicability of the Fairness Doctrine—and that task has been assigned to the Federal Communications Commission, with review by the courts. In any case, the majority treats this "throwaway" language precisely for what it is—a useless appendage inserted routinely in Commission opinions—and proceeds to make its own, independent determination anyway: "In the present case, we do not believe that the broadcast of Armed Forces recruitment messages . . . raises a controversial issue of public importance. . . ."

Finally, the Commission majority states why it believes that the recruitment messages do not raise controversial issues of public importance. Its creation is scarcely a monument to clarity. So far as I can determine, however, the majority seems to be saying that advertisements asking young men to join the Army—like "similar recruitment messages" asking people to become "policemen, firemen, teachers, census enumerators, peace corp volunteers, etc."—only raise the issue whether the particular institution in question (here the Army) has the legitimate power to recruit members. (The majority states: "We note the power of the Government to raise an army has not been questioned. . . ." I cannot imagine why the majority merely "notes" this point if it is the crux of its holding.) The majority then goes on to reject the petitioners' arguments, stating that the recruitment advertisements do not refer to the "use made of the army (war in Vietnam)" and the "manner in which manpower is conscripted (Selective Service draft)."

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[2] The internally quoted material is taken from other military recruitment advertisements reproduced in Appendix III, p. 1, to Mr. Jelinek's letter. Some of the material will be quoted elsewhere in this opinion.

This reasoning seems faulty on a number of counts.

First, it merely illustrates the principle that determined men, if they try hard enough, can define any problem out of existence. If the Commission had applied similar reasoning to cigarette advertisements three years ago, we would presumably have ruled that cigarette advertisements raise only the issue of whether cigarette manufacturers have the right to recruit customers. Not surprisingly, the broadcasting industry made precisely this argument with respect to cigarette advertising, contending that "no controversial issue of public importance can be presented where a lawful business is advertising a lawful product." Not surprisingly, we gave it suitably short shrift. See *Cigarette Advertising*, 9 F.C.C. 2d 921, 938–40 (1967). What *is* surprising, however, is that the majority now finds such specious reasoning so persuasive.

Second, it seems obvious to me from the text of the recruitment advertisements that they do far more than merely assert the right of the army to recruit members. Indeed, it is difficult to treat this latter notion seriously. What would the average listener or viewer think upon hearing a military recruitment advertisement such as, "Should your boy join the U.S. Marines? . . . It really depends on . . . how soon he wants to be a man"? Would he assume that this is the Army's effort to persuade him that it can legitimately recruit members? On the contrary, the rather blatant message of these spots is that it is "*desirable*," for a multitude of reasons, for a young man to join the military. The principle question, therefore, is whether promotion of the "desirability" of military service raises a controversial issue of public importance.

Third, it seems clear that the majority's references to other types of recruitment—"policemen, firemen, teachers, census enumerators, peace corp volunteers, etc."—are simply misplaced. For one thing, so far as I know policemen, firemen, teachers, etc., are not threatened with the prospect that if they do not "volunteer" for service, they will be drafted! Congressional appropriations for "standing armies," the quartering of troops, and the relative role of the military generally have been controversial issues since the very founding of our nation. They are no less so at this hour. This is in part because the military conscripts men against their will, forces them to kill and destroy, and subjects them to the omnipresent threat of death. These risks are simply not shared by census enumerators, whatever else may be the hazards of their job. For another thing, there is no question as to the power of municipalities and schools to hire policemen and teachers. Serious question has been raised, however, as to whether the President can legitimately conduct a war in Southeast Asia, invading new countries at will, without a declaration of war by the Congress, as required by Article I, Section 8, of the Constitution. It is one thing to hire men to teach school; it is quite another to force them to fight and die in a war that may be illegal.

IV

The majority finally advances as its essential arguments the proposition that there is no connection between military recruitment announcements and two other issues of admittedly high controversy—the Vietnam War and the Selective Service system. This argument is faulty for many reasons.

First, as discussed above, the majority has set up a "straw man" by adopting a highly artificial and narrow definition of the scope, function and impact of the military recruitment advertisements in question, and then knocking it down as "non-controversial."

Even if the recruitment advertisements made no claims that military service was "desirable," but merely contained the exhortation "Join the Army, Join the Army," I believe they would raise an issue of controversy and public importance. The reason is that one simply cannot separate the controversiality of a recruitment advertisement from the nature and function of the job in question. If—to pick a deliberately strong example—the Government were to recruit soldiers for a special commando troop whose function was widely known as encompassing the assassination of civilians in Vietnamese villages, and used advertisements which simply urged men to "Join the Commandos, Join the Commandos," only a person with the most tenuous grip on reality could reason that nothing more than "the power of the Government to raise an army" had been placed in question. Recruitment advertisements for policemen, firemen, teachers, census enumerators, and so forth, are not controversial because the work they do is not controversial. But I suspect recruitment solicitations for National Guardsmen in the Kent State University region of Ohio, or

for the CIA in Berkeley, would be highly controversial. So it is for recruitment into the armed forces generally at this time.

Second, the military recruitment advertisements before us obviously do far more than urge young men to "Join the Army." They make grandiose and wide-ranging claims as to the "*desirability*" of military service, just as cigarette commercials taught the desirability of smoking. And once the desirability of military service is placed in issue, I simply do not see how one can avoid a discussion of what one will be doing there [continuing one's education, becoming "a man," joining "the leaders"], where one will be doing it [in "close to 200 places around the world"—one of which is presumably Vietnam], and how one will be rewarded ["good pay" and a share in the "fight for freedom" and the "protection of our nation and our ideals"].

Third, even apart from the present Vietnam conflict, the issue of military service has traditionally been embroiled in extreme controversy of great public importance. See *United States* v. *O'Brien*, 891 U.S. 367 (1968); *Holmes* v. *United States*, 891 U.S. 936 (1968) (Douglas, J., dissenting, with a long historical sketch on the controversial nature of the Armed Forces). Indeed, the role of the military in our society in general, and its specialized methods for recruiting members in particular, have generated controversies of such long standing that they extend almost back to the Revolutionary War.

See *United States* v. *Nugent*, 346 U.S. 1 (1953); *Hamilton* v. *Regents of the Univ. of California*, 293 U.S. 245 (1934); *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Tarble's Case*, 80 U.S. [13 Wall.] 397 (1891); *Prize Cases*, 67 U.S. [2 Black] 635 (1862). The history of this controversy is quite distinct from the experience of other public groups, like firemen and teachers, relied upon by the majority. In *Schenck* v. *United States*, 249 U.S. 47 (1919), for example, the Supreme Court adopted the "clear and present danger" test to convict persons of circulating documents which complained that the Conscription Act violated the Thirteenth Amendment's prohibition against "slavery" and "involuntary servitude," and urged potential draftees to "assert your opposition to the draft." Even today one pressing and important "controversial" issue is the extent to which a young man who succumbs to military recruitment advertisements and joins the army loses those constitutional rights guaranteed to civilians by the Supreme Court in cases since *Schenck*. See Note, *Dissenting Servicemen and the First Amendment*, 58 Geo. L. J. 534 (1970).

Fourth, it cannot be denied that this country is in fact engaged in a serious war, and that the army is playing an integral part in it. A federal court, for example, has acknowledged that service in the Armed Forces, whether by recruitment or enlistment, carries with it "a strong probability of ultimate service in Vietnam." *United States v. Sisson*, 294 F. Supp. 511, 513 (D. Mass. 1968). Indeed, almost all our pressing national problems—inflation, campus unrest, racial discrimination, the urban crisis, mass demonstrations and protest—appear linked in some way to the Vietnam War. Highly respected legal scholars have argued, as well, that the President has violated the Constitution in conducting an "undeclared" war. F. Wormuth, *The President Versus the Constitution* (paper published by the Center for the Study of Democratic Institutions, Santa Barbara, Calif., 1968); Hughes, *Civil Disobedience and the Political Question Doctrine*, 43 N. Y. U. L. Rev. 1 (1968); *The Vietnam War and International Law*, Am. Soc. Int'l Law (R. Falk ed., 1968). How can recruitment solicitations be considered anything but controversial?

Finally, consider some simple statistics. In 1969, some 59,000 Americans (49,000 men and 10,000 women) died of lung cancer, and over 90% of these deaths are reputedly linked to cigarette smoking. *Smoking and Lung Cancer*, Public Health Service pamphlet (1970). This means that of the 70,000,000 Americans who consume tobacco in one form or another, approximately 53,100—*or one out of 1,300*—died of lung cancer in 1969. (If one accepts the higher figure of 300,000 cigarette-related deaths per year, the ratio becomes one out of 233.) The enormity of this problem in part lead the FCC several years ago to apply the Fairness Doctrine to cigarette commercials. *Cigarette Advertising*, 9 F.C.C. 2d 921 (1967).

Yet what of the hazards of military service? During 1969, the same period in question, the United States had 3,127,000 servicemen in uniform around the world—many of whom were thousands of miles from Vietnam. Of that total number, however, approximately 11,527—or one out of 275—lost their lives in Vietnam. *Source:* Office of Public Information, Southeast Asia Desk, U.S. Department of Defense (June 18, 1970).

Simply stated, it is *at least* as dangerous to enlist in the armed services as it is to use tobacco. This Commission has ruled that invitations to smoke cigarettes raise issues of sufficient controversy and public importance to invoke the Fairness Doctrine. Yet invitation to join the military do not. Why? Frankly, the majority's reasoning—what there is of it—escapes me.

Cigarette advertisements were brought under the Fairness Doctrine—which after all, requires only that the other side be told—in part because they were inherently deceptive. The ads represented to their audience that smoking was "desirable," without warning that death or serious illness might follow. I believe that solicitations for military service are similarly deceptive, for they do not warn their audience that death or serious injury might follow as a statistical consequence of enlistment, or that a young man of draft age may have *alternatives* to the "enlist-or-be-drafted" dilemma. Congress itself has, in the Selective Service Act, exempted from military service, for reasons of strong national policy, persons who fall in numerous categories. Persons, therefore, whom Congress did not intend to induct, may be induced into a military obligation which was unrequired, and perhaps even undesirable, as a direct consequence of partial truths contained in the advertisements before us. To the extent these advertisements suggest that young men can satisfy their patriotic obligations to their country only by military service, they are inherently deceptive. Only the application of the Fairness Doctrine can correct this deception by requiring the presentation of alternative views.

V

The majority claims that the military recruitment advertisements do not raise an issue of controversy and public importance. They contend that in any case there is "no indication that any of the stations against whom the compliant was filed have failed to treat the issues of Vietnam and the draft (both concededly controversial issues of public importance) in conformance with the fairness doctrine." In our *Cigarette Advertising* ruling, 9 F.C.C. 2d 921 (1967), we addressed this problem of sufficiency. Whereas we concluded that the broadcaster was not required to devote an "equal" amount of time to opposing views, we held that the time must at least be "significant" *id.*, 9 F.C.C. 2d at 949. In *National Broadcasting Co.* [WNBC–TV], 16 F.C.C. 2d 947, 15 P & F Radio Reg. 2d 1059 (1969), for example, the Commission (over my dissent) ruled that a ratio of one anti-smoking commercial to 8.1 cigarette commercials was "significant."

In the present case, however, so far as I know, we do not have any indication of the ratio involved—military recruitment advertisements to anti-military coverage. The majority's assumption that all the licensees broadcasting such advertisements have fulfilled their Fairness Doctrine obligations, therefore, seems completely unsupported by any evidence. One can only wonder why the majority seems so eager to base such an important precedent-setting decision on so little.

In addition, there are a number of factors that should be weighed in determining whether a licensee has given "significant" coverage to various views. First, an important factor is the frequency and regularity of presentation. The Commission has explicitly recognized this factor in its decision. *Cigarette Advertising*, 9 F.C.C. 2d 921, 941 (1967):

> We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the Fairness Doctrine . . . For, while the Fairness Doctrine does not contemplate "equal time" if the presentation of one side of the issue is on a regular and continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue.

In affirming this ruling the United States Court of Appeals in *Banzhaf* v. *FCC*, 405 F. 2d 1082, 1099 (D.C. Cir. 1968), was even more explicit:

> In these circumstances, the Commission could reasonably determine that news broadcasts, private and governmental educational programs, the information provided by other media . . . inadequately inform the public of the extent to which its life and health are most probably in jeopardy. *The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood.* A man who hears a hundred 'yeses' for each 'no,' when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed. [Emphasis supplied.]

According to the Office of the Controller, U.S. Department of Defense (information supplied June 19, 1970), the American Forces Radio and Television Service (AFRTS) spent *at least* $229,000 in 1969 producing 1,000 radio and 300 television spot announcements, all supporting military information themes.[3] Although it is unclear how many of these are devoted to military recruitment advertisements of the sort before us (an interesting question which the majority has failed to ask), it is perhaps insightful that the Defense Department itself budgets the cost of the spot announcements to "recruiting"—an indication that perhaps the Pentagon has something more in mind than mere information to the public when it runs its spots from coast to coast.

How effective are these military advertisements? No one can tell. However, the Chief of Naval Personnel, Vice Admiral Charles K. Duncan, recently reported to Congress that the Navy alone receives from $8 to $10 million in free time over the airwaves for military programming every year—a "significant" amount by anyone's public relations standards. *Hearings on Fiscal Year 1971 Department of Defense Budget*, House Subcommittee on Defense Appropriations, 91st Cong., 2d Sess. Pt. 11, at p. 86, Mar. 3, 1970). Without more direct evidence before us, and in light of this military propaganda barrage, I would question whether the San Francisco stations have truly fulfilled their Fairness Doctrine obligations.

Second, even if licensees have satisfied the Fairness Doctrine under traditional analyses, I think we must recognize the unusually powerful impact of spot advertising as compared to normal news coverage. Prepared spot announcements should be placed in a class by themselves—a proposition acknowledged by FCC Chairman Dean Burch with respect to political advertising. *Voters' Time*, Twentieth Century Fund Commission on Campaign Costs in the Electronic Era, p. 15 (New York 1969) ; *Statement of Chairman Dean Burch*, Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, June 2, 1970. The spot announcements in question invoke the familiar Madison Avenue techniques: the enticements of glamour and excitement, the promise of a rewarding future, the allure of travel to faraway places, the invocation of an ethic of masculinity, and the reassuring appearance of well-known celebrities—Jack Webb, Coach Richie Guerin of the Atlanta Hawks, Jonathan Winters, former U.S. Senator Paul Douglas, and "Marine Reservist Ed McMahon"—to intone the blandishments prepared by the Army's recruitment officers and public relations specialists. Petitioners seek only to present an alternative to the siren call of the military establishment. This the majority has refused them.

One final point requires mention. The broadcasting industry bitterly fought the anti-smoking announcements, fearing that their insertion into daily programming might eliminate time that otherwise could be used for paying commercials. The military recruitment advertisements before use, however, provide the licensee with no income. They are donated, free of charge, by broadcasters as an alleged "public service announcement." If a station broadcast two such advertisements a day, it could easily reduce this number to one a day, and fill the vacated spot with the proffered anti-military recruitment advertisements. In so doing, the license would be out-of-pocket nothing. It seems clear to me, therefore, that the intensity of resistance to petitioner's message may be caused more by "political" than "economic" considerations. Let's face facts. One ruffles no feathers when one supports the military establishment; but opposition to that establishment always seems controversial. I find it revealing, to say the least, that broadcasters find themselves so eager to donate free time to the

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[3] It is difficult to put a dollar value on the recruiting spot activities of the Pentagon. The talent of contributors like Jack Webb, Frank Blair, Jonathan Winters, and so forth, are given without charge. Their commercial value would, of course, be thousands of dollars in the aggregate. The air time is also "contributed" (subject to such coercion as may be involved from the combination of the Department of Defense and the Federal Communications Commission). The value of this time is also virtually impossible to compute accurately, but estimates running well in excess of $10 million annually would appear reasonable. The hidden costs of Defense Department personnel, physical facilities, materials, distribution costs, and so forth cannot be ascertained. But even the Pentagon itself is prepared to acknowledge directly attributable costs of at least $229,000 in 1969. The radio spots are prepared by three professionals and one clerical aide (salaried at $49,000 a year), who regularly send them to 350 radio stations across the country for systematic rebroadcast. They produced 1000 radio spots in 1969 alone. The acknowledged cost: $121,000. AFRTS also spent a total of $108,000 in 1969 producing 260 television recruitment spots and 40 five-minute fillers (combining both entertainment and a recruitment pitch) for regular use on 90 television stations across the country. The AFRTS television effort employs six full-time professionals and one clerical aide, also at a cost of $49,000. Thus, AFRTS publicly acknowledges spending a total of $229,000 for radio and television recruitment spots in 1969 alone.

army to recruit soldiers to fight its wars, yet deny a portion of that free time to opponents of that process. The "robust, wide-open debate" so often publicly cherished by this Commission seems sadly lacking in this decision. That the Commission is a party to both decisions—the implied encouragement to broadcasters to carry the government's "public service" announcements, and support for the exclusion of contrary views—makes today's decision especially vicious.

VI

Even if there were no basis in law whatsoever for petitioners' claims (which most assuredly there is), a confident and compassionate government would grant their "humble petitions" (to quote from the Declaration of Independence). Is this Administration really so frightened of the rights of free speech and press and "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (to quote from the Bill of Rights) that its critics must be met with intimidation (the Vice President versus the networks), gunfire (at Kent), and slammed doors (at the FCC)? What harm can be done by granting American citizens access to the airways they own to present their modest messages of reply to their government, when it would cost the broadcasting industry nothing? If that truly constitutes a threat to national security, then the "Decline and Fall of the American Empire" is closer at hand than any of the modern-day Gibbons have feared to predict.

But the fact of the matter is that—whatever side God may be on—the law is with the petitioners. The FCC and the broadcasting industry together, using U.S. Army commercials, have the "power" to abridge Americans' freedom of speech (subject to review by the courts). But I do not believe they have the legal right to do so. At any rate, as is by now obvious, they do not have the wisdom to refrain from doing so.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., June 24, 1970.

In reply refer to: 8427–B.

ALABAMA EDUCATIONAL TELEVISION COMMISSION,
Birmingham, Ala.

FACULTY SENATE, UNIVERSITY OF ALABAMA,
College of Arts and Sciences,
University, Ala.

MRS. JUDY AUSTIN,
University, Ala.

GENTLEMEN AND MRS. AUSTIN: The Commission has received a letter of complaint from the Faculty Senate of the College of Arts and Sciences of the University of Alabama, a petition signed by sixty persons at the University attached to a cover letter from Judith Austin, a former employee of the Alabama Educational Television Commission (hereinafter referred to as AETC) and more than 15 individual letters complaining about the programming policies of Alabama educational television stations since the AETC assumed control of the NET affiliation on July 1, 1969. In addition, the Commission has under consideration eight applications for renewal of license of the noncommercial educational television stations in Alabama filed by the licensee, AETC.

When the Commission receives complaints of the general nature here involved, its usual practice is to refer them to the licensee in order to afford the licensee an opportunity to comment. The Austin and Faculty Senate letters alleged that since the AETC assumed the NET affiliation from one of its programming centers, the University of Alabama, certain Black oriented programs were being systematically deleted from the schedule including such shows as "Soul," "Black Journal," and "On Being Black" and all Vietnam moratorium coverage. The letters were forwarded to the licensee for comment. The licensee made the following comments on the letters: (1) the AETC's six local programming centers are given priority over NET programs; (2) it is the licensee's obligation to control the programming; (3) the NET affiliation contract requires that its programs be carried in full; (4) the programs named by the complainants contain ". . . lewd, vulgar, obscene, profane or repulsive material . . ." which will not be presented by the AETC; (5) the AETC assumed the network affiliation on July 1, 1969 to remedy technical connecting problems and to equally divide the programming among its six centers; and (6) no moratorium coverage

was presented because it was adequately covered by the networks. A short letter of reply from the Faculty Senate stated that it was not accusing the AETC of censorship but preferred the original policy of program selection and scheduling.

The AETC further submitted a comment to another programming complaint. In this letter the licensee listed 257 programs which were carried for a total 217 hours during a 30 week period from September, 1969 to April, 1970 which ". . . either were integrated or involve a Negro complement entirely." 155 of those hours were the program "Sesame Street," half of which were repeated programs, i.e., morning and afternoon.

The Commission has reviewed the overall operations of the eight Alabama educational stations and the allegations raised by the complainants to determine if the public interest would be served by a grant of the applications. With respect to the issues of program selection and control, the Commission, barring certain exceptions, is not concerned with matters essentially of licensee taste or judgment. cf. *Palmetto Broadcasting Co.*, 33 FCC 250, 257 (1962). The licensee necessarily and properly was wide discretion in choosing the programming to meet the needs and interests of the community. The Commission regards the maintenance of control over programming as a most fundamental obligation of the licensee. Here we are dealing with a few programs which in the licensee's opinion contain certain offensive material.

In view of the foregoing, there is no substantial problem warranting further inquiry, and the Commission has directed that the applications for renewal of license filed by the AETC be granted.

Commissioner H. Rex Lee dissenting; Commissioner Cox dissenting and issuing a statement;[4] Commissioner Johnson dissenting and issuing the attached statement.

By direction of the Commission:

BEN F. WAPLE,
Secretary.

ALABAMA EDUCATIONAL TELEVISION

[In re Letter to Alabama Educational Television Commission, Renewing License of Stations Charged with Programming Violations]

PRELIMINARY DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

This may not seem like much, but it makes a difference.—Camus, *Between Yes and No.*

The Alabama Educational Television Commission, under the guise of cleaning the airwaves of "obscenity," has succeeded today in getting this Commission's imprimatur of approval for the AETC's blotting out of a substantial portion of NET's black-oriented programming over Alabama's eight-station educational network. I dissent.

The complaint filed in this manner clearly discloses the extent to which the facts are genuinely confused. This is, in other words, precisely the kind of instance in which the Commission should attempt to find out what's going on before it disposes of this serious matter. How we can justify our failure to at least hold a hearing is beyond me.

The complainants seek an explanation for the loss over Alabama's airwaves of several nationally-known black program series—"Black Journal," "On Being Black," "Soul," and the critically acclaimed "Denver Black Panther Trial."

Among many points and questions that could be raised, two seem especially important:

1. Why couldn't the Alabama stations just pre-empt objectionable shows rather than blotting out a whole series of programs? We today allow Alabama's network to burn down the barn to trap a lone rat that I am not sure is even there.

2. The complaints also raise a very serious question of whether Alabama ETV can now be adequately serving the black community. From what few facts are available, it appears that for the past year Alabama ETV has presented integrated programming less than 10 percent of the time.

Is this adequate for a state whose population is 30 percent black? I think not.

We have traveled this wearisome road before. This Commission once before renewed the license of a southern station accused of racial discrimination in programming. We were reversed. *United Church of Christ* v. *F.C.C.*, 16 P & F Radio Reg. 2d 2095 (No. 19,409, D.C. Cir. June 20, 1969).

[4] Commissioner Cox's statement is to be released at a later date.

We need to heed the warnings of the Kerner Commission:

> The absence of Negro faces and activities from the media has an effect on white audiences as well as black. If what the white American reads in his newspapers or sees on television conditions his expectation of what is ordinary and normal in the larger society, he will neither understand nor accept the black American. By failing to portray the Negro as a matter of routine and in the context of the total society, the news media have, we believe, contributed to the black-white schism in this country.

Report of the National Advisory Commission on Civil Disorders 383 (Bantam Book Ed. 1968).

We cannot know what a full investigation or hearing might disclose. I do not pass judgment on the facts at this time. I am appalled, however, at my colleagues' refusal to even find out what those facts may be in a case in which we have so many distinguished complainants making such serious charges.

Camus once described an incident of racial discrimination, brushed over by society, by saying, "This may not seem like much, but it makes a difference." The majority today brushes aside what may be much more. In any event, the appearance as well as the reality of this Commission's concern *does* make a difference.

I may wish to issue a more thorough analysis of this case in the future. For now, however, this must suffice as an expression of concern that the FCC's undistinguished record in the area of race relations has not been improved by today's action.

DISSENTING STATEMENT OF COMMISSIONER H. REX LEE

I dissent to the majority's action of granting the renewals of the eight Alabama educational television stations without first obtaining additional information from the licensee concerning its programming policies.

On the basis of the information before us, I did not feel that the renewal applications should have been designated for hearing; however, sufficient questions had been raised to justify further inquiry.

Appendix IV

Federal Communications Commission,
Washington, D.C., April 2, 1970.

Remarks of Commissioner Nicholas Johnson, Federal Communications Commission, prepared for delivery as the Ferris Lecture in Journalism and Public Relations of the Woodrow Wilson School of Public and International Affairs and the Council of the Humanities of Princeton University, Princeton, New Jersey, Thursday, April 2, 1970, 8:00 p.m.

POLITICS AND POWER IN RADIO AND TELEVISION LAND

The revolution is over. The coup has occurred. There's a new gang in town. It's called "television."

> We now have a government
> Brought to you by
> A small screen of glass
> A bird and an eye . . . and the advertising agencies of the top 100 corporations

Today's democratic dialogue is on the tube. The President gets his time on television by sending out Vice President Agnew to frighten the media verbally. The Panthers get their time on television by sending out their vice presidents to frighten the media in other ways. As Miss Tricia Nixon says, "you can't underestimate the power of fear."

So much for free speech. For, as befits a commercial nation, most of our free speech has given way to paid speech, to profitable speech.

The top 100 television advertisers include many of the top 100 corporations by any measure. These are the same companies that, together, control one-half of all the manufacturing assets in the United States. They control about 85% of all network television advertising. The presidents of these companies, with the support of the three network presidents, determine what the American people will be permitted to see (and prevented from seeing) on television.

It is they who made the decision to show a fifth rerun of "I Love Lucy" rather than Senator Fulbright's Vietnam Hearings—and thereby triggered Fred Friendly's resignation. It is they who change the subjects, or the treatment, of documen-

taries—or, what is more likely, ban them altogether. It is they who censor Tommy Smothers' comments opposing the war (or Elke Sommer's and Carol Burnett's appeals for letters for peace to Mrs. Martin Luther King)—while Bob Hope comments favorably about the war (and appeals for funds for an "Eisenhower Medical Center").

We should not be surprised that this same group is also buying and controlling the television time during which the nation is permitted to consider its political affairs, and the election of its public officials. In an age in which most aspects of our lives have become a facet of big business we should not be startled that politics is no exception.

In this instance, however, the big business is called television. Some politicians spend all of their campaign funds on television-related activities. Senators who spend over $200,000 on a campaign, and Congressmen who spend over $50,000, spend at least 50% of their campaign funds on television. The total spent just to purchase radio and television time in 1968 was $59 million—up from $35 million in 1964. When the related television production costs are included the total is more like $90 million.

Who buys this time? Where does the money come from? Principally from the same corporations that buy all the other television time. Roughly 90% of the political campaign funds in the United States are provided by 1% of the people. And, for federal office, most of that 90% comes from big business (and big labor). Why?

Suppose, for example, you represent one of the corporations that receives over $1 billion a year in Defense Department contracts. (The top 10 defense contractors split $10.7 billion between them.) How much would it cost you to make a modest campaign contribution to *all* elected federal officials? Let us assume a year. This is still an extraordinarily modest investment of 1/10 of 1% of cumbent Senator, and $100,000 for *each* of the two major parties' candidates for President. The total bill? A mere $585,000 a year. Assume a few additional well-placed contributions of $50,000 to those 15 Congressmen and 10 Senators who hold special power over your company—enough to bring the total to $1 million a year. This is still an extarordinarily modest investment of 1/10 of 1% of your annual return from the federal government. In fact, of course, no one corporation needs to contribute to all Congressmen and Senators, so the total costs would actually be much lower.

Now I don't mean to suggest that all companies operate with such a crass view of the governmental process, or that all elected officials vote their contributions rather than their consciences. This country has always been blessed with a great many elected officials of integrity, intelligence and independence. Many officials try to avoid big money campaigning, and refuse to accept large contributions from donors of questionable motive. But all are caught up in a system of ever-escalating television costs and broadcaster power, a system they did not create and cannot control. And the late Speaker Rayburn's counsel, "To get along, go along," has never been more true than it is now for incumbents who want to be re-elected.

There have been some exceptions, of course, but on the whole the system of high cost television politics has worked extraordinarily well for incumbents. The politics of big business is the politics of incumbency, of stability, of status quo. That happens to accord with the personal desires and career plans for most elected officials. It's an almost irresistable marriage. And a very successful one. Since 1954, 92% of all incumbent Congressmen have won reelection; 85% of all incumbent Senators have been returned. These are scarcely figures to give support to those who argue that disaffected, alienated protesters ought to be content to seek solutions within the conventional political process.

And the system has also worked quite well for big business. Take the federal budget, for example. When you total *all* the expenses associated with the entire legislative branch of government, the entire judicial branch of government, all the major independent regulatory commissions (and even some of the executive branch personnel costs), it comes to something on the order of one-half of one percent of the $200 billion federal budget. In other words, you could abolish much of the federal government and scarcely notice the difference when you make out your income tax return a couple weeks from now. One-half of one percent.

Now it takes a tremendous capacity for propaganda and persuasion (as well as a lot of gall) to convince the American people that they should fight rising taxes by cutting back on the appropriations to those activities that total one-half of one percent of the federal budget—while urging them to support addi-

tional expenditures for weaponry and the unwarranted subsidy programs that contribute to the 99 and one-half percent. (If you abolished the FCC entirely, it would still take 1,000 years to save the equivalent of 10% of one year's federal budget.)

How else could you get a President to cut back on the education budget the same week he announces an ABM program expansion? How else could you get him to propose an increase in a maritime subsidy program (already running $700 million a year) that virtually all economists concede has no economic justification whatsoever? How else could you sustain an agricultural subsidy program that pays each of the 264 largest farming units in the country an average subsidy of $200,000 annually? Why else would we permit oil import quotas that provide the poverty-ridden oil companies with an additional $6 billion a year at the consumers' expense? How could you possibly justify the hypocrisy of publicly-proclaimed governmental efforts to cut back on the 300,000 deaths from cigarette smoking each year—while at the same time providing $80 million annually in subsidies to tobacco growers? How else could we justify food distribution programs that permit rich businessmen to eat at the public's expense (the "business expense" half paid for by consumers in excess product costs, and half paid for by taxpayers) while denying equivalent feeding privileges to the poor?

The songwriter put it well:

> And to support this style of living
> See the system they devise
> While for the rich we've socialism
> We give the poor free enterprise

These programs require support from elected officials—and ignorance on the part of the people. And it is the financial power of corporate America, and the ideological power of Big Broadcasting, that makes it all possible.

Televised government and politics may not be an insignificant cost of doing business, but it's far more profitable (and predictable) than turning the running of the country over to an educated and informed populace. Besides, what's an additional $59 million for political television time for corporations that are already investing $3 *billion* to control the other programming? It's interesting that, with all the concern over the "rising costs of campaigning," we haven't heard many complaints from the presidents of the top 100 corporations.

Of course, there are many ways that a broadcaster can affect his elected representatives' fortunes besides the sale of time during campaigns.

It begins with the attitudes of his audience about government and politics generally. Is the federal government portrayed as the enemy ("pointy-headed, briefcase-carrying bureaucrats in Washington") who take excessive taxes and give nothing in return? Or are politicians viewed as respected persons in the community? In one southern community a black disc jockey was told by the white station owner that he could not provide the listeners even occasional news among the records because, "You're not going to educate the Negroes of this community at my expense." Is the audience told of the problems of war, injustice, over population, hunger, pollution, civil rights, education and so forth? Or do they view anyone who talks of the major social and political issues as if he were speaking a foreign language?

The general level of education, information, opinions and attitudes of elected representatives' constituents are something over which the broadcaster has a great deal of influence.

Then there is the matter of how much time the elected official has on the station, and how he is portrayed. Does he have a weekly "report to the people"? That is wholly within the station owner's discretion. Does the station have a Washington "news bureau" (devoted almost exclusively to obtaining filmed clips of the region's elected Senators and Congressmen)? That, too, is wholly within the discretion of the station owner. Does it use the items the official may send the station on his own? How are they portrayed?

The election is, of course, the crucial time. This is when the broadcaster's power is most directly felt. He can make time available to the candidates—or make none available at all (old reruns are always more profitable than old politicians). He can make the time available free—or charge full commercial rates. He can be flexible, or rigid, in demanding cash payments and the scheduling of time well in advance. And, as always, he has control over the "news"—how much will be carried from the campaign, who "makes news" and who doesn't, how flattering the film may be, and how it is introduced by the newsman (News programs are

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exempt from the "equal time" doctrine, and the vague "fairness doctrine" protects only against the grossest abuses.) Finally, there is always the matter of editorial endorsements of candidates.

Is it any wonder that when a "Pastore Bill" is introduced (substantially curtailing the right to contest license renewals, guaranteed to the public by the Communications Act of 1934) that it is supported by 23 Senators and 118 Congressmen? The broadcasting industry is, without question, the single most powerful lobby in our nation's history.

What should we do about it? What can we do about it? Once the Big Broadcasting-Big Business axis has kidnapped and run off with the democratic process is there anyway of guaranteeing its safe return? Probably not. But that doesn't mean we are without hope, or that we should not try.

There has been a rising chorus of demand that *something* be done. There is a general cynicism about the relationship between big business and big government. It's symbolized by Mason Williams' observation that, "Government makes better deals with business than it does with people"—and his shorthand expression, "The U.S. Government, Inc."

There is widespread awareness of the increasing costs of "campaigning." And more and more of the people who have examined the problem at all are coming away with the realization that the real issue, almost the only cause of the significant rise in costs, is television time. Of course, we should more rigorously enforce limitations on corporate and individual political contributions. Of course, we should examine the possibility of franking privileges for candidates. There are many proposals. And yet, in general, if we can solve the television time problem the bumper stickers will very largely take care of themselves.

There are a number of proposals kicking about. The Senate Commerce Committee has considered a proposal requiring stations to sell political advertising time at the lowest unit rate charged other advertisers. Senators Hart and Pearson, and Congressman Macdonald, have proposed legislation that would require substantial discounts by broadcast stations for the sale of a fixed number of commercials. The Twentieth Century Fund has proposed that a fixed amount of network television time be made available to presidential candidates—to be paid for by the taxpayers at 50% of commercial rates. (Congressional candidates could purchase time at a 50% discount.) The Committee for Economic Development has suggested that more of the television burden be borne by educational television stations. (The broadcasters have always argued that Section 315 of the Communications Act—requiring "equal time" and "fairness"—and their fear of having to make time available to a myriad of splinter parties, are all that prevent them from making great quantities of free time available. This assertion is rather effectively rebutted by the fact that when there *are* only two candidates for an office they seldom if ever make free time available then either. In any event, many of the proposals just mentioned, and others—including a recent statement by the FCC—also address the means for modifying or repealing Section 315.)

Now these are all useful proposals. They have been put forward by experienced men of good will. They are designed to deal with the pressures and powers of the real world: that there is no industry with greater political power than broadcasting, and that our political process is largely controlled by businessmen and elected officials who have a stake in the politics of incumbency. (Note that all the proposals mentioned permit unlimited purchase of time by the big money candidates, and that all recognize the broadcasters' "right" to compensation.)

But wouldn't it be useful to at least *begin* our analysis of this problem with basics—and a benchmark of how another nation has dealt with it? Can we agree on the following propositions?

(1) Personal wealth is irrelevant to the qualities we desire in our elected office holders.

(2) It destroys the independence of public officials, makes them less responsive to the needs and desires of their constituents, and is demeaning, to have to obtain large financial campaign contributions from contributors who will later seek support for special interest legislation.

(3) Full and open communication between candidates and constituents is essential to a fully functioning democracy.

(4) Television has today largely replaced the soapbox and the handbill as the most effective and powerful means of political communication.

(5) It is inappropriate that any private group control televised communication in ways that both affect the outcome of the election and contribute to its private profit.

(6) It is especially inappropriate that the people's information about candidates come principally, or exclusively, from short bursts of professionally prepared propaganda almost totally devoid of information about the candidate or the issues.

Can we agree on that much? If so, the remedies to our current predictment seem rather obvious:

(1) Television time should be made available free to all candidates for public office.

(2) This time should be equally apportioned among all major party candidates, and made available to others based upon the votes received in prior elections or the number of signatures on petitions.

(3) The purchase of any additional political time on television should be prohibited.

(4) Candidates should be forbidden to use time in less than five minute segments.

(5) When political propaganda films and advertising techniques are used, such presentations should be followed immediately by time during which the candidate is shown by the station in a setting over which he has no control, such as a debate, press conference or news interview.

These general propositions purposefully leave a lot of specific dangling. How much free time? Precisely how would it be apportioned? Such details are important. But first we must agree on the basics. And at least this set of ground rules would give all candidates equal access to television, give all more time than they can now afford, eliminate the influence of corporate and other major donors, minimize the influence of the political TV commercial, and give the viewer-citizen a better opportunity to participate intelligently in the process of self-governing.

Each of these provisions is essential to the success of the reform. If we are to insure that each candidate will have an equal opportunity to talk with his constituents, television time must be free, and the total amount of time must be limited. "Discount rates" only permit the rich to buy even more advantage over the poor than now—and further incense the irresponsible broadcasters to keep all candidates off the air. The 30-second and one-minute announcements contribute little to the democratic dialogue. Just permitting candidates to present *them* at less cost is little help. On the other hand, we don't want to preclude the use of any modern technique of visual communication. The solution is to permit it all—and then balance it by making the candidate appear on his own.

Before such proposals are cast aside as unrealistic and unworkable, let us examine the practice in England. Most British citizens are appalled at our practice of selling candidates to the citizenry like mouthwash, and permitting the rich (and those funded by the rich) to have the advantage of buying television time. In fact, the British system encompasses most of the features just enumerated. Short spot announcements are prohibited. The purchase of time is outlawed. Free time is made available. It is fairly apportioned, roughly in accordance with demonstrated political strength.

Of course, there are some differences in our politics. But there is no basic reason why their system couldn't work in the United States. No reason, that is, except for the fact that the broadcasters and the FCC have long ago forgotten the premise of the Communications Acts of 1934: that in exchange for the opportunity to make handsome private profit from public property the broadcasters are expected to return some "public service" time, *some* programming that does not maximize their profits.

What could better qualify as "public service" programming than time spent examining the important public issues of the day, and presenting candidates for public office? The only reason broadcasters feel so put upon when campaign time rolls around is that they haven't been making time available all along for public service. They haven't been keeping up their end of the bargain.

I have proposed what I call the "one-third time rule." This proposal would affect every network-affiliated television station. (These blessed few are the richest—through no effort of their own—the most influential, and the most easily able to provide the service Congress originally intended.) Each such station would have to provide one-third of its "prime time" (generally 7:00 to 11:00 p.m.) for purposes other than profit-maximizing programming. In practice this would be programming from the networks: public affairs, cultural, educational—anything other than the lowest-common-denominator, commercially-laden fare we're now offered. The programming would have to be staggered by the networks

so as not to overlap. The net result would be that on any given evening during prime time, every American viewer who could receive the three networks' programs would have a choice. He would still have a choice of *two* channels offering westerns, dramatic series, situation comedies, musical variety, feature films, sports and game shows. But he would also have *one* channel that was offering something else. (Stations could, of course, substitute their own, locally produced, programs in the appropriate categories instead of the network shows.)

The burden on the stations would not be great. The time involved (a little over an hour a day) would generally be substantially less than 10% of their broadcast day. (A modest quantity of institutional advertising might even be permitted on the hour and half-hour to lessen their costs.) The networks and stations would still have complete control over the content of the programs presented. No viewer would be told to watch "what was good for him"—no program type would have been denied him. But the choice available for viewing would be widened significantly, and the impact upon our country could be immense.

One of the ways in which this impact could be felt would be in political time. Once broadcasters become accustomed to giving their viewers an hour or so of other than profit-maximizing programming each evening, it is a simple matter to make some of that one-third time available for political purposes just prior to elections. The broadcaster would not be concerned about audience size or revenue during that time anyway. The time would be set aside already. He could schedule the political time well in advance according to formulae that minimize pressures, administrative inconvenience, and the last minute rush of shuffling programs.

The "one-third time rule" brings the added bonus of better programming year round. Of course, free political time could also be provided by the FCC without the need for the one-third time rule.

Whatever solution is ultimately adopted, the future of our democratic system will turn on our success in capturing back a part of it from Big Broadcasting and Big Business. Their power may ultimately dictate compromises. But it seems to me to be a mistake to start our analysis with the assumption that broadcasters must, as a matter of course, be guaranteed their "right" to go on maximizing profit hour after gruesome hour. I think it is time we stopped worrying about the broadcasters' economic health and started treating our nation's political illness. Free political television time, and the one-third time rule, could be just the remedy we're looking for.

Recently I have been walking to work past one of Washington, D.C.'s many little parks and statues. This one displays a poet's work carved in stone, as if to emphasize its indestructable quality. The words are:

> . . . our soul shall never perish,
> Freedom knows no dying,
> And the greedy cannot harvest
> Fields where seas are lying;
> Cannot bind the living spirit
> Nor the living word . . .

Those are sentiments to lift man's spirit in today's struggle to recapture our government from the grip of Big Business and Big Broadcasting. But they are also a trifle sobering when one contemplates the magnitude of our task. For the lines were written by Taras Shevchenko in 1845—about the conditions in the Ukraine.

APPENDIX V



What You Can Do to Improve TV

CRITICS OF RADIO AND television are generally agreed that the Federal Communications Commission is a far from effective guardian of the public interest in broadcasting. It has failed — according to one widely accepted view — because it has, in effect, been captured by the industry it was established to regulate. How did this come about? And what can you do about it? Many people have written me letters asking essentially that question. This is an attempt at an answer.

So far as I know, the problem is not that sinister forces staged a coup one dark night in the FCC's headquarters at 20th and M Streets in Washington. The problem is much more subtle, and common to virtually all regulatory agencies. As James Landis put it in his devastating report to President Kennedy: "It is the daily machine-gun-like impact on both agency and its staff of industry representatives that makes for industry orientation on the part of

many honest and capable agency members as well as agency staffs."

The remedy, in my view, is not going to come from spontaneous government action. Ordinary citizens can and must — and upon occasion do — influence those administrative decisions. But *effective* citizen representation requires considerably more sophistication than has been generally evidenced.

One basic principle, which I will call the law of effective reform, is this: in order to get relief from legal institutions (Congress, courts, agencies) one must assert, first, the factual basis for the grievance and the specific parties involved; second, the legal principle that indicates relief is due (constitutional provision, statute, regulation, court or agency decision); and third, the precise remedy sought (new legislation or regulations, license revocation, fines, or an order changing practices). When this principle is not understood, which is most of the time, the most legitimate public protests from thousands of citizens fall like drops of rain upon lonely and uncharted seas. But by understanding and using the right strategy the meekest among us can roll back the ocean.

Here is an illustration of both points.

The health hazards of cigarette smoking and, especially, the impact of TV cigarette commercials on teenagers, have been matters of wide concern for a good many years. Yet despite ominous government reports, and despite the warning notice now printed on cigarette packages, the commercials con-

tinued, cigarette consumption increased, and more and more teenagers picked up a habit which TV told them was the road to sexual prowess and a fun-packed adult world. A Federal Trade Commission report deplored the impact of cigarette commercials. Senator Robert Kennedy had suggested legislation outlawing them. Hundreds of thousands of Americans wrote letters to everybody they could think of — Senators, Congressmen, the networks, advertisers, the FTC — and the FCC. Most got replies; some did not. But nothing happened.

This protest failed, I believe, because it ignored the law of effective reform. Vague feelings rather than facts were presented. The letter writers were not specific about who had done something wrong. They did not refer to any legal principle that had been violated. And, finally, they did not seek a precise remedy. Indeed, many such letters begin, "Can't the FCC do something about . . . ?" The answer is that it can't — or at least that it won't — until you tell it just what you want it to do.

Fortunately, however, there was one young man who understood the law of effective reform and attacked the problem accordingly. He was John Banzhaf, a New York lawyer in his twenties. Mr. Banzhaf, too, wrote to Washington. But his letter was different. He called it a "fairness complaint." In it he specified an offender: the CBS-owned flagship station in New York City, WCBS. He said the station ran great quantities of cigarette commercials. He then referred to a legal principle, the "fairness

doctrine," which has evolved over the years from the Communications Act, FCC regulations, and FCC and court decisions. It provides, in summary, that a broadcaster has an obligation to treat "controversial issues of public importance" fairly, and to present all sides of such issues during the course of his programming. The remedy it provides, and which John Banzhaf sought, is that the FCC can order a station complained of to present the omitted points of view. (The FCC generally leaves it up to the station to decide how this is to be done.) In this case, said Mr. Banzhaf, the debate about cigarette smoking is "a controversial issue of public importance." Cigarette commercials constitute the presentation of a particular point of view. (Cigarette smoking is associated with vigor, success, and good times.) WCBS had failed, he said, to present the other point of view. (Cigarette smoking is also associated with gruesome lingering illnesses and death.) The "fairness doctrine" requires, therefore, that the FCC order WCBS (and, by implication, all other stations) to present information about the health hazards of cigarette smoking.

Mr. Banzhaf won. A potential of some fifty to one hundred million dollars' worth of free antismoking commercials are now being presented in the course of a year over radio and television. Through his rather simple act and investment in a six-cent stamp he had produced a result that federal officials and hundreds of thousands of concerned Americans had been unable to bring about: cigarette consumption

has declined in our nation for one of the first times in its history.

The point of this story is not that "one man can make a difference" (although he can, and did), or that the fairness doctrine is the magic solution to all complaints about broadcasting (although it has not been used as much as it might). The point is that for each citizen grievance (about broadcasting or other matters) there is one particular course of action suggested by the law of effective reform that will bring the quickest and most thorough results in the most efficient and cheapest way. Any effective reformer must spend at least as much energy planning that optimum strategy as executing it. You *can* fight city hall, the "little man" *can* do effective battle with massive corporate and governmental institutions, the government *can* be made to be responsive to an individual citizen's desires. The individual's frustration in our institutionalized society comes only from ignorance, not impotence. Those who preach the necessity for revolution in this country might do better to study and practice the strategy of utilizing presently available techniques of reform.

It is obviously impossible to spell out in advance all potential grievances about broadcasting, let alone the optimum remedy for each. But a few more examples may be useful.

Though you may not know it, you can, and should, have a voice in deciding who will operate

radio and TV stations in your community. This is the citizen's ultimate control over broadcast programming. A broadcast station owner is using the public's property — the airwaves — and Congress has provided that he cannot "own" this property in the sense that the corner druggist owns his drugstore. A broadcaster is like an elected official, and his license entitles him to no more than a three-year term, after which he must either have his license renewed by the FCC or be turned out of office. You — his constituents — who are supposed to vote in this election often do not even know it is being held. All the licenses in each state expire at the same time. Any local organization with a stake in the quality of broadcasting (church, union, civil rights group, or civic club) can appear as a party in a license renewal proceeding by writing the FCC that it wishes to be a party, expressing its views in writing, or requesting an oral hearing. It not only can participate in the FCC proceeding, but also — often more important — it can appeal to a court for reversal if the FCC grants the renewal unjustifiably.

This right to challenge license renewals was first established five years ago, when the United Church of Christ, along with two leaders of the Jackson, Mississippi, Negro community, the Reverend Robert L. T. Smith and Mr. Aaron Henry, filed with the FCC a petition to deny the application for license renewal of the local TV station, WLBT. Their petition, which represented the culmination

of a decade of complaints by Jackson Negroes against WLBT, alleged that the station systematically excluded Negroes from access to its facilities and that it had systematically promoted segregationist views and denied presentation of opposing views supported by Negroes.

The Commission, which tended to regard these public intruders as some sort of unfamiliar pestilence to be scourged from its corridors, refused to accord the petitioners "standing" to participate in the renewal proceeding as parties. These representatives of the Jackson black community took an appeal to the District of Columbia U.S. Court of Appeals and won. The court held that local citizens *do* have "standing" as parties before the FCC, remanded the proceeding to the Commission for another hearing, and retained jurisdiction to finally dispose of the case. The FCC subsequently held the hearing, admitting the church as an active party to the proceeding, and later granted the station a renewal — over the dissenting protests of Commissioner Kenneth A. Cox and myself.

Without blinking, the church went back to the court of appeals again, and this time the court, in exasperation with the Commission, *itself* ordered the Commission to accept new applications for the station's license in some of the harshest language ever directed by a court at a federal regulatory agency. Judge Warren E. Burger (now Chief Justice of the United States Supreme Court) expressed "profound concern" at the Commission's "impa-

tience" with the church as a representative of the public, and condemned in no uncertain terms the Commission's "hostility" toward its efforts. This decision will go into the record books as a ringing reaffirmation of the public right to "cast its vote" in the proceedings of *its* Federal Communications Commission.

Many have argued that public participation in the license renewal process be made easier. Congressman John Moss says: "It is time to make every single broadcast license renewal application subject to a public proceeding within the city or region where the station is located." Consumers Union has urged that broadcasters be required to carry more meaningful and regular announcements about the public's rights. And Thomas B. Hoving's National Citizens Committee for Broadcasting is showing signs of possessing the capacity and courage to play a very constructive role in this regard.

Agency legal action is not, of course, the only form of popular participation in policy formation. John Banzhaf could have organized mass picketing, protesting the immorality of stations and tobacco manufacturers profiting from the promotion of disease and death. The church could have obtained thousands of signatures on a petition and sent it to the President or to Jackson's Congressman. Either could have conducted a sit-in at the FCC or at station WLBT. (In early 1968 WNDT-TV in New York was seized by twenty young people during a "broadcast-in.") The point is not that the activities

they chose to pursue were somewhat more gentlemanly. It's that the appropriate legal remedy may be the most efficient and effective path to reform.

Within the past two years a number of other groups have bestirred themselves, by effective legal means, about the broadcasting situation in their communities. Four interesting cases are illustrative. One concerns the renewal application of radio station WXUR in Media, Pennsylvania. Some nineteen local organizations banded together and hired a Washington lawyer to protest WXUR's alleged policy of carrying masses of right-wing political programming unrelieved by programs promoting other viewpoints. They requested, and obtained, a public hearing in their own home town.

On different grounds a group of Los Angeles businessmen petitioned the Commission not to renew the license of TV station KHJ. They charged it had provided inadequate local service to the area. Moreover, these businessmen asserted their rights under the Communications Act to apply for a license to operate this profitable station themselves.

In Ashtabula, Ohio, a local of the Retail Clerks Union, petitioned the Commission to deny license renewal to several nearby radio stations which refused to carry the local's paid advertisements urging consumers to boycott a department store with which it had been involved in a labor dispute. It argued that the fairness doctrine required the stations to match the department store's commercials

urging people to shop at the store with the union's contrary message.

Another protest was filed from St. Louis by organizations of young blacks who believed three local Negro-oriented ("soul") radio stations were not providing adequate service to the city's Negro population.

On a national level, the American Civil Liberties Union intervened in the FCC's proceeding involving the proposed takeover of ABC by International Telephone and Telegraph Corporation. (The Justice Department ultimately appealed the FCC-approved merger to the U.S. Court of Appeals, and the parties called it off before the court resolved the matter.)

The AFL-CIO has taken a general interest in the application of the fairness doctrine, especially, of course, when unions are attacked. The Washington-based Institute for American Democracy exists solely to combat hate programming and publishes *How to Combat Air Pollution* and a newsletter. John Banzhaf is now supported in his follow-up activities by an organization called Action on Smoking and Health. He urged a license revocation proceeding against NBC-owned WNBC in New York on the grounds that it had failed to comply with the FCC's cigarette fairness ruling, and intervened in the renewals of several California stations. (In an "unrelated" action the NBC network subsequently volunteered to put on a fixed number of anticigarette-smoking commercials during prime-

time television programming last fall.) A group of good music lovers in Chicago (Citizens Committee to Save WFMT-FM) made an effort to prevent the *Chicago Tribune* from acquiring the station. A similar group in Atlanta inundated the FCC with mail protesting the possible loss of broadcast classical music in that city.

The American Civil Liberties Union has recently suggested that instead of relying on the spontaneous activities of existing organizations or the formation of ad hoc groups, the FCC should set up local committees of citizen volunteers to monitor local radio and TV, particularly with respect to the fairness doctrine. Monitoring is one of the most important aspects of effective broadcasting reform. It is an ideal group project for people of all ages, but must be done right to be useful. The United Church of Christ has had the most experience.

Unfortunately there are few presently recognized legal rights or remedies that will affect the quality of programs, protect us from an inundation of commercials, or guarantee the opportunity to express our views or talents over the airwaves. In time there will be — when you, and others like you, finally harness your outrage and your imagination to the law of effective reform and pull other newly recognized legal rights into the stable of remedies.

But for now the best defense is still to turn off your set or switch stations. Since the broadcasters are in the audience-delivering business, they would

undoubtedly respond if enough people refused to watch or listen; but such an effort is admittedly hard, if not impossible, to organize.

On the other hand, it is easy enough to write or phone a local station manager and even to arrange a conference with him. He is not likely to be unresponsive. Similarly, letters to network presidents and to advertisers can be influential. (If one-tenth of one percent of the audience of the average network series show were to request its continuation it probably would not be canceled.) You can also send such general letters to the FCC, which, if you request, will be included in the station's "complaint file" for consideration at license renewal time. However, they will not have maximum impact unless a citizens' group subsequently appears and raises the issues as a party contesting the license renewal.

In fairness to the broadcasters, it should be said that citizens' groups and listeners and viewers are not generally too helpful when it comes to suggesting new program ideas. What many organizations *think* would be a good program often turns out to be a dud. When offered free air time, many organizations do not take it, or do not follow through for a sustained period. (On the other hand, some radio station managers who have been offered locally produced programs of good quality have turned them down in favor of cheaper and easier disc jockey or phone-in shows.)

Many communities have the blessing of commu-

nity-supported noncommercial stations. The Pacifica Foundation operates radio stations WBAI in New York, KPFA in Berkeley, and KPRK in Los Angeles. It has recently begun a new station in Houston. Seattle has listener-supported KRAB. Public television stations (or "educational television") now exist in about a hundred and ninety communities (such as Channel 13 in New York and Channel 28 in Los Angeles). Such stations should be especially responsive to listener-viewer commendation, criticism, and contributions, since most are heavily dependent upon audience financial support. If your town doesn't have such a station you might want to investigate starting one. If cable television is to be installed as a profit-making venture in your community (instead of community-owned) you will want to be sure the licensing authority (often the city council) requires it to provide a number of "free" channels for educational programming to schools and community programming to homes.

The whole theoretical foundation of American broadcasting is the tie of a local station to its community and its local service. The station is licensed to serve the needs of the local community. And if it is not doing so we should seriously consider substituting direct satellite-to-home (or cable) broadcasting for a system that gives away 95 percent of the public's most valuable airwaves to the private profit of 7500 local stations. FCC regulations require the

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station to survey the community's local needs, and to provide programming to those needs. Station files at the FCC are supposed to be filled with comments from local citizens. The three-year license-renewal process is designed to encourage local participation.

In fact, greater community involvement in stations' affairs ought to be welcomed by the more responsible broadcasters — better local service is usually translated into larger audiences and higher commercial rates and profits.

The philosophy and rhetoric of participatory democracy is on the rise. All that remains is to translate its abundant energy and ideals into effective action. The legal process often offers the easiest route to results. Yet legal rights and powers lie about unknown and unused. Increasing sophistication has been reflected in greater public participation at the FCC. I, for one, welcome it.

Afterword

Much has happened in the short time since this chapter was written. Citizen groups and individuals all over the country have cast their vote in the decision-making process at the FCC by filing petitions to deny license renewals, competing applications for licenses of existing stations, and petitions to prevent the transfer of ownership or control of existing stations. A new technique for asserting local control over radio and television stations has been

pioneered by the United Church of Christ in Texarkana, Texas, and Rochester, New York. And the National Association of Broadcasters reacted by sponsoring legislation (Senate Bill S. 2004) which would counteract much of this wave of citizens' participation by prohibiting the filing of competing applications for existing radio and television stations. A brief summary of the last year's activity illustrates the growing national interest in the operations of local broadcast stations.

Petitions to deny. Petitions to deny the renewal of radio and television station licenses have been filed in many communities—against WMAL-TV and WTOP-TV, Washington, D.C.; KRON-TV, San Francisco; KFBC-TV, Cheyenne, Wyoming; KSL-TV, Salt Lake City, Utah; WFIL-TV, Philadelphia, Pennsylvania; WHTN-TV, Huntington, West Virginia; and KEWQ-AM, Paradise, California. The Institute for Policy Studies in Washington D.C., has produced a study analyzing the ownership, programming, and community surveys of all the television stations in the Virginia-Maryland-West Virginia-Washington, D.C., renewal group. This landmark effort may become a model which local citizens' groups can follow to analyze, assess and criticize the performance of local stations.

Competing applications. A number of citizens' groups have taken a more exhaustive (and expensive) approach by filing their own applications for the licenses of stations in their communities. In a landmark opinion, the FCC gave these efforts a

large measure of support by taking away the license of WHDH-TV in Boston, Massachusetts, and giving it to a citizens' group that had been trying for a decade to obtain that license. The case then went into the courts. In what may prove to be another landmark opinion, an FCC hearing examiner took away the license of KHJ-TV in Los Angeles, California, and gave it to a competing group of businessmen and local citizens. That case must eventually be considered by the full Commission, and will then no doubt be taken to the courts. Other groups have filed competing applications against such stations as KNBC-TV, Los Angeles, California; WPIX-TV, New York; WFAN-TV and WOOK-AM, Washington, D.C.; WNAC-TV, Boston, Massachusetts; and WTAR-TV, Norfolk, Virginia.

Transfers of ownership and control. The Citizens Committee to Save WFMT-FM successfully obtained a court order directing the FCC to hold hearings on the question whether the *Chicago Tribune* should be permitted to acquire WFMT-FM, the city's classical music station. And the *Tribune* recently announced it was giving up the fight, and would donate the station to a foundation which would preserve its classical format. The FCC itself denied an application for transfer of control in a vitally important case: WCAM-AM in Camden, New Jersey. In the Camden case, an important consideration was the fear that the purchasers of these stations had failed adequately to survey the needs of the local community and design programming to

accommodate those needs. This case may signal an increased alertness on the part of the Federal Communications Commission to subject proposed transfers to critical scrutiny in the future.

Local negotiations. In two crucially important cases, citizens' groups filed petitions to deny the license renewals of television stations and then proceeded to bargain directly with those stations *at the local level* to obtain desired reforms. In Texarkana, Texas, the United Church of Christ successfully persuaded station KTAL-TV to sign an agreement whereby it promised to recruit and train a staff member from each minority group in the community (including a minimum of two full-time Negro reporters), finance a toll-free line for requests from surrounding communities for news coverage and inquiries about public service announcements, increase its facilities for local news coverage, publicize the rights of the poor, broadcast religious programming covering the entire spectrum of religious thought in the community, and hold monthly meetings with a committee of local groups to discuss changes in station programming. Most importantly, the agreement states that it shall be considered a part of the station's license renewal application, and any "material variance" by the station will be considered a failure to operate in the public interest — leading to revocation of that station's license. A similar agreement has just been negotiated between a citizens' group in Rochester, New York, and a local station, WHEC-TV. This immensely signifi-

cant development may herald a new technique of community influence over the media, in which concerned citizens negotiate directly with their local stations to seek reforms without the complicated and costly legal proceedings required before the FCC and the courts.

S. 2004. In 1969 legislation was introduced which would effectively eliminate the present right of citizens to file competing applications for the licenses of local stations. Not surprisingly, this legislation has active and vocal enthusiasts throughout the broadcasting industry. Essentially, it would provide that the FCC could not accept a competing application for an existing radio or television station until the Commission had first independently refused to renew that station's license — without knowing, that is, that any citizens' group was even interested in applying for that license. As Christopher Lydon of the *New York Times* has aptly put it, the bill is similar to a law that would prohibit anyone from running for election against an incumbent Congressman until that Congressman had first been impeached!

The broadcasting industry has argued that it needs this legislation to protect its economic investments in broadcast properties. It argues that if citizens are allowed to think they might be permitted to operate local stations on their own, and thus permitted to challenge those stations' licenses, investments will be jeopardized and that risk will force reduction of the presently "high" programming ex-

penditures — to the detriment of the public, of course. As *Variety* magazine has reported, however, the opposite seems more the case. Faced with the threat of license challenges, station owners and managers have *increased* their programming expenditures (especially in news and public affairs) to polish up their track record and to stave off any pending or potential license challengers.

If adopted, the bill would, among other things, undermine the type of local negotiations with television stations pioneered by the United Church of Christ in Texarkana, and would dash cold water on the aspirations of many groups (often composed of minorities from the hearts of American cities) to increase the public service provided by radio and television facilities in their area. Only time will tell whether the powerful broadcasters' lobby in Washington has the political muscle to obtain this legislation without significant protest from citizens and consumers.

WHAT TO DO

(1) Inform yourself about your rights in broadcasting. Write for literature to the FCC and to public-spirited organizations working in this area. Get the public library to buy the major reference works you'll need. Visit your stations (or the FCC) and examine the stations' application forms and other public files.

(2) Take notes or make audio tape recordings when you listen to radio or watch television. Record what you like and don't like. Organize others to do the same.

(3) Express your views. Write the stations, the networks, advertisers, the FCC. Develop specific suggestions about programs you would like to see — or have taken off the air — or other specific suggestions for station management. Visit with your station managers.

(4) Join others. Let the national organizations know you support their efforts. Find out if chapters or activities already exist in your community. Form television and radio committees in the union, church, and civic organizations to which you belong.

(5) Use the FCC. You should not hesitate to file fairness complaints when warranted, ask for equal time for candidates, or ask to reply to personal attacks. Prepare and file reports with the FCC on the

performance of your local stations when their licenses come up for renewal. Consider intervening as a party in the renewal hearing of any station whose record is especially bad. Urge the FCC to hold local hearings if warranted. See if others are interested in starting a station that might compete for the license of a present station at renewal time.

This is not an easy road. All of us lead busy lives and have other things to do. You won't win any popularity contests with broadcasters, advertisers, some public officials and powerful local citizens. You may not be warmly received by the FCC. You may have to appeal to court. You may lose. But there is little that touches our lives as consumers more than the ever-present radio and television that fills our eyes and ears — and the minds of our children. It is clearly America's number one consumer product, our most powerful potential force for good — or evil. And it is subject to our democratic control. But only if we know our rights and are prepared to fight for them. Besides, whoever said democracy — or consumer sovereignty — was going to be easy?

FREE MATERIALS

Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, Public Notice of July 1, 1964, available from FCC, Washington, D.C. 20554.

Use of Broadcast Facilities by Candidates for Public Office, Public Notice of April 27, 1966, available from FCC, Washington, D.C. 20554.

Personal Attack Rules, FCC 67–795, adopted July 5, 1967, available from FCC, Washington, D.C. 20554.

How to Protect Citizen Rights in Television and Radio, available from Office of Communication, United Church of Christ, 289 Park Avenue South, New York, N.Y. 10010.

The National Association of Broadcasters, an industry group formed by the broadcasters, is located at 1661 N Street N.W., Washington, D.C. 20036. The NAB has established programming and advertising codes for the industry and can provide information about them upon request. The agreement to comply with the codes is voluntary on the part of each broadcast licensee.

The Citizens Communications Center, at 1816 Jefferson Place N.W., Washington, D.C. 20036, has recently been established to provide citizens with free legal assistance on selected communications matters. Free materials are available.

LOCAL INFORMATION

Local stations are required to maintain in your community and make available to you in their "station file for local public inspection":

All applications made to the Commission since May 13, 1965, including exhibits, letters, documents and amendments

All correspondence between the station and the Commission concerning applications

Ownership reports filed since May 13, 1965, and records of all requests for political broadcast time

Check your local library for these materials:

Annual Report of FCC to Congress (75 cents); can be ordered from Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

How to Combat Air Pollution (50 cents); can be ordered from Institute for American Democracy, 1330 Massachusetts Avenue N.W., Washington, D.C. 20005.

Broadcasting Yearbook ($10, one volume, published annually), Broadcasting Publications, Inc., 1735 De Sales Street N.W., Washington, D.C. 20036.

Television Factbook ($25, 2 volumes, published annually), Television Digest, Inc., 2025 Eye Street N.W., Washington, D.C. 20006.

CATV and Station Coverage Atlas, ($17.50, one volume, published annually), Television Digest, Inc., 2025 Eye Street N.W., Washington, D.C. 20006.

The organizations listed in the "Where to Write" section may also publish materials.

WHERE TO WRITE

Action for Children's Television
33 Hancock Avenue
Newton Centre, Massachusetts 02159

Action on Smoking and Health
2000 H Street N.W.
Washington, D.C. 20006

American Broadcasting Companies, Inc.
1330 Avenue of Americas
New York, N.Y. 10019

American Council for Better Broadcasts with TACT
17 West Main
Madison, Wisconsin 53703

Anti-Defamation League
1640 Rhode Island Avenue N.W.
Washington, D.C. 20036

Citizens Communications Center
1816 Jefferson Place N.W.
Washington, D.C. 20036

Columbia Broadcasting System, Inc.
51 West 52nd Street
New York, N.Y. 10019

Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

Institute for American Democracy, Inc.
1330 Massachusetts Avenue N.W.
Washington, D.C. 20005

Institute for Policy Studies
1520 New Hampshire Avenue N.W.
Washington, D.C. 20036

Mutual Broadcasting Company
135 West 50th St.
New York, N.Y. 10019

National Association for Better Broadcasting
373 Northwestern Avenue
Los Angeles, California 90004

National Audience Board, Inc.
152 East End Avenue
New York, N.Y. 10028

National Broadcasting Company
30 Rockefeller Plaza
New York, N.Y. 10020

National Citizens Committee for Broadcasting
609 Fifth Avenue
New York, N.Y. 10017

Office of Communication
United Church of Christ
289 Park Avenue South
New York, N.Y. 10010

Television, Radio and Film Commission
The Methodist Church
475 Riverside Drive
New York, N.Y. 10027

LICENSE RENEWALS

All licenses expire on the same day within a given state every three years. Stations must file for license renewal with the FCC 90 days *prior* to the expiration date. Petitions to deny a station's license renewal application must be filed between 90 and 30 days *prior* to the expiration date. Forthcoming *expiration* dates* include:

(1) *For stations in Florida, Puerto Rico and Virgin Islands:* February 1 — 1970, 1973, 1976, and 1979.

(2) *For stations in Alabama and Georgia:* April 1 — 1970, 1973, 1976, and 1979.

(3) *For stations in Arkansas, Louisiana and Mississippi:* June 1 — 1970, 1973, 1976, and 1979.

(4) *For stations in Tennessee, Kentucky and Indiana:* August 1 — 1970, 1973, 1976, and 1979.

(5) *For stations in Ohio and Michigan:* October 1 — 1970, 1973, 1976, and 1979.

(6) *For stations in Illinois and Wisconsin:* December 1 — 1970, 1973, 1976, and 1979.

(7) *For stations in Iowa and Missouri:* February 1 — 1971, 1974, 1977, and 1980.

(8) *For stations in Minnesota, North Dakota,*

* Dates are subject to change.

South Dakota, Montana and Colorado: April 1 — 1971, 1974, 1977, and 1980.

(9) *For stations in Kansas, Oklahoma and Nebraska:* June 1 — 1971, 1974, 1977, and 1980.

(10) *For stations in Texas:* August 1 — 1971, 1974, 1977, and 1980.

(11) *For stations in Wyoming, Nevada, Arizona, Utah, New Mexico and Idaho:* October 1 — 1971, 1974, 1977, and 1980.

(12) *For stations in California:* December 1 — 1971, 1974, 1977, and 1980.

(13) *For stations in Washington, Oregon, Alaska, Guam and Hawaii:* February 1 — 1972, 1975, 1978, and 1981.

(14) *For stations in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont:* April 1 — 1972, 1975, 1978, and 1981.

(15) *For stations in New Jersey and New York:* June 1 — 1972, 1975, 1978, and 1981.

(16) *For stations in Delaware and Pennsylvania:* August 1 — 1972, 1975, 1978, and 1981.

(17) *For stations in Maryland, District of Columbia, Virginia and West Virginia:* October 1 — 1972, 1975, 1978, and 1981.

(18) *For stations in North Carolina and South Carolina:* December 1 — 1972, 1975, 1978, and 1981.

Appendix VI

Congressional Approval Nears on Bill To Create a "Continuing Engine of Business Harassment"

(U.S. Chamber of Commerce)

The President has asked Congress to give statutory authority to the Office of Consumer Affairs in the Executive Branch. Congress is considering going far beyond this and creating a powerful new consumer agency.

This agency would operate independently—free of any White House restraints. Its potentials for growth and for business harassment would be virtually unlimited.

Now clearing Senate and House Committees, this legislation is likely to receive early floor action. Your Senators and Representatives—particularly those serving on the Government Operations Committees—should hear your views *immediately* on the dangers that are inherent in such a proposal.

"*A continuing engine of business harassment*" is the phrase one White House staffer has used to describe the powerful independent consumer agency Congress is on the verge of creating.

"*The seed of a potentially ungovernable Federal department*" is another Washington observer's views of an independent agency to "protect" consumers.

"*The most important consumer legislation ever*", says consumer advocate and business critic Ralph Nader.

Nader has good reason to praise the bill reported out of the House Government Operations Committee and nearing approval by its Senate counterpart: He is the chief architect of the independent agency approach and he has been its most vigorous lobbyist. His organization may also be eligible for Federal subsidies if one variation of his bill is passed.

The *rght kind* of consumer agency—an office in the White House to coordinate the hundreds of Federal consumer-related activities—would actually be in the best interests of both business and consumers.

But the *wrong kind* of agency—an independent consumer agency—would be freed of the restraints and safeguards which would surround a White House consumer office. Sooner or later, therefore, the independent agency would get involved in a welter of operating and enforcement responsibilities, administering new and larger programs at an ever-growing cost. And because of the great popular appeal of consumer issues, Congress would find it difficult if not impossible to deny the independent agency new powers, new functions, and new appropriations.

HOUSE BILL

As reported by the House Government Operations Committee, H.R. 18214 would actually set up *two* new agencies: an Office of Consumer Affairs in the Executive Office of the President *and* a strong independent Consumer Protection Agency. Although the two bodies are theoretically equal, a reading of the authority assigned each makes clear that the independent agency would be far more powerful—and dangerous.

The *White House consumer office* would serve primarily to coordinate Federal consumer activities. The *independent agency* could intervene as the consumer's attorney in court and regulatory agency proceedings and would be armed with vast fact-finding powers—including subpoena power—and authority to name names including brand names.

Worse yet, some functions are assigned to both agencies, thereby actually encouraging duplication of effort. For example, both agency and office would have authority to compile and publish information from public and private sources including test results and analyses on consumer products, as well as on commercial practices detrimental to consumers. Thus, individual businesses could well find themselves confronted with simultaneous demands for the same information from two different groups of Federal officials. There's little ques-

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tion who would *win* such a confrontation: The independent agency would have vast information-gathering powers including the subpoena power; the White House consumer office could not compete. The real loser, of course, would be the businessman pulled and hauled by the two bureaucracies—and, beyond him, the consumer who would pay the invisible but painfully real costs of increased regulation in the form of both higher taxes and higher prices.

SENATE PROPOSAL

The legislation adopted by the Senate Executive Reorganization Subcommittee (a panel of the parent Government Operations Committee) contains these major provisions:

A strong *independent consumer protection agency* very similar in powers and functions to the independent agency proposed in the House bill.

A *Consumer Fraud Division* in the Department of Justice to prosecute businessmen accused of defrauding consumers and to enforce any consumer class action legislation which Congress may enact.

A *Council of Consumer Advisors* in the Executive Office of the President to coordinate Federal consumer-related activities and assure that consumer interests are taken into account in policy-making. The council would be composed of three members, one of whom would be the director of the independent consumer agency.

A *system of Federal grants to start or expand consumer protection activities* of state and local governments as well as those of such private groups as Ralph Nader's Center for the Study of Responsive Law.

The prospect then would be a repetition of the experience of the Department of Health, Education, and Welfare. DHEW started out as a relatively modest agency, swelled to a cabinet department, and today has reached such vast proportions (six times its original number of employees) that the *Washington Post* has described it as "glutted, uncoordinated, in competition with itself."

The same sequence of events which produced the 102,000-man DHEW could start again with an independent consumer agency, culminating eventually in a "glutted, uncoordinated" Department of Consumers.

EFFECTS ON BUSINESS

An independent consumer agency which is "unabashedly partisan to the consumer" (in Nader's phrase) could have drastic and direct impact on even everyday business transactions and operations.

The subpoena power could be used to obtain the records of both management and labor to determine if a negotiated wage increase or the subsequent price increase is detrimental to consumers' interests. This information could be widely publicized. In effect, the independent consumer agency could become a referee at the bargaining table.

The rates or service of regulated businesses like utilities and transportation companies could be the subject of consumer agency investigations for which company records could be subpoenaed. The information thus gathered could be published, and the appropriate regulatory agency could be requested to initiate proceedings to cut rates or alter service. Then, once the proceedings were underway, the consumer agency could intervene as a third party to the proceeding to argue its case.

Government agencies, private testing laboratories, and even makers and suppliers of consumer products could be compelled to make available to the consumer agency the results of product tests. Such results could then be published, identifying both company and brand name. Comparisons of product performance and quality could be published for any and all consumer products.

Technical assistance could be provided to set up even the most militant of consumer groups, including those advocating or practicing consumer boycotts or black-listing. Under the Senate bill, in fact, such groups would even be eligible for Federal subsidies to start or expand their activities.

IMPACT ON GOVERNMENT

The independent consumer agency could use its powers on other government agencies as well. The publicity potential of a consumer agency would be enormous and could easily be used as a potent weapon to club other agencies or officials not quickly acceding to its views.

Even the President would feel the independent consumer agency's muscle. Consider the pressures the White House would be subjected to if the consumer agency argued, for example, that the Tariff Commission should deny an Administration request to protect a particular industry because higher import tariffs would result in increased consumer prices.

Consumer issues have great public appeal. Everyone, after all, is a consumer. Consequently, Congress would have great difficulty refusing any request for additional consumer programs, powers, and funds. Not much time would be likely to pass before the resulting super-agency was transformed into a full-fledged cabinet-level Department of Consumer Affairs—a department which recent history indicates is likely to be unmanageable.

THE BETTER WAY

None of this has to happen.

But *all* of it is likely to take place if American business does not wake up to the challenges and threats posed by consumer agency legislation.

Consumers *are* entitled to representation in their Federal government—but not in a way that threatens to paralyze the business system.

How much better to establish an Office of Consumer Affairs in the Executive Office of the President—an office that will represent consumers' views and coordinate the nearly one thousand consumer-related activities of Federal agencies to achieve a greater measure of efficiency and economy in government.

Nader's "unabashedly partisan" independent consumer agency is not the answer. What *is needed* is a White House consumer office which will meet the balanced needs of consumers, business, and the economy as a whole, now and in the future.

Write your Senators and Representative today—particularly those serving on the Government Operations Committees—to urge support for a White House consumer office—and *only* a White House office. *Immediately!*

Appendix VII

In the United States District Court for the District of Maryland

HARRISON WELLFORD *v.* CLIFFORD L. HARDIN, IND. AND AS SECRETARY OF AGRICULTURE ROY W. LENNARTSON, IND. AND AS ADMINISTRATOR, ET AL.

(No. 21551 Civil Action)

Filed: June 26, 1970

James J. Hanks, Jr., Baltimore, Maryland, for plaintiff.

George Beall, United States Attorney, Fred Motz, Assistant United States Attorney, Baltimore, Maryland, and Jeffrey F. Axelrad, Attorney, Department of Justice, Washington, D.C., for defendant.

Northrop, District Judge.

This case involves the implementation of the Freedom of Information Act, 5 U.S.C. § 552, 81 Stat. 54. The plaintiff, desiring certain information and documents from the Department of Agriculture, seeks to have this court compel the Secretary of Agriculture to produce those items which he has heretofore refused to supply. The requested relief related to (1) letters of warning sent by the Compliance and Evaluation staff of the Consumer Marketing Service to non-federally inspected meat or poultry processors suspected by the staff of engaging in interstate commerce, (2) information with respect to detentions of meat and poultry products, (3) the biweekly reports of the Director, Slaughter Inspection Division, to the Administrator of the Consumer and Marketing Service, (4) and the minutes of meetings of the National Food Inspection Advisory Committee. In his complaint, the plaintiff further requested the results of chemical analyses of cooked sausage products, but since the defendant has granted this request, this issue is no longer in this case.

Both sides have moved for summary judgment, and the defendant has also moved to dismiss. As will be more fully set out below, this court finds that there are no material issues of fact as to two of the plaintiff's claims, and therefore this case is ripe for decision as to them. As to the two remaining claims, this court will require further proceedings.

The controlling statute in this case, 5 U.S.C. § 552, reads in pertinent part:

(3) (a) . . . [E]ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. . . .

(b) This section does not apply to matters that are—

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

* * * * * * *

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

I. LETTERS OF WARNING AND DETENTION ACTIONS

The defendant objects to the production of these items on two grounds. He says first that these items are not "identifiable records" within the meaning of 5 U.S.C. § 552, and secondly that they are part of investigatory files compiled for law-enforcement purposes.

The argument that the requested information does not constitute "identifiable records" can be disposed of in short measure. The government in its memoran-

dum relies on two cases, a memorandum of the Attorney General, and the affidavit of Roy W. Lennartson, Administrator of the Consumer and Marketing Service. Under close scrutiny, none of these authorities supports the defendant's position.

The defendant's reliance on Tuchinsky v. Selective Service, —F.2d—, 38 L.W. 2325 (7th Cir. 1969), is misplaced. In affirming a district court's denial of access to personnel data about local draft board officials, the court's only reference to the identifiable records argument was as follows:

We point out that the district court might well have denied relief under Section 552 on the basis of affidavits which state that the Selective Service System kept no "identifiable records" of personnel data about board personnel. In our computerized society this is somewhat difficult to understand. Nevertheless, here is no denial that these records are not "identifiable" and consequently the attorney established no right under the statutory language of Section 552.

This statement by the Circuit Court of Appeals relates only to the failure of the plaintiff's affidavit to controvert the defendant's statement that these were not identifiable records. It is based on procedural grounds, and does not relate at all to the substantive claim that these records are not identifiable. In fact, the court intimates that such a claim is "somewhat difficult to understand". Furthermore, the district court's decision was not grounded on the identifiable records issue, and therefore any reference to the identifiability issue is merely dictum.

Also in support of its position, the government cites *Bristol-Meyers Co.* v. *FTC*, 284 F. Supp. 745 (DD.C. 1968). Whatever force this opinion might have had with this court is vitiated by the reversal of the United States Circuit Court of Appeals for the District of Columbia in *Bristol-Meyers Co.* v. *FTC*, No. 22,277 (March 26, 1970). In that very well reasoned and persuasive opinion, the court reviewed the legislative history of Section 552, and stated that "[t]he legislative history establishes that the primary purpose of the Freedom of Information Act was to increase the citizen's access to government records". The court then went on to say:

The statutory requirement that a request for disclosure specify "identifiable records" calls for "a reasonable description enabling the Government employee to locate the requested records," but it is "not to be used as a method of withholding records." The FTC can hardly claim that it was unable to ascertain which documents were sought by Bristol-Meyers.

It is clear from the affidavits in this case that the records sought are indeed identifiable. Mr. Lennartson, the Director of the Consumer and Marketing Service, stated:

No identifiable record contains information on detentions sought by plaintiff but instead such information is dispersed in many individual files, some of which are in storage. Assembling this information would require the search of many files and be extremely burdensome.

This statement leaves no doubt that the defendant knows what information is being sought. This is all that the identifiability requirement contemplates. The fact that to find the material would be a difficult or time-consuming task is of no importance in making this determination; an agency may make such charges for this work as permitted by the statute. To deny a citizen that access to agency records which Congress has specifically granted, because it would be difficult to find the records, would subvert Congressional intent to say the least. Therefore, this court finds the defendant's assertion that this requested information is not an "identifiable record" within the meaning of the statute to be totally without merit.

The defendant's second objection to the production of this material is that, pursuant to 5 U.S.C. § 552(b)(7), the information sought is part of investigatory files compiled for law-enforcement purposes. While there is not an abundance of clear authority on this point, this court is of the opinion that the defendant's blanket refusal to disclose and permit inspection and copying of the requested material is unjustified.

The purpose of the exception to the Act for investigatory files compiled for law-enforcement purposes is stated in the report of the House Government Operations Committee:

This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. [*The act*] *is not intended to give a private party indirectly any*

earlier or greater access to investigatory files than would have directly in such litigation or proceedings. [Italics supplied.]

House Report No. 1497, 2 U.S. Code Cong. & Admin. News 2418 (89th Cong., 2d Sess. 1966).

The defendants urge this court to accept the interpretation of this section by the United States District Court for the District of Puerto Rico in *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591 (D.P.R. 1967). The facts of that case, however, are distinguishable, and properly dictate the result reached by that court. The National Labor Relations Board refused to make records available to an employer against whom an unfair labor practice charge was pending. The records requested were statements made by witnesses to Board investigators in the course of their investigation of an unfair labor practice charge. The court held that the investigatory file exception applied to that situation, and that the plaintiffs would only be entitled to examine the statements of witnesses who had testified on direct examination. It is very important to note, however, that the ruling in that case dealt with a request for records from a party to an adjudicative proceeding in progress.

In the case before this court, the defendant has refused to produce material relating to numerous letters of warning and detention actions. It is clear that this is not a situation, as envisioned by the House Report, where a party to an enforcement action is seeking to obtain investigatory material prematurely; in fact, the parties directly affected by the material sought in this action are fully aware of the contents. In *Bristol-Meyers* v. *FTC*, *supra*, the investigatory-files exception was characterized as "intended to limit persons charged with violations of the federal regulatory statutes to the discovery available to persons charged with violations of federal criminal law". *Id.* at 6. With this policy in mind, it is clear that the specific material sought in this action is not within the exception for investigatory files compiled for law-enforcement purposes. Disclosure of material already in the hands of potential parties to law enforcement proceedings can in no way be said to interfere with the agency's legitimate law-enforcement functions. This conclusion is based on this court's reading of the legislative history surrounding this exception, which reveals that its purpose was to prevent premature discovery by a defendant in an enforcement proceeding. Whatever valid policy reasons there may be for extending this exception to other situations cannot serve to alter this court's result. Such a judgment must be made by Congress.

II. BI-WEEKLY REPORTS AND NATIONAL FOOD INSPECTION ADVISORY COMMITTEE MINUTES

The requests of the plaintiff for relief from the refusal of the Secretary to produce bi-weekly reports of the Director, Slaughter Inspection Division to the Administrator, Consumer and Marketing Service, and the minutes of the meetings of the National Food Inspection Advisory Committee, cannot be disposed of at this time. The defendant maintains that the material sought falls within 5 U.S.C. § 552(b)(5) which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency".

In addressing itself to a similar contention, the Circuit Court of Appeals for the District of Columbia in *Bristol-Meyers* v. *FTC*, *supra*, held that the district court, in order to make a meaningful assessment of the propriety of such a claim, should "evaluate the content and status of those documents which the Commission would protect as internal memoranda." The court enunciated a general framework within which a district court could make this determination:

The statute exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This provision encourages the free exchange of ideas among government policy makers, but it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum. Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only "those internal working papers in which opinions are expressed and policies formulated and recommended." Furthermore, an internal memorandum may lose its protected status when it is publicly cited by an agency as the sole basis for agency action.

Accordingly, before reaching any conclusions as to this requested material, this court will examine the documents in question *in camera*, and will make

its determination based on such an examination within the framework given above.

Therefore, it is this 2th day of June, 1970, Ordered:

1. That the defendant produce the requested letters of warning and information with respect to detention actions of meat and poultry products, and that the defendant be and hereby is enjoined from withholding the same in the future from the plaintiff; and

2. That the defendant submit within forty-five days for *in camera* inspection by this court, copies of the bi-weekly reports of the Director, Slaughter Inspection Division, to the Administrator of the Consumer and Marketing Service, and the minutes of the meetings of the National Food Inspection Advisory Committee, from January 1, 1970, to date.

EDWARD S. NORTHROP,
U.S. District Judge.

APPENDIX VIII(A)

CENTER FOR STUDY OF RESPONSIVE LAW,
Washington, D.C., July 17, 1970.

The HONORABLE JOHN VOLPE,
Secretary of Transportation, U.S. Department of Transportation,
Washington, D.C.

DEAR SECRETARY VOLPE: We are enclosing for your information a copy of a petition relating to air safety, which was submitted to the Administrator of the Federal Aviation Administration by Ralph Nader on February 25, 1970. This petition incorporates the findings of a report by James Bruce and John Draper entitled "Crash Safety in General Aviation Aircraft," copies of which have been provided to the Office of the Secretary, and calls for rulemaking action by FAA to improve and upgrade Federal standards for crash-worthiness and occupant protection in small aircraft.

Specifically, the FAA is urged, among other things, to require the installation of shoulder harnesses in all aircraft in which such installation is presently feasible, and to upgrade standards of cabin design in order to minimize potential sources of injury to occupants.

As far as can be determined, however, almost five months have passed and no public response or action whatever had been taken by FAA on this critical safety issue. The rules suggested in the petition are well within the existing technology and economic capabilities of the general aviation industry. In our view, responsible action by the Administrator requires full and careful consideration of the needs for improved safety characteristics in these aircraft, in a proceeding on the record and open to public inquiry and particpiation.

We wish to emphasize the vital nature of this matter for the safety of general aviation pilots and passengers in the coming years. We are referring this matter to you in the hope that you may be able to assist in obtaining prompt and meaningful FAA action.

Sincerely,

(s) JOHN DRAPER,
(s) REUBEN ROBERTSON.

APPENDIX VIII(B)

BEFORE THE FEDERAL AVIATION ADMINISTRATION

RALPH NADER, PETITIONER

TO: HON. JOHN H. SHAFFER, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION

PETITION REQUESTING INSTITUTION OF A RULEMAKING PROCESSING TO ESTABLISH REVISED RULES FOR SPECIFICATIONS FOR GENERAL AVIATION AIRCRAFT TO IMPROVE PASSENGER SAFETY IN THE EVENT OF CRASH

This is a petition filed under Section 11.25 of the Administration's regulations, 14 C.F.R. 11.25, et seq. This petition requests the Administrator immediately to institute a rulemaking proceeding for the purpose of establishing new and comprehensive rules governing the specifications for the construction and equipment of light aircraft, in order to improve crash worthiness of such aircraft. In such a proceeding the Administrator and the administration staff will be able to develop construction and equipment standards, well within the present state of the aeronautical engineering art, that will increase the probability of survival, in a crash, of the occupants of general aviation aircraft.

Pending the issuance of such rules, petitioner also requests the suspension of certification of any new general aviation aircraft.

The Administrator is not only empowered, but is under a duty imposed by statute, to promote the safety of civil aircraft in flight by prescribing minimum standards governing the design, material, workmanship and construction of aircraft. Federal Aviation Act of 1958, Section 601, 49 U.S.C §1421. This petition requests the Administrator to take all steps necessary, particularly the institution of a rulemaking proceeding and investigation, to prescribe appropriate minimum standards governing

(1) the design of the cabin or cockpit of general aviation aircraft so that the cabin or cockpit will remain intact, in crashes, under impacts of force levels up to 40g, the force level that the human body can withstand without serious injury; in other words, the cabin or cockpit should be designed to remain intact and protect its occupants against impacts which, if so protected, the occupants would be able to survive;

(2) the immediate installation of shoulder harnesses in all aircraft presently in service, or constructed under currently effective certificates, in which such installation is feasible; such as aircraft already designed with shoulder harness tiedown points, or in which shoulder harnesses can be safely installed and attached to aircraft seats;

(3) the design, materials and workmanship of cabin or cockpit interiors, particularly interior walls, instrument panels and other accessories, control wheels and pedals, and seats to minimize injury to occupants of cabins whose bodies may strike such items in a crash.

Petitioner is not an engineer. He is not in a position to submit the kind of detailed specifications which should ultimately be included in the regulations and standards that should be adopted. Attached to this petition, however, is a study of safety engineering—and its neglect—in general aviation aircraft design by two aeronautical engineers, James Bruce and John Draper, entitled *Crash Safety in General Aviation Aircraft* (1970). The Bruce-Draper report discusses in great detail and fully documents the safety problems which the rulemaking proceeding here requested should investigate. A bibliography of available engineering literature and data on the subject is attached to the report. The following discussion summaries the detailed presentation in the Bruce-Draper report.

INTRODUCTION

More than twelve hundred fatalities occurred in general aviation accidents in 1967. In those accidents, at least three hundred people need to have died; indeed, it may be that one half of all general aviation fatalities, or the deaths of six hundred people were unnecessary.

There are fully eight times more deaths per passenger mile in small, single engine aircraft than in travel by passenger car, and more than fifty times as many deaths per passenger mile in small, single engine aircraft than in the scheduled air carriers.

National Transportation Safety Board figures for 1968 show 1399 fatalities, an increase of 9% over 1967. Under the National Transportation Safety Board (NTSB) definition of "accident" approximately 4% of the general aviation fleet is involved in an accident every year. Given the expectancy that an airplane will normally last for twenty years or longer, a large percentage of the airplanes rolling off the assembly lines today will experience an accident during their lifetimes. Allowing for the event of one plane being involved in more than one accident, it can be statistically predicted that at least 70% of the aircraft in production today will eventually have an accident.

The fundamental concept in the field of crash safety is the distinction between a "survivable" accident and a "non-survivable" accident. A properly-designed airplane need not suffer in its performance because of a high degree of "crashworthiness" or accident survivability. A discussion of the specific design elements involved follows.

1. Cabin or Cockpit Integrity

The maximum force that a human being can tolerate on his body without injury is considered to be 40 g. The first requirement of a "survivable" crash is that the passenger cabin remain substantially intact throughout the impacts, and this is often used as a working definition in crash safety research. Most light aircraft now in service will collapse when subjected to impact forces less than the levels within human tolerance. Airplanes designed in the future should not collapse

under forces less than a human being can withstand. The engineering for such design has been known for more than a quarter century. In 1943, under the auspices of the Cornell University Medical College, Hugh DeHaven published *Injuries in Thirty Light-Aircraft Accidents*, medical data and crash details from field investigations of the Civil Aeronautics Board. In 1945 he published *The Relationship of Injuries to Structure in Survivable Aircraft Accidents*. These reports defined the problem, its causes, and several solutions.

In 1950, *Aviation Week Magazine*, in an article entitled *Crash Safety Can Be Engineered*, said:

"But while a person harnessed in a seat can take it easily, a 35g impact is more than conventional aircraft structures can withstand without destruction of the cockpit, so far as CIR [Crash Injury Research] can determine. CIR believes private planes should have cockpit structures and body support provisions which can stand up to 25–35g crashes at least as well as the persons in the plane. Give the occupants half a chance and 'They'll walk away from most run-of-the-mill crashes.'"

The article set forth several recommended design features for the cabin and fuselage structure:

1) The cabin should be a protective capsule engineered to remain intact in crashes and thereby giving "living space" to the occupants. 2) The nose should be long and designed to absorb energy as it collapses. 3) The cabin should be the strong point in the structure while the wings, tail, and front of the fuselage should fail inwards progressively in a crash. 4) A keel or skid in the bottom of the fuselage running from the nose back under the passenger cabin would permit the airplane to slide instead of plough into the ground, halving the average impact force. 5) The fuel tanks should be strong enough to prevent rupture in a 20g crash.

Designed wing failure is important. If the wing contacts the ground first and is integrated directly into the cabin structure, the force on the wing tip will tend to rend the cabin. Crashworthiness will be improved if the wings are designed to separate just outside the fuselage, taking the dangerous fuel with them. This means that the design engineer should plan a wing structure which will fail outboard of the fuselage when subjected to crash loads (e.g., 15–20g's) in the *longitudinal* direction. Such a design is compatible with the wing strength in the *vertical* direction which is necessary for flying (the FAA requires 6g). Several airplanes flying now, such as the Convair 240, have these desirable failure characteristics.

The CAA-Texas A. and M. Agricultural Airplane, the Ag–1, developed specifically for the hazardous occupation of agricultural spraying, had a cabin structure that would withstand a 40g crash, the limit of human tolerance to injury. The pilot's seat was displaced away from the nose and all disposable loads were put in front of the cockpit. A high, head-rest structure and tubular guard rails protected the pilot in the event of a turnover. The cockpit structure was independent of the structure ahead of it. In a crash the engine would collapse at 15g's, absorbing some of the initial impact. Then the firewall would collapse, absorbing more energy. The hopper behind the firewall would withstand 25g. And finally the cockpit would stay intact if the remaining crash force did not exceed 40g. The report explained that "by the time the nose section and the hopper structure collapse, it can be expected that the remaining energy will not be great and cockpit structures will provide a '40g island of safety' for the pilot."

The Helioplane Courier "was designed explicitly for crash survivability along with other unique flight safety characteristics." The cabin is a structure of welded molybdenum alloy tubing. This aircraft can remain in level flight at 30 mph. Its latest version is the C–STOL (Conventional or Short Take-Off and Land). There has not been one fatality recorded among all the legal flights in this airplane; exceptions involved attempted instrument flights by unauthorized personnel. This airplane demonstrates that performance and crash safety design are completely compatible.

The Beech Bonanza had 1) a long nose section to soak up crash energy as it deformed; 2) a reinforced wing root structure that would minimize the possibility of the wing tearing off part of the fuselage if the wing were separated from the fuselage in the crash; 3) a reinforced keel section; 4) reinforced cockpit to give a "capsule" for occupant protection. The twin Bonanza had a long nose, reinforced cabin, and heavy keel. The engine nacelles were placed ahead of the cabin and the cabin was located above and aft of the leading edge of the

wing. According to Beech, over 62% of the aircraft's weight was below and ahead of the occupants. Only 4½% of the weight was in a position to damage the cabin in the event of a crash. This design explains why this aircraft is often able to survive with an intact cabin devastating crashes in which the tail is torn off, the wings gone and the nose demolished.

A 1959 study, *Severity of Injury in Lightplane Accidents*, of the injury rate, aircraft damage, accident severity, impact angle and impact speed involving 1596 persons in 913 lightplane accidents indicated:

"That approximately one third (37.1%) of the fatally injured persons studied sustained their *fatal* injuries in structural environments which were damaged to a degree no greater than 'distorted.' Likewise 66% of the persons *dangerously* injured also sustained their injuries in relatively undamaged environments. Since survival with only minor injury occurred in other accidents involving greater damage, it is obvious that those persons who were fatally injured in 'distorted' structures sustained their fatal injuries in survivable crash force conditions and therefore died unnecessarily."

The report also concluded that 92.6% of the accidents studied involved impact speeds between 20 and 80 miles per hour and that nearly 75% of 883 aircraft crashed at angles to the terrain of 45 degrees or less.

Early in 1960, the U.S. Army Transportation Research Command began a study of aircraft safety and survivability, including the ". . . specific relationships between crash forces, structural failures, crash fires, and injuries." Reports summarizing the work were made public. In 1965 the Army began a study to consolidate all the crash safety reports in order to offer the "state of the art" in one design manual available to the public. In July 1967, this design guide was published as USAAVLABS Technical Report 67-22 *Crash Survival Design Guide* by J. W. Turnbow, D. F. Carroll, J. L. Haley, Jr., W. H. Reed, S. H. Robertson, and L. W. Weinberg. This guide confirms the earlier findings of DeHaven and others.

Present FAA regulations on crashworthiness, Part 23.561, fail to take into account any of this engineering knowledge or the research-based knowledge of the human body's tolerance to impact. The regulations require the structure to withstand without collapse 9g, 3g, and 1½g, applied statically, in the longitudinal, vertical, and lateral directions; yet the body can tolerate 40g, 20g, and 20g force applied correspondingly.

II. Shoulder harnesses

In an airplane crash, the airplane abruptly decelerates. If the occupant is not wearing his seat belt and does not have a shoulder harness, he continues to hurtle through the cockpit at the airplane's speed just prior to impact. There is nothing there to cause him to change his speed until he reaches the front end of the cockpit. He then smashes into the control panel which has either stopped or greatly decelerated. There is a collision between a human body moving at great speed against a relatively stationary mass of knobs, rigid edges, and metal tubes. The result is destruction of the human body.

With a lap safety belt the passenger is thrown against his seat belt, causing his arms, legs, and torso to flail out in the forward direction. ". . . [T]he flailing envelope for a single individual restrained by a seat belt is a sphere nearly ten feet in diameter." Swearingen, Hasbrook, Snyder, and McFadden, *Kinematic Behavior of the Human Body During Deceleration.* Anyone in the front seats of the cockpit is certain to strike the control wheel, control panel, foot pedals, or other forward structure.

Swearingen, *Tolerances of the Human Face to Crash Impact*, states that "70% to 80% of all deaths and injuries in crash decelerations are from face and/or head injuries caused by body flailing and the head striking surrounding structures. . . ."

Restraining the passenger's torso with a shoulder harness might appear to be the only remedy for this. Again, studies 25 years old or more have confirmed this.

Last year, after two years of consideration, the FAA promulgated a rule (now 14 C.F.R. 23.785) requiring that all newly certificated aircraft be fitted with shoulder harnesses. This regulation is inadequate. It should be modified to provide 1) that all aircraft with designed-in tie-down points for harnesses be fitted with them promptly; 2) that all newly manufactured aircraft designed with tie-down points be fitted with harnesses before delivery; 3) that in aircraft without ie-down points the seats, insofar as possible, be fitted with shoulder harnesses; 4) that in landing and take-off the harnesses be worn by crew and passengers.

III. Cabin and cockpit interior design

As FAA personnel have pointed out, shoulder harnesses are "not the complete answer to occupant protection, since, although the system may keep the occupant from going to the instrument panel during impacts, it does not keep the panel from going to the occupant."

1. As Swearingen states in *Biomechanics of Facial Injury*, "A striking reduction in impact injuries and deaths can be attained by the engineering application of two principles: a) distribute the impact load over as much body area as possible. . . ." This can be accomplished not only by use of harnesses but by constructing the interior of the cockpit so that when a portion of the body strikes it, the impact area is as great as possible. This means, as Swearingen noted in *Tolerances of the Human Face to Crash Impact*, if design eliminated "rigid tubes, angles, knobs, heavy door posts, sharp instruments, and heavy metal of small radius of curvature (to name a few) all designed to impact the face and head on very small areas," and changing "this environment to a medium-weight deformable metal (without heavy structure directly behind it) with a radius of curvature of 6 to 10 inches for energy attenuation and padded with one or two inches of slow return material to contour to the bones of the face and distribute the impact load over the available area of the face, it would be impossible to produce facial and forehead fractures in crash impacts. The limit of human tolerance would then be the forces necessary to produce brain lacerations without fracture."

Yet, as a 1966 report, *Cockpit Design for Impact Survival*, states, the interior of a typical light aircraft contains "myriads of pointed and sharp-edged protuberances. . . . Under static conditions, these objects cause little problem, but, during impact circumstances, they produce punctures, creases, and fractures in the protoplasm which presses against them. . . . [O]ne can almost 'read' the make of aircraft by viewing the 'impact signature' left by the respective aircraft on the occupants of specific seats."

Here too the technology is known. Swearingen's research, summarized in a report entitled *Evaluation of Various Padding Materials for Crash Protection*, and other work, outlines in detail the specifications for interior construction to reduce injury. Swearingen tested and approved a light-weight semicylinder of aluminum installed on the upper edge of the instrument panel. When struck by the head it mashes inward, spreading the crash forces. It can be filled with crushable foam for improved performance. In a 40 ft. per second impact on the typical instrument panel, the peak g force was 440g on a very small area of the head. With the cylinder the number of g's dropped to 100, less than ¼ of the previous test, and was spread out over a large portion of the head. The overall result was that the impact force was well within the tolerable range. A person would be only knocked unconscious for a few minutes. Total weight of the cylinder is 1½ pounds and probable installation cost is $50 or less.

2. The chest often impacts the control wheel and column. *Cockpit Design for Impact Survival* reported that "pilots may be found on occasion impaled upon a portion of the control wheel, as on the horns of a bull, especially in cases where the wheel is constructed of brittle material." Instead of being a lethal obstruction, the control wheel should be a partial restraint system, retarding the forward motion of the pilot's torso. The area of the control wheel facing the pilot's chest should be increased and the whole wheel padded to distribute the load over as large an area on the occupant's chest as possible.

3. The legs and ankles are also subject to unnecessary injury. The danger of post-crash fire makes it important that the occupant not only remain conscious, but also avoid serious injury to the legs and arms which are needed to escape from the downed aircraft. If they strike the bottom of the instrument panel in today's light aircraft, injury is probable. There are airplanes coming off the assembly line today in which the bottom of the panel consists of a sharp metal edge. It is uncommon to see a new airplane in which the designer has anticipated the possibility of the occupant's legs striking the lower edge of the instrument panel. The solution is simply to make a rounded lower edge out of soft metal and then pad it. The whole instrument panel should be constructed of soft metal anyway. The Army *Crash Survival Design Guide* supports this recommendation, and also makes a point of proper rudder pedal configuration to protect the feet and ankles:

"If the rudder pedal is a simple bar type of arrangement, the heel may be forced under the pedal. . . . If the forces are great enough, a badly-injured or trapped foot could result. It is therefore desirable to design the rudder pedals

and surrounding structure to . . . [provide] a pedal capable of supporting both the ball of the foot and the heel and by providing surrounding structure of sufficient strength to prevent crushing and trapping of the lower limbs."

4. Seat design is important for absorbing vertical impact forces. At angles of 45 degrees or less, when the crashing aircraft "bottoms out", the occupants tend to be driven into their seats and down to non-yielding structure underneath. Almost all the load is transmitted through the two bones in the occupant's buttocks. The cushion of the seat is critically important, because terrific loads are imposed at two small points on the cushion. Certain types of springs or other resilient mechanisms cannot absorb much impact before they act as a rigid platform into which the occupant's spine is driven. Finally, the front seat back is a dangerous threat for the rear seat occupant in a light aircraft. Years ago the airlines began to use soft metal panels to form the seat back in large aircraft. After a crash in an airliner the seat backs were very distorted, indicating that the metal absorbed much of the passengers' forward impact. Previously, metal tubing formed the upper edge of the seat back. When struck by an occupant's head or arms, it would indent only slightly and therefore cause skull and arm fractures. Properly designed seats are on the market; no research and development is required for the manufacturer to solve this problem.

CONCLUSION

The Administrator has the power and the duty to promote safety in civil aviation. The rules suggested here are well within the present state-of-the-art of aeronautical engineering. They are well within the economic capabilities of the aircraft industry. A rulemaking proceeding and investigation, in which engineers from industry as well as FAA engineers can participate, and which can be monitored by persons representing the interest of the traveling public and the users of general aviation, can result in effective, feasible technical engineering standards for design and construction of safer general aviation aircraft. Considering how long most of the basic information has been publicly known, to continue to ignore the need for and possibilities of improving safety in general aviation aircraft design and construction would be a dereliction of duty by the FAA, and, in legal terms, a clear abuse of discretion. Some of the rules, like those respecting the installation and use of shoulder harnesses, can be promulgated immediately. Others, like those relating to detailed standards for cabin construction and cabin interior design and materials, can be developed in the course of a rulemaking proceeding. Such a proceeding should be instituted immediately.

Respectfully submitted,

WILLIAM A. DOBROVIR,
Attorney for Petitioner.

APPENDIX IX (A)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Bankruptcy No. 70–347

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY

PETITION FOR REPRESENTATION OF CONSUMER INTERESTS

To the Honorable John F. Fullan, Judge of the District Court of the United States for the Eastern District of Pennsylvania:

This petition is filed on behalf of various individual and institutional parties concerned with the effect of the Penn Central Transportation Company reorganization upon the interests of consumers and other national and community interests, to urge this Court to take certain measures to assure effective representation of those interests in the management of the Penn Central at all times during the reorganization and thereafter. Specifically, petitioners request the Court to appoint one or more trustees for the purpose of representing and promoting public consumer and community interests, as distinct from the private interests of management, creditors, and shareholders. Petitioners in support thereof respectfully represent:

PETITIONERS

1. The petitioner Ralph Nader, a resident of Winsted, Connecticut, is an author, lawyer, and advocate of the public interest in various consumer, safety and environmental issues.

2. The petitioner Reuben B. Robertson, III is a resident and member of the bar of the District of Columbia.

3. The petitioner Jonathan A. Rowe is a resident of North Sandwich, New Hampshire, and a third-year law student at the University of Pennsylvania Law School in Philadelphia.

4. The petitioner Anthony Haswell is a resident of Chicago, Illinois, a member of the bar of the State of Illinois, and Chairman of the National Association of Railroad Passengers.

5. Each of the above individual petitioners is a frequent passenger by railroad, including the Penn Central, and a consumer of commodities transported by railroad. The individual petitioners are and have been engaged in the analysis and advocacy of consumer, environmental, safety and community interests in various modes of transportation, including railroads.

6. The petitioner National Association of Railroad Passengers is a not-for-profit corporation organized under the laws of the State of Illinois to represent and promote the interests of railroad passengers. The Association at present has approximately 7,000 dues paying members. Membership in the Association is open to all users of rail passenger service and to other citizens who believe that modern trains are an essential element of a balanced transportation system. Its national headquarters are at 417 New Jersey Avenue, S.E., Washington, D.C. 20003.

PUBLIC INTEREST CONSIDERATIONS

7. Penn Central performs essential transportation services for the public. In 1969, it carried 88.2 billion ton-miles of freight, 10.2% of the national total of 768 billion. It carried a total of 91.4 million passengers, of which 54.0 million were commuters and 37.4 million were intercity travellers. These amounts were 32.1%, 26.0%, and 42.6% respectively of the national totals of 295.9 million, 208.1 million, and 87.8 million. Penn Central's 1969 total passenger-miles of 3.4 billion were 28% of the national total of 12.2 billion.

8. Continuation and improvement of Penn Central freight services is vital for the health of the national economy, in that the cost of transporting its freight load by other modes would be several times the $1.3 billion it was paid by shippers in 1969.

9. Continuation and improvement of Penn Central passenger services is vital for the national interest in personal mobility and a better environment. If all Penn Central's passengers were forced to use air and highway facilities, the result would be massive air and highway traffic congestion, bordering on paralysis in some areas. Expansion of these faciilities to adequately accommodate the additional traffic would cost an enormous amount of money and scarce land area, and create intolerable levels of noise and air pollution.

10. The quality of Penn Central freight service has steadily deteriorated since the 1968 merger despite assertions by management that it is interested in this business as a profit making operation.

11. The quality and quantity of Penn Central commuter service has deteriorated to an abysmally low level. Management has repeatedly stated that it has no interest in this operation unless it is supported with public funds.

12. The quality and quantity of Penn Central intercity passenger service, other than between New York City and Washington, D.C., has deteriorated at least as much as commuter service. Dozens of Penn Central communities have already lost their passenger service. The present management has requested the Interstate Commerce Commission for authority to discontinue ALL passenger service west of Buffalo, New York, and Harrisburg, Pennsylvania. Were this request granted, such major cities as Indianapolis and Terre Haute, Indiana; Ann Arbor, Jackson, and Kalamazoo, Michigan; Cleveland and Springfield, Ohio; and Erie, Pennsylvania would have no rail passenger service. This could be a crippling blow to the economies of these important cities, as well as to innumerable smaller communities. A principal objective of Section 77 bankruptcy proceedings is to keep essential service running, not to facilitate its discon-

tinuance. *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 309n.12 (1954) ; *In re Denver & R. Co.*, 38 F. Supp. 106 (D. Colo. 1940).

13. There is evidence of serious deterioration in maintenance and safety standards in Penn Central operations. In a recent report on the probable cause of a June, 1968 Penn Central passenger train derailment at Glenn Dale, Maryland, the National Transportation Safety Board was strongly critical of Penn Central for failure to require proper maintenance of its welded rail main tracks, and for inadequate monitoring of factors which might adversely affect the track or train operations. The degradation of safety performance in Penn Central operations is demonstrated by the following statistics based on official reports of the Federal Railroad Administration:

TRAIN ACCIDENTS PER MILLION LOCOMOTIVE MILES

Railroad	1963	1966	1969
New York Central	3.91	5.53	
Pennsylvania Railroad	6.87	12.50	
New Haven	1.97	5.39	
Penn Central			12.58

14. Despite the rapid, sustained deterioration in availability, quality and reliability of freight and passenger service since the 1968 merger, Penn Central management has continued to seek authority from the Interstate Commerce Commission and State regulatory bodies to institute still higher tariffs which have resulted and will continue to result in substantial increases in consumer costs.

15. Legislation is now pending before the Congess to establish a quasi-public corporation to operate all intercity passenger service. The success of this corporation will be directly dependent upon the degree of cooperation extended by the railroads in such matters as reasonable track use fees, adequate track maintenance, rights of trains, etc. The attitude of present Penn Central management toward passenger service gives little hope for such necessary cooperation with the proposed rail passenger corporation. Moreover, establishment of the passenger corporation will not affect or assist Penn Central's commuter services.

TRUSTEE APPOINTMENT

16. Under Section 77(c)(1) of the Bankruptcy Act, 11 U.S.C. Sec. 205(c)(1), as amended, it is the duty of the Court to appoint one or more trustees of the debtor's property. The petitioners submit that the purposes of those provisions of the Bankruptcy Act which relates to reorganization of railroads can only be met by the appointment of one or more persons as trustees whose express duty it is to represent and promote the interests of consumers and the public in the operation and management of the debtor's estate. These interests necessarily include the availability of adequate and economical commuter and intercity passenger service; availability of adequate, economical freight transport; assurance of the highest possible degree of safety; alleviation of air and water pollution and other sources of environmental contamination; and development and promotion of a coordinated national transportation system involving all modes of surface and air transportation. In light of the unique nature and public responsibilities of a major railroad such as the Penn Central, the Court must establish at the outset the priority of such concerns over the claims of creditors, stockholders and other private interests. The real and effective representation of these concerns can be assured only by appointing as trustees persons expressly committed to advancing them.

17. The court clearly has the power to appoint representatives of the public interest as trustees. See, *e.g.*, *In re Long Island R. Co.*, 83 F. Supp. 971 (D. N.Y. 1949). Judge Kennedy, setting forth the rationale impelling his choice of two trustees specifically for the purpose of representing the interests of commuters and communities in the Long Island Railroad bankruptcy proceeding, stated as follows:

> . . . everything I know personally about the situation and everything that was said at the hearing, compels the conclusion that the appointment of a trustee or trustees representing the community is absolutely essential . . . the management, pending reorganization, should be such that the community as a whole will feel that its peculiar interests are in competent hands at every stage of the proceeding. 83 F. Supp., 976–973.

Thus, it is clear that the court can and indeed should name trustees who will represent the public as a party with a vital interest in the railroad's management.

18. To fulfill the underlying public purposes of Sec. 77 of the Bankruptcy Act, and of the very expectations and conditions under which Penn Central acquired its vast properties, assets and special privileges, it is essential that the public be represented in the choice of trustees. Section 77 of the Bankruptcy Act provides a special and unique process for the reorganization of insolvent railroads; it was written to make certain that railroad service would not disintegrate and that the public would not lose the vital services of a railroad which had gone, or been led, into bankruptcy. During Congressional debates on a 1935 amendment to Sec. 77, Congressman Sumners of Texas pointed out on the floor of the House:

> The purpose of this legislation is to avoid the scrapping of a road and selling it . . . The Bankruptcy Act of which the measure before us is supplemental, was designed to aid crippled railroads and bring about reorganizations so that they might render improved service to the public and prevent stockholders and owners of securities from sustaining irreparable losses. *Congressional Record*, Aug. 15, 1935, p. H–13299.

To the greatest extent possible, the transportation service is to be continued and even improved, regardless of the interests of creditors and stockholders. *In re Denver and Rio Grande Western R. Co.*, 38 F. Supp. 106, 115 (D. Colo. 1940). The purpose of the law under which these trustees are to be appointed requires that the needs of the transportation-consuming public be represented in the management of the railroad during the critical period of its reorganization. This requirement is especially urgent in the case of Penn Central, the current management of which has pursued a course of steadily curtailing both freight and passenger service and has publicly expressed the view that still further cutbacks are the means by which it intends to regain the economic viability of the enterprise.

19. The business and properties of the Penn Central clearly are affected with a public interest. Under various state and Federal laws and regulatory provisions, they are tools to be used for the benefit of the public large. The Penn Central acquired its original franchises and many of the properties on which it operates under special agreements with the states. These agreements expressed the expectation and imposed the duty that the railroad would in return use these franchises and properties to the benefit of the public. As just one example, the Pennsylvania Railroad—a predecessor of the Penn Central—bought its so-called "western works" from the State of Pennsylvania under the explicit command that it would be

> . . . bound ever thereafter to keep up and in good repair and operating condition, the line of said railroad . . . and the said railroad shall remain forever a public highway . . . and kept open and in repair . . . for the use and enjoyment of all parties desiring to use the same. An Act For The Sale of the Main Line of the Public Works, No. 579, Laws of Pennsylvania of the Session of 1857, Sec. 5.

This point is crucial: that the claim of the public to transportation service from these properties precedes the right of the purely private claimants under liens, mortgages, and other encumbrances. Creditors, stockholders, and other parties with private interests will be tempted to turn the railroad properties towards the fullest possible satisfaction of their own claims. The very conditions under which the properties were acquired and private profits have been reaped from them make clear and urgent that during the reorganization there should be at least one trustee whose first and basic concern is that the railroad's ability to serve the public not be impaired.

20. Petitioners further contend that no trustee should be appointed who is or was an officer or director of Penn Central. Misguided and inept management policies were a major cause of the company's downfall. Based on interviews with railroad industry officials, financial analysts, shippers, regulatory officials and others, the *Wall Street Journal* recently concluded in an article that the Penn Central's problems fundamentally stem from the poor and continuously deteriorating service the railroad has provided its customers:

> "According to shippers, Penn Central's service failures include every type of complaint ever registered, and in greater numbers than ever encountered on any other line. The list includes inability to furnish cars to shippers in sufficient numbers, lengthy delays, chronic jam-ups at terminals and connecting points with other railroads, misdirected cars and cars lost for weeks or months at a time. Major shippers even report examples of loaded cars leaving

their plants only to return some weeks later still fully loaded." *Wall Street Journal*, June 12, 1970, p. 1.

The same article continued as follows:

"Some regulatory officials and financial analysts make it clear they distrust statements made by Penn Central officials. For example, company officers had prepared financial plans indicating a first-quarter loss from railroad operations of about $50 million; in fact, the deficit was much larger. 'Financial people don't know if Penn Central is deliberately deceiving them, or whether the company just doesn't know what it's doing,' one observer says.

"Some Penn Central directors feel this lack of credibility, whether or not it's intentional, has extended even into the boardroom. According to knowledgable sources, some of the outside directors felt they had been 'hoodwinked' by management after they picked up highly important financial information from a company debenture prospectus—information that hadn't been given them as directors." *Id.*, p. 16.

Only a person having no previous connection with Penn Central's management could be relied upon to make the difficult decisions as to necessary personnel changes, and to be free of all constraint or inhibition in investigating the causes of the railroad's financial demise, including possible conflict of interest or other improprieties on the part of Penn Central directors or officers.

21. The petitioners urge, in addition, that the Court use extreme caution in appointing as trustee any individual from a financial institution involved with the Penn Central. Reports since the filing of the petition in bankruptcy have revealed that conflicts of interest between the railroad and those financial institutions which are creditors, holders in trust of stock, or connected by interlocking directors, may well have contributed to the decline of railroad service and even to the financial debacle. A recent staff report of the House Banking and Currency Committee stated that "preliminary investigation reveals heavy involvement by banking institutions in nearly every one of Penn Central's operations. Every aspect of the issues involved in the collapse of the corporation appears to lead back to some banking institution." The Penn Central's 1968 ownership records reveal that 17 of the 31 largest shareholders were commercial banks, and that they held in sum 22.1% of the outstanding stock. The influence of these institutions, so entwined in the railroad's affairs, must be minimized in the interest of healthy and independent management of the railroad.

CONCLUSION

Consumers of all kinds, including freight shippers, commuters and intercity travelers, have a vital interest in the manner in which Penn Central operations are conducted under the supervision of this Court. The law is clear that public interest considerations must be given priority in the operation and financial reorganization of the railroad. The trustees will have pervasive power to control the affairs and policies of the railroad for a period of several years and perhaps decades. Under the circumstances, it is imperative that one or more trustees be named who will specifically represent the interests of the consumers and users of Penn Central services.

Respectfully submitted,

ANTHONY HASWELL,
REUBEN B. ROBERTSON III,
Attorneys for Petitioners.

July 20, 1970.

APPENDIX IX(B)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Bankruptcy No. 70-347

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY

PETITION FOR APPOINTMENT OF CITIZENS' ADVISORY COMMITTEE

To the Honorable John P. Fullam, Judge of the United States District Court for the Eastern District of Pennsylvania:

Come now the petitioners Ralph Nader, Reuben B. Robertson, III, Jonathan A. Rowe, Anthony Haswell and National Association of Railroad Passengers, hav-

ing previously petitioned this Court regarding the appointment of one or more trustees specifically to represent and promote the interests of the public and consumers in the reorganization and management of the Penn Central who now further urge the court to establish and appoint a Citizens' Advisory Committee to advise and assist the trustees with regard to various aspects of the public interest. The reasons and authority for such appointment and the powers and duties of the proposed Committee are set forth in the accompanying memorandum in support of this petition.

Respectfully submitted,

THOMAS K. GILHOOL,
REUBEN B. ROBERTSON, III.

JULY 22, 1970.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Bankruptcy No. 70–347

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY

MEMORANDUM IN SUPPORT OF PETITION FOR APPOINTMENT OF CITIZENS' ADVISORY COMMITTEE

The Court's duties in protecting the public interest in a railroad reorganization proceeding under Section 77 of the Bankruptcy Act do not, of course, end with the appointment of Trustees to manage the estate. The petitioners, who include rail passengers, consumers and parties professionally and institutionally committed to the advocacy of various consumer, safety and environmental causes, have urged the Court to take whatever measures may be necessary and appropriate to advance community and consumer interests in overseeing the Penn Central's reorganization. We believe that these interests can be significantly aided by the appointment of a special committee of advisors to the trustees which can make studies and recommendations to them—and to this Court—regarding the many facets of the public interest. While novel, this action appears to be well within the clearly established powers of the Court. This memorandum spells out in further detail the proposal and the legal authority of the Court to adopt it.

PURPOSES OF THE COMMITTEE

There can be no serious argument that the first priority in the management and reorganization of a bankrupt railroad must be the public interest, including specifically the right of the people to be assured safe, dependable, adequate and economical transportation by rail. *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 309 n. 12 (1954) ; *in re Denver and Rio Grande Western R. Co.*, 38 F. Supp. 106 (D. Colo. 1940) ; *In re Long Island R. Co.*, 83 F. Supp. 971 (D. N.Y. 1949). The public's multiple and complex needs require thoughtful, coordinated analysis and implementation which the trustees alone, absorbed in the day to day problems of management and operation, may not be able to fulfill adequately.

Penn Central serves a region under siege by a massive transportation and environmental crisis. The urban areas of the Northeastern United States are already congested and overcrowded, its highways and airways are clogged, its rivers becoming open sewers and its air a potential source of epidemic asphyxiation. The incessant parasitic demands of railroad management upon the public for higher and higher passenger fares and freight tariffs, the degrading of service and safety standards, the Penn Central's relentless drive to rid itself of customers and of all obligations to provide intercity passenger service, capped finally by the initiation of bankruptcy proceedings have intensified the crisis and made an ugly joke of the corporation's basic legal commitment to serve the public continuously and adequately. This background underscores the urgency of special provisions by this Court and the trustees on behalf of the public.

The interests of consumers, passengers, shippers, communities and the public at large must no longer be short-changed with respect to Penn Central operations. To this end it would be appropriate and useful to have a special committee to advise the trustees on various aspects of the public interest. Without in any way interfering with the daily operations and management functions of the trustees, the committee would be in a position to analyze public complaints, tariffs and schedules, population trends as related to available service, environ-

mental considerations, maintenance and safety standards and other aspects of the public interest. The proposed committee could make reports and recommendations to the trustees as to developing problems and ways in which the quality of the railroad's public service might be improved. Further, the committee would evaluate the efforts of the trustees from a public interest perspective and could make reports to the Court on any changes that might be necessary for fulfillment of the railroad's basic mission of public service. One possible format for the composition of such a citizens' advisory committee has been set forth for the Court's review in Appendix A to this memorandum.

AUTHORITY OF THE COURT

While we are not aware of any previous railroad bankruptcy proceeding in which such a public interest advisory committee has been appointed, the Court's power to take such action is clear. Section 77(a) of the Bankruptcy Act, governing railroad reorganizations, confers upon the District Court having jurisdiction the full panoply of powers over the debtor and the trustees that apply generally in bankruptcy proceedings. For example, Section 11(a)(6) of the Act, amended by the Chandler Act in 1938 so as to apply unequivocally to proceedings under Section 77, see Hanna & MacLachlan, *Cases on Creditors' Rights*, 1965 Supplement, 9, explicitly provides that the Court has the power to "bring in and substitute additional persons or parties in proceedings under this title when necessary for the complete determination of a matter in controversy." Similarly, Section 343 of the Act expressly states that a receiver or trustee shall manage the debtors' business and property "subject to the control of the court." The power thus conferred on the Court in general bankruptcy proceedings is made specifically applicable to the court in railroad bankruptcies by section 77(a), which gives the bankruptcy court "all the powers not inconsistent with this section which a court of the United States would have had if it had been appointed a receiver in equity of the property of the debtor for any purpose." Additionally, of course, the Court has inherent and express powers to enter appropriate orders and impose such restrictions and conditions as may be necessary in the management of the debtor's affairs, e.g., Bankruptcy Act, Secs. 11(a)(15), 11(b).

Nothing in the Act or in the decisional law interpreting the Act appears to restrict or prohibit the Court from appointing advisors or advisory committees. In the Long Island Railroad bankruptcy proceedings, the appointment of a firm of engineering consultants as advisors to the trustees, whose principal role was to make studies, determine the facts and submit reports and recommendations to the trustees, was discussed at length and expressly approved by District Judge Kennedy. *In re Long Island R. Co.*, 91 F. Supp. 439 (D. N.Y., 1950). No case has been found limiting or denying the Court either the power to pass upon the appointment of or to appoint directly consultants or advisors to the trustees for the purpose of gathering and analyzing facts and making recommendations to the trustees or the Court. Certainly where the stakes are so high and the identification and implementation of the public interest are so critical, such restraints should not be read into a statute the primary purpose of which is to protect the public.

Respectfully submitted,

THOMAS K. GILHOOL,
REUBEN B. ROBERTSON, III.

JULY 22, 1970.

[APPENDIX A]

POSSIBLE COMPOSITION AND CHARTER FOR CITIZENS' ADVISORY COMMITTEE TO TRUSTEES IN PENN CENTRAL REORGANIZATION

The Citizens' Advisory Committee would be composed of three to five members appointed by the Court for terms of five years, and drawn from groups or organizations representing such interests as

(*a*) railroad passengers, including commuters;

(*b*) consumers of commodities transported by rail;

(*c*) environmental quality, including conservation and aesthetic interests, city and regional planning, population distribution, and clean air and water advocates;

(*d*) shippers by rail;

(*e*) railway labor.

The Committee's basic mandate shall be to protect and promote to the fullest extent possible within its powers during the Penn Central reorganization, the needs of the public for safe, clean, modern, efficient, economical and reliable rail transportation; sound regional planning including comprehensive intermodal transportation planning; conservation of natural resources including pure air, water and open spaces. To achieve these ends, the Committee shall have the following powers and duties:

(*a*) Examination of all books and records of the debtor and any company controlling, controlled by or under common control with the debtor;

(*b*) Attendance of any meetings of the trustees and officers of the debtor, and the right to be kept informed of all actions, plans and proposals regarding operation of the Penn Central and to receive copies of all company correspondence and memoranda;

(*c*) Making studies of and reporting to the trustees periodically and at all appropriate times upon the actual or potential impact of Penn Central operation and any proposed or suggested plans or changes on any aspect of the public interest; and making such recommendations as the Committee deems appropriate to protect and advance the interests of consumers and the public generally;

(*d*) Studying and reporting to the trustees and the Court on the effects of past Penn Central policies and practices upon the public, and on the causes of the financial collapse precipitating the petition in bankruptcy;

(*e*) To report annually or at any other appropriate time on the adequacy of actions taken by the trustees to implement the recommendations of the Committee, on the impact of the debtors operations on the public interest, and on any problem in the management of the estate that the Committee deems necessary or appropriate to bring to the Court's attention;

(*f*) To apply for and receive any federal, state, local or private grant of funds, research, facilities or assistance of any kind to advance the purposes for which the Committee is established.

APPENDIX X(A)

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C. 20554

FCC 69-631 32888.

(Docket No. 18244)

IN THE MATTER OF PETITION FOR RULEMAKING TO REQUIRE BROADCAST LICENSEES TO SHOW NONDISCRIMINATION IN THEIR EMPLOYMENT PRACTICES

REPORT AND ORDER

Adopted June 4, 1969, released June 6, 1969. By the Commission: Commissioner Bartley not participating; Commissioner Robert E. Lee concurring in part and dissenting in part and issuing a statement.

1. On July 5, 1968, the Commission released a Memorandum Opinion and Order and Notice of Proposed Rule Making, 33 F.R. 9960, 13 FCC 2d 766, setting forth its view that discriminatory employment practices by a broadcast licensee are incompatible with operation in the public interest. We found that the Commission has a responsibility to implement the important national policy against discrimination on the basis of race, color, religion or national origin, and we accordingly announced our intention to act upon substantial complaints of discrimination, either directly or by referral to an appropriate federal, state or local body. At the same time, we stated our doubt that embodying the policy in rule form and requiring periodic (e.g., at renewal time) showings of compliance with the policy would be useful. The tentative decision to proceed primarily upon a complaint basis[1] was substantially influenced by considerations related to our limited staff resources. However, we simultaneously instituted rule making to explore the questions of whether the basic nondiscrimination requirement should be embodied in a rule, whether a showing of compliance should be required, and whether notices of equal employment rights should mandatorily be posted in employment offices and placed on employment applications.

2. The comments and reply comments filed on these issues have been most helpful. The interested parties are essentially unanimous in support of the proposition that there ought not be discrimination in employment practices of broadcast licensees. However, several parties have urged either that the Commission lacks authority to implement this policy, in light of the creation of a special Commission (the Equal Employment Opportunity Commission) to act across-the-board with respect to the problem of discrimination or, that, for the same reason, it would at least be better policy for the Federal Communications Commission not to attempt to duplicate the EEOC's processes with additional requirements in the broadcast field. For the reasons already stated in the July 5, 1968 Memorandum Opinion and Order and Notice of Proposed Rule Making, we cannot agree with these latter contentions. Indeed, a substantial case has been made that because of the relationship of the government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity.[2] However, we need not decide this point. It is enough that the importance and urgency of the equal employment opportunity policy in the areas covered command its implementation on every appropriate front. Action by the Commission will complement, not conflict with, action by bodies specially created to enforce the policy, as the EEOC points out in its comments and as the Department of Justice has also advised us. It is also clear that we have an independent responsibility to effectuate such a strong national policy in broadcasting, and that we need not await a judgment of discrimination by some other forum or tribunal. *National Broadcasting Company* v. *United States*,

[1] We did indicate our intention to acquire statistical racial employment data.

[2] The contention is rested upon such decisions of *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

319 U.S. 190 (1943); *Southern Steamship Company* v. *Labor Board*, 316 U.S. 31 (1942).[3] As Assistant Attorney General Pollack urged:

"Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries. For these reasons I consider adoption of the proposed rule, or one embodying the same principles, a positive step which your Commission appears to have ample authority to take."[4]

3. The fear has also been expressed, with respect to the complaint referral policy we announced in our July 1968 opinion, that inconsequential or spurious complaints of discrimination could be used to delay Commission consideration of applications. We agree that consideration of applications should not be held up because of inconsequential complaints. For that reason, our earlier opinion stated that we will refer to other agencies only ". . . complaint[s] raising a substantial issue of discrimination . . . against a station . . ." In this connection, we may also make our own preliminary investigation at our discretion in lieu of the complaint referral procedure. We will exercise care in the use of these procedures to the end that no licensee need fear undue delay arising out of the referral procedure. On the other hand, we do not believe that an application should be granted where a serious qualification question remains unresolved. The command of the Communications Act is to the contrary, whatever the nature of the particular unresolved public interest question. Therefore, while not every complaint of an isolated action, even if substantial, will warrant deferring a renewal or designating a renewal application for hearing,[5] renewal will not be appropriate where there is a pattern of substantial failure to accord equal employment opportunities.

4. The earlier opinion proposed almost sole reliance upon a complaint procedure and further stated our view that it was not necessary to adopt the policy on equal employment opportunity in rule form. A number of commenting parties have urged that a formal rule would be useful, not only to emphasize the policy and make it specific, but also to make available the remedy of forfeitures under Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. § 503, where there is noncompliance. They state, as we have recognized in other contexts, that denial of a license may sometimes be so severe a remedy that it becomes useless. We find these contentions to be meritorious, particularly since, as noted above, some complaints may be appropriately considered independently of consideration of renewal appplications. It has also been urged by a substantial number of parties active in this field that the equal employment opportunity policy cannot be effectively implemented by relying solely upon individual complaints. They point out that consideration of complaints, particularly if referred to other agencies, is time consuming (a point also made by industry parties), and they state their experience that many people will not complain even though they suspect or know they have been treated unfairly in respect either to initial employment or management practices, that many people will not even seek employment where they believe discriminatory practices to exist, and that individuals have great difficulty in demonstrating the existence of discrimination where it does exist.

5. These parties urge that only a serious compliance program with the burden upon the licensee to demonstrate operation conforming to national policy will be effective. The United States Commission on Civil Rights thus has stated in its comments:

"It is not enough that no one comes forward to complain of its noncompliance, for that may leave discriminatory practices undisturbed, much as all other complaint-oriented procedures for enforcing State and Federal FEP requirements have had only a minor impact upon the widespread discrimination the National Advisory Commission has found still exists. (Id. at 91). The New Jersey Governor's Select Commission on Civil Disorder stated earlier this year:

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[3] The policy being so clear, our authority extends to its application to stations with fewer than 25 employees, although Congress chose to limit the particular remedies in the Civil Rights Act of 1964, entrusted to the EEOC, to those employers having at least 25 employees.

[4] Letter of Assistant Attorney General Stephen J. Pollack, Department of Justice, March 21, 1968, page 4.

[5] Adoption of a specific rule, which we are now proposing, will make forfeitures available where appropriate.

"If the enforcement of equal opportunity laws on the State level is predicated upon individual complaints, it is bound to be weak and ineffective." (Report for Action (1968) at 73.)

"As Appendix B to these comments indicates, there is substantial unanimity among FEP commissions and professional sources, including a number of persons who have specialized for a lifetime in problems of administrative law, that complaint-oriented procedures to enforce nondiscrimination requirements, for various reasons, do not work. They cannot, in light of two decades of experience, be expected to work." [6]

Moreover, reliance solely upon a complaint procedure to implement equal employment opportunity cannot cope with general patterns of discrimination developed out of indifference as much as out of outright bias. In this connection, the Committee on Government Contracts concluded in 1960 that:

"Overt discrimination, in the sense that an employer actually refuses to hire solely because of race, religion, color or national origin is not as prevalent as is generally believed. To a greater degree, the indifference of employers to establishing a positive policy of nondiscrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.

"The direct result of such indifference is that schools, training institutions, recruitment and referreal sources follow the pattern set by industry. Employment sources do not normally supply job applicants regardless of race, color, religion or national origin unless asked to do so by employers." [7]

Despite the workload problems, these considerations impel us to adopt further requirements to assure equal employment opportunity, especially in view of the urgent national need cited in our earlier opinion. We believe it vital that such action be taken.

6. In order to accomplish the foregoing purposes, we are adopting rules modeled closely upon the equal opportunity program requirements which the Civil Service Commission has adopted for Government agencies, and which are the product of considerable experience.[8] We have decided upon the basis of the record before us that such rules should be adopted. They are set out in *Appendix* A hereto.

7. We also believe, as stated in our earlier opinion, that *statistical information should be obtained.* Such information will give us a "profile" of the broadcast industry, and may also be *more useful in indicating noncompliance than we had previously thought.* See *United States* v. *Wiman*, 304 F. 2d 53 (C.A. 5, 1962); *State of Alabama* v. *United States*, 304 F. 2d 583, 586 (C.A. 5, 1962). As the court stated in the latter case (304 F. 2d at 586): "In the problem of racial discrimination, statistics often tell much, and Courts listen." We therefore propose to adopt an *additional rule to obtain statistical data for the broadcast industry. We had considered as the vehicle for reporting statistical information the primary Employer Information Report EEO–1 developed by the EEOC,* the Office of Federal Contract Compliance of the Department of Labor, and Plans for Progress. This form requires statistics on several general work categories [9] for employees who are Negro, Oriental, American Indian and Spanish Surnamed American. It is already being prepared annually by many broadcasters, and its use by broadcasters already using it would have that advantage. However, we have devised a new form which we believe will be more useful for our purposes.[10] It utilizes the same job categories as the EEO–1 form,[11] but requires a station-by-station breakdown, which EEO–1 does not. We believe our proposed form has considerable additional advantages by way of simplicity and brevity. This form will still

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[6] Comments of U.S. Commission on Civil Rights, September 9, 1968, pp. 5–6.

[7] Pattern for Progress, Final Report to President Eisenhower from the Committee on Government Contracts, page 14 (1960).

[8] Equal Opportunity, Agency Program, 5 CFR 713.203.

[9] These categories are: Officials and managers, Professionals, Technicians, Sales workers, Office and clerical, Craftsmen (Skilled), Operatives (Semi-skilled), Laborers (Unskilled) and Service Workers.

[10] See the Commission's Further Notice of Proposed Rule Making in Docket No. 18244, "In the Matter of Petition for Rule Making to require broadcast licensees to show nondiscrimination in their employment practices," (FCC 69–632), adopted June 4, 1969, for the text of the proposed rules, amendments to current FCC reporting forms and the proposed FCC Form 325, Annual Employment Report.

[11] While the advantages of having the same job categories as those in the EEO–1 form prompted their use in the new FCC form, we invite comment upon alternative categories which might be more directly related to the broadcast industry, and thus perhaps more useful.

permit inter-industry comparisons and should minimize industry burdens.[12] Preparation of the requested information should be of minimal difficulty. We seek the advice and suggestions of all interested persons concerning the proposed form. We propose to include network personnel and so-called headquarters staffs for broadcast operations.

8. In accordance with the considerations set forth in paragraphs 4, 5 and 6, *supra*, we are also proposing to require the submission by licencees of more detailed equal opportunity programs as to significant minority groups (Negroes, Orientals, American Indians and Spanish Surnamed Americans) which may be most in need of assistance in achieving equal employment. These written programs will enable licensees to focus, in terms of their individual situations, upon the best method of assuring effective equal employment practices. Supplemental to the adoption of such programs will be reports to be prepared with renewal applications whose purpose will be a review by the licensee of the effectiveness of his program. Since we have not hitherto proposed specific requirements in this area, we seek comment upon the particulars of the proposed provisions. See Note 10, *supra*, for reference to the text of these provisions. We propose to require that each station with five or more fulltime employees develop an equal employment opportunity program, taking due account of such factors as station size and location, and demographic makeup of the area.[13] The scope of the program would vary with the size of the station and the nature of the community and its racial makeup, but its essential purpose for every station would be to assure equal opportunity in every aspect of station employment practice, including traing, hiring, promotion, pay scales and work assignments. While permitting flexibility, the programs would be expected to include specifics of the station's practices such as, but not limited to those listed in the additions to the application forms. See Note 10, *supra*, for reference to the text of these additions. The proposed procedure would require that these programs be submitted by existing stations within appropriate time, and by applicants for new and transferred facilities. They would be kept open for public inspection at the station and modified as required. In view of these requirements we see no need for a separate requirement on the posting of notices and statements on application forms discussed in the Notice of Proposed Rule Making. In addition, as mention above, we also believe that reports should be prepared at renewal time to enable the licensee to appraise the effectiveness and relevance to his own situation of his equal employment opportunity program. It should be most useful to know how the specific practices proposed in the station's equal employment opportunity program have been concretely applied and what effect they have had upon the flow of applications for employment, actual hiring, and the status of minority group members. This information would be submitted by each broadcaster in appropriate exhibits with the application for renewal of license.

9. It is important to emphasize in connection with the requirements of the general rule, and the equal opportunity programs proposed, that they do not cover certain areas of employment practice which we described as most appropriate for an "appeal to conscience" in our earlier opinion. The need for such further affirmative action along the lines suggested in the Kerner Report is however, strongly urged as a voluntary supplement to the requirements of the proposed rules. Thus, broadcasters might consider the adoption of special training programs for qualifiable minority group members, cooperative action with other organizations to improve employment opportunities and community conditions that affect employability, and other measures in addition to the employment practices suggested in the proposed rules. These voluntary measures may well be the chief hope of achieving equal employment opportunity at the earliest possible time, and the decision to take such action rests with the individual broadcaster.

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[12] We propose to obtain the requested information only for the broadcast operations of licensees also engaged in non-broadcast activities, except for related subscription services, which we believe should be included.

[13] We believe it reasonable to exclude stations with less than five fulltime employees. While the rules now adopted apply to all employees and contain general requirements which can readily be adhered to even where minority group representation may be minimal, we also should make clear that a licensee need not prepare an equal employment opportunity program where the particular minority groups concerned are represented in the area in such insignificant numbers that a program would not be meaningful.

10. It is ordered, pursuant to the authority contained in Sections 4(i), 303, 307, 308, 309 and 310 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, 307, 308, 309 and 310, that effective July 14, 1969, Part 73 of the Commission's Rules is amended as set forth in Appendix A hereto.

FEDERAL COMMUNICATIONS COMMISSION,*
BEN F. WAPLE, *Secretary.*

APPENDIX A

In Part 73, §§ 73.125, 73.301, 73.599, 73.680, and 73.793, all to read identically, are added as follows:

§ 73. Equal employment opportunities.

(a) *General policy:* Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or non-commercially operated standard, FM, television or international broadcast stations (as defined in this Part) to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, or national origin.

(b) *Equal employment opportunity program:* Each station shall establish, maintain, and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice. Under the terms of its program, a station shall:

(1) Define the responsibility of each level of management to insure a positive application and vigorous enforcement of the policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance.

(2) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation.

(3) Communicate the station's equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion or national origin, and solicit their recruitment assistance on a continuing basis.

(4) Conduct a continuing campaign to exclude every form of prejudice or discrimination based upon race, color, religion or national origin from the station's personnel policies and practices and working conditions.

(5) Conduct continuing review of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure, genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility in the station.

STATEMENT OF COMMISSIONER ROBERT E. LEE CONCURRING IN PART AND DISSENTING IN PART

I concur in the Report and Order and dissent to the related Further Notice of Proposed Rule Making. Since this Report and Order includes, in paragraphs 7 and 8, the reasons in support of the Further Notice of Proposed Rule Making, both documents will be considered in this statement.

There is no disagreement as to the importance of equal employment opportunity in the broadcast industry, or as to the desirability of an FCC prohibition of employment discrimination by broadcast licensees. There is serious question about the effectiveness of the proposed reporting requirements as a basis for determining compliance, and consequent doubt as to the justification for the burdens they would impose on the industry and the Commission.

The proponents of periodic reporting treated it as a means by which stations would show compliance with the requirement that they afford equal employment opportunity, without discrimination because of race, color, religion or national origin. The concept is that annual reports showing compliance (or its lack) would provide a convenient and practicable way to enforce equal employment opportunity in the broadcast industry. But the allure of this idea fades on analysis. The proposed reporting requirements would not only be burdensome

*See attached statement of Commissioner Robert E. Lee.

Note: Rules changes herein will be covered by T.S. III (68)–4.

and impracticable; they could not possibly serve the intended purpose of reflecting—must less enforcing—compliance.

The proposed annual report is a "profile" of station payrolls, showing—for each of nine job categories—the total number of employees and those in each of four minority groups. The proposed form is based on Form EEO–1 on which licensees with at least 100 employees already report annually to the Joint Reporting Committee at Washington. These reports provide a source of information concerning the major employers in the broadcast industry. The Equal Employment Opportunity Commission, which administers Title VII of the Civil Rights Act of 1964, applicable to employers in interstate commerce with 25 or more employees, does not require the filing of Form EEO–1 by employers with fewer than 100 employees. This indicates that profile reports are considered useful primarily as indicia of broad industry trends in minority employment, rather than as showings of compliance or noncompliance by individual employers.

There are several reasons why annual "profile" reports to the FCC could not provide a basis for determining whether a station is complying with the prohibition against discriminatory employment practices. The report simply reflects the numbers of negroes, orientals, American Indians and Spanish Surnamed Americans in the several job categories. It reflects nothing of the availability or nonavailability of persons in any of these minority groups who are qualified and locally available for work in the several job categories at the reporting broadcast station. Nor does it reflect comparative qualifications of persons in majority or minority groups, which are a proper and permissible basis for decisions by broadcast licensees concerning employment and promotion. It is pertinent to note that the Civil Rights Act expressly disclaims the intention that employers be expected to increase exising proportions of minorities on their payrolls by discriminaton against applicants or employees who are not members of minority groups.

The clear goal is to increase employment opportunities for minorities. The method of achieving that goal is eliminating discrimination—in recruitment, employment, pay, privileges, opportunity for advancement, and employment terminations. However, it is almost self-evident that the proposed annual payroll "profiles" cannot serve the purpose of showing compliance with the requirement of non-discrimination. There is no way by which staff could, by inspection of profile reports, rationally conclude, from the summary payroll data they would show, whether the reporting station has or has not discriminated during the reporting period, in hiring new staff, re-assigning work, promoting staff, setting rates of pay, providing training, dismissing staff, or in making any other decisions concerning staffing or working conditions at the station.

Furthermore, such reports would be burdensome, both to licensees and the Commission. In order to obtain consistently based, industry-wide statistics, either licensees with fewer than 100 employees would have to fill out and file the more detailed Form EEO–1, which is designed for larger employers, or licensees who submit Forms EEO–1 to the Joint Reporting Committee would have to prepare, in addition, the separate annual "profile" report which the General Counsel proposes that all broadcast licensees with at least 5 employees be required to submit annually to the FCC. This, insofar as we have been able to ascertain, would be the first time employers with so few on their payrolls would be required to submit annual employment "profile" reports. It is difficult to understand the justification for the FCC to impose these additional reporting requirements either on the larger broadcasters (with 100 or more employers) or on the smaller ones.

As with profile reports, the proposed new Section to the station application forms combines a desirable objective with a questionable method. The method is to have all applicants submit an extremely detailed statement (set out on pages 2 through 5 of the Appendix attached to the Further Noice of Proposed Rule Making), concerning he station's practices and policies for effectuating nondiscrimination.

The present staff of the Broadcast Bureau is not adequate in numbers, background and training, to digest, evaluate and arrive at sound judgments concerning additional reports of this magnitude and nature. Unless such reports could be subjected to searching analysis and well-founded judgment by staff expert in the difficult and sensitive field of employment discrimination, offending licensees would be in a position to paper-over discriminatory practice with artfully contrived, self-serving statements.

If, on the other hand, meaningful analysis of the reports were to be carried out, the Commission would need a substantial staff and budget for the purpose. Should the Commission find it desirable to add the proposed new Section to the application forms, the first needed step would be a thorough study of the staff and budgetary needs, which would include:

(a) Qualified analysts and clerical staff to handle the resultant correspondence with reporting licensees and applicants.

(b) Headquarters staff and field investigators to handle and inquire into the complaints which would probably arise upon local inspection by disappointed job seekers or job holders of the station's public file containing the detailed statements of employment practices and policies forming part of station applications.

(c) Added workloads on the Hearing Division, Hearing Examiners, Review Board and the Office of Opinions and Review resulting from cases arising out of claims and disclosures made in the new Section to the application forms.

Once careful estimates were made of staff and budgetary needs, the matter should be taken up with the Bureau of the Budget, and with interested Committees of the Senate and House of Representatives. These bodies will have interest, not only in the costs involved, but also in related questions about the justification for separate employment reports to FCC by those licensees (with 100 or more employees) already required to file the EEO–1 Report with another Government Agency.

Only when all these steps have been taken, and hurdles cleared, would it seem appropriate to arouse the expectations of those proposing reporting requirements by putting out specific rule making proposals on them.

Meanwhile, it would seem appropriate to announce in the Report and Order, in lieu of its present paragraphs 7 and 8, that the Commission is inquiring into the budgetary, staffing and other related questions posed, and that the docket will be held open for further announcements and possible action depending upon the findings reached and clearances obtained from (or withheld by) the Bureau of the Budget and on possibilities for obtaining sufficient appropriated funds to cover the added staffing needs.

Relatively few complaints—none so far adjudged substantial—have been received since the Commission last year announced the policy of receiving and referring to the EEOC or corresponding state and local agencies, complaints alleging discriminatory employment practices by broadcast licensees. The staff has managed to handle the small handful of such complaints without referral to other agencies. Whether it would be practicable to continue this after adoption of the proposal reporting requirements (Appendix to the Report and Order) would depend on whether a substantial number of complaints would be generated by the availability to the public of the station's policy statements proposed to be included with applications.

Under these circumstances, I would:

(a) Delete paragraphs 7 and 8 of the Report and Order and not issue, at this time, the Further Notice of Proposed Rule Making.

(b) Announce at this time that the Commission is still considering possible solutions to difficult problems raised by the reporting requirements advocated by a number of the parties, including budgetary and staffing needs for meaningful review of and—where necessary—action upon such reports.

(c) Clear these matters with the Bureau of the Budget and invite the attention of appropriate Committees of Congress to such annual reporting requirements by licensees and such additional information as it may wish to require on station applications before inaugurating further rule making on these subjects.

Appendix X(B)

Remarks by William H. Brown III, Chairman, U.S. Equal Employment Opportunity Commission, for the Edison Electric Institute, Affirmative Action Conference, Brown Palace Hotel, Denver, Colo., May 15, 1969

Ladies and gentlemen, I am happy to be able to address this gathering today, a gathering designed to realize in meaningful terms one of the most important ideals of our times—equal opportunity for employment for all people. I say ideal without reservation, for equal employment is certainly not a reality today; not in our times, not in your industry.

The electrical power industry is of particular significance for many reasons—the large number of people employed; the geographical spread of the employment; the monopolistic nature of the industry; the tremendous value of your assets.

The significance of the utilities industry to American business and American life intensifies its importance as an equal opportunity employer. I am sure that everyone in this audience subscribes to the concept of equal employment opportunity; the fact of your inviting me to speak here today indicates your concern.

You should, then be concerned to learn that the electrical power industry has had one of the worst equal employment records of all industry groupings in America. The findings and statistics supplied to me—based on the reports that you yourselves submitted—will graphically demonstrate that the most effective methods of discrimination and exclusion are being practiced in your industry. The case histories give living shape to the story of exclusion and the hard facts of discrimination become glaring in the light of cold statistics.

The Equal Employment Opportunity Commission has used and will continue to use statistics, not for the purposes of punishment, but to illuminate the effects of discrimination where it exists and spotlight imaginative, affirmative employment policies where they exist. EEOC dwells on differences in employment patterns to prove that in almost every industry, every city, one or more employers who concentrate on affirmative action—not just affirmative motion—themselves destroy the myth that qualified and qualifiable minorities are not available.

When we publicize such disparities we are not setting quotas for the employers on the short end of the comparison. But we are throwing down the gauntlet, and certainly firms which pride themselves on being EEO employers, or send representatives to meetings such as this, should take a hard look at themselves. And this look *has* to be quantitative.

You as businessmen would not applaud the salesman who writes copious sales plans each quarter and then doesn't deliver the sales. You would call him in, show him how Mike in the next sales unit in the same district is doing much better and challenge him to do likewise. That is essentially what EEOC does with employment statistics in a context such as a White House meeting, a public hearing or this session.

In June of 1968, the facts of exclusion and underutilization were presented to representatives of the electric power and natural gas industries at a White House meeting sponsored jointly by the Federal Power Commission and the EEOC. At that time, the utilities industries—and particularly the electric power companies—were informed that according to 1966 and 1967 data, they were the worst employer of minorities of any industry grouping.

At that time—

> Electric companies employed only 41 black managers, out of almost 30,000
> Out of 15,000 technicians, only 59 were black
> Of over 6,000 sales workers, 27 were black
> In the nation's 11 largest electric companies, employing over 8,000 officials and managers, in 1966, 13 were black; in 1967, 12 were black—and in both years 6 were employed by one company
> And for Spanish Americans, the picture was no less bleak—these 11 largest companies employed them as only 0.3% of their total workforce . . .

At the time these statistics were presented to your industry—possibly to many of you personally, my predecessor as Chairman of EEOC said, "We do not believe this is a picture of which you will be proud, collectively or—with few exceptions—individually. The exceptions to the patterns are encouraging in kind but discouraging in number. One matter is clear; these hours we spend today in conference will mean very little if they do not lead to action. Such action is possible only with the commitment of top industry management. Your presence here today, I think, implies that commitment. But commitment which is unfulfilled may be apathy, if not self-deception. And that is why we hope that the programs we will discuss today will help you translate your commitment into action."

The Chairmanship of the EEOC has now changed; the patterns of minority exclusion and under-utilization in the electric companies, apparently and unfortunately, has changed only marginally at best. Based on reports for 1968 and 1969 submitted to the EEOC by 115 members of the Edison Electrical Institute employing the large majority of the total workforce in the electric power industry, your industry still inhabits the bottom of the list in terms of minority utilization.

This conference is devoted to affirmative *action*. I hope it will not celebrate the affirmative *motion* that results of the past year indicate has been going on.

The figures I will relate will show better than any words the continuing failure of the electric power industry to comply with the letter and spirit of the law.

Blacks, who comprise almost 12 percent of the nation, make up only 4.8 percent of 115 electric companies' employment and hold only 2.8 percent of white collar jobs in 1969. These figures are up only slightly from 4.1% and 2.1% a year ago.

As one descends the job scale, as the jobs become less desirable—and lower paying—and as upward mobility becomes increasingly difficult, suddenly, there the black workers show up. Thus, less than half of one percent of managerial and professional jobs are filled by blacks compared to over 5 percent of the clerical jobs. The same is true in the blue collar area; while fully a quarter of the laborers are black, less than 2% of craftsmen, foremen and kindred workers are.

Gross underutilization of minorities in your industry is not limited to blacks alone—Spanish Surnamed Americans hold only 1.2% of total jobs and comprise only one-half of one percent of the officials, managers and professionals. Women are almost entirely restricted to the clerical category—almost 40,000 are employed in that category compared to about 3,000 for all other categories combined.

It is quite obvious from this recital of statistics that in the aggregate, your industry is one of the poorest performers in the field of minority and female employment. However, I have hardly begun; the scene is actually much more frightening because a few isolated companies hide the inexcusable records of the rest:

Eighty-three of 115 reporting companies in your Institute have no blacks classified as officials or managers; 34 have no women.

In 64 of the companies, there are no black professionals and no female professionals in 26.

There are no black technicians in 64 companies, no black sales personnel in 72.

Women are completely absent from the technician category in 35 companies; from the craftsmen category in 104 companies.

I cannot accept the excuse, from any of these companies which are such painfully good examples of exclusion, that qualified minorities and women just could not be found.

One large company in a southern town which is 35% black reports *no blacks in any of its white collar* positions.

In a midwestern city with 17.5% of its population black, the electric company has no black manager, professional or salesman.

A major Western utility company in a city whose black population is over 10 percent has only 1 black manager out of almost 1900 and only 20 professionals out of 2,000.

In a Southwestern city in which almost 5% of the labor force is Spanish American, one electric company has no official, no salesman, one professional and three technicians who are Spanish Surnamed Americans out of 624 employees in those categories.

Another company in the same town has *not one Spanish Surnamed American employee.*

These statistics for the major portion of the electric power industry, which show one or two or ten or twenty blacks—and often none—in job classifications which encompass thousands of workers, cast more than a shadow on your industry's protestation of vigorous policies and progress. Words and good intentions cannot act as a substitute for the provision of better jobs with better prospects for minorities and women.

In the 1968 White House meeting, one company was singled out. Although it was far from a model employer of minorities at higher job levels, it was at least far ahead of the rest of the industry. It still is and it is the *only* company which goes a way towards proving that qualified and qualifiable minorities and women can be found.

Almost half of the increase in minority employment at the managerial level between 1968 and 1969 among all 115 companies is accounted for by this one company.

This company employs *40% of all black craftsmen in the industry* while employing less than 10% of total craftsmen.

Blacks accounted for almost half of its new hires in the craftsmen category which encompasses more than ¼ of its total workforce.

If this company is removed from the aggregate data, there is an almost total absence of change in minority employment for the other 114 companies from 1968 to 1969.

One of the excuses offered for this state is the practices of unions. Undoubtedly, unions do contribute to this picture. But I want to point out that unions have nothing to do with the white collar situation, and the white collar situation is infinitely worse than the blue collar situation. If the companies which profess equal employment policies were to implement such policies in the white collar categories, is there really any doubt that the unions would believe the companies were serious in the areas where collective bargaining agreements prevail?

I would like now to take this audience one step further along the road of illumination. Instead of overwhelming you with numbers, I want to paint for you the picture of actual cases of discrimination in the electric power industry.

Recently, the EEOC ruled on complaints lodged against some of the largest electrical power companies in this country. Their policies and practices were found to be in direct violation of Title VII. The companies were perfect examples of institutionalized discrimination, in both their physical plant and their job structure. Investigators found segregated rest rooms, segregated lines of progression and separate employee benefits such as retirement plans and pension funds.

Carelessness or lack of awareness can create the same results as overt discrimination. Seniority lines, testing procedures, training programs and promotion systems often operate to keep out minorities or freeze them at the lowest job levels with no upward mobility.

Isn't it all a little unbelievable in America in 1969?

Unbelievable that by design or by negligence human beings still don't have the right to use facilities freely; or to be promoted on merit; or to compete freely for jobs; or to accrue the benefits other receive—all merely because of race or religion or national origin or sex? Regardless of whether the *intent* of the President of those utilities was for all employees to have equal employment opportunity, his failure—by virtue of unconcern or negligence—to see that his intentions were effected, produced the situation I have described.

Just as top management must be held ultimately responsible for company profits and quality of output, so must they be for personnel action and employee relations. In addition to the concern for keeping expenses down, there must be an equal concern that non-discriminatory employment standards are being adequately maintained throughout the total organization.

Your companies should establish whatever procedures and periodic checks are necessary to enforce those standards just as you establish cost accounting procedures. And each company should take the same vigorous and severe action against employees whose discriminatory behavior violates company policy as it would against employees who carelessly squander profits.

The depressing array of statistics I have just finished relating outlines the debilitating lack of effective EEO policies in your industry by detailing the lack of real results. You met with the EEOC last year in an attempt to find avenues for improvement; they have obviously not yet been found. It is my hope that this meeting will give you the impetus to change and the tools with which to effect that change.

When top management of the electric companies applies itself seriously to implementation of EEO policies; when it responds to the statistics in its own companies, and the unlawful practices which exist in its offices and create those statistics, then and only then will the bleak employment picture of the present change—and very quickly.

And once it has *really* begun to change—at all levels, not just at the entry level—the going is easy. Improvement, in terms of numbers of minorities in meaningful jobs, is in itself a tool. Under-representation of minorities bears heavily on credibility—how can a company be an Equal Opportunity Employer, as so many advertise, when their workforce above the lowest blue collar level is virtually all white? Minority representation in the workforce today bears heavily on the chances of recruitment success in the future. Just as there is a "take-off" point for an underdeveloped economy, when it will start to prosper without extra aid, there is one for a company, when it will no longer need to make a special effort at "communication" because the minority contingent of its workforce will recruit through the informal channels by which word of most

job openings is disseminated. This work must be started; we cannot accept excuses any longer; the statistics must change and the "take-off" point must be reached.

The White House meeting last year was a call to action—a recital of grim statistics and a challenge to change them. You have not met that challenge.

You cannot in all conscience continue to attend such meetings as this and then return to your office to do what results in nothing.

A year ago at the White House, it was noted that the time-consuming compliance process might be the inevitable alternative if real action were not forthcoming from your industry on a less formal basis. I do not mean to threaten—and the Commission presently lacks real enforcement power—but do want to make a simple statement of fact. We have seen in the intervening year what must have been more motion than action, by most of you, and I am not disposed to see another such year go by.

Appendix X (C)

Employment Patterns in the Utilities Industry, 1966–67

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, JUNE 12, 1968
(SUMMARY OF REPORT)

This is to summarize conclusions and findings from a study of minority employment patterns in the utilities industry to be presented June 12, 1968, at a White House meeting with industry representatives, sponsored jointly by the Equal Employment Opportunity Commission and the Federal Power Commission.

The report covers electric, gas and combination utilities with total employment of 566,542 in 1966 and 565,053 in 1967.[1]

PRINCIPAL CONCLUSIONS AND FINDINGS

1. *The economic leadership of the nations' utilities is not matched by leadership in the area of equal employment opportunity.*

Utilities lag behind other major industries in employment of Negroes.

Out of 556,542 employees in 1966, only 3.7 percent were Negro, lower than for any other industry reporting employment of 500,000 or more:

	Percent Negro	
Medical Services	16.4	
Primary Metals	12.3	
Food and Kindred Products	11.1	
Business Services	10.3	
Educational Services	9.7	
Retail Trade	9.3	
Transportation Equipment	9.1	
Transportation	8.6	
Apparel	8.6	
Textiles	7.9	
Fabricated Metal Products	7.2	
Wholesale Trade	6.5	
Paper and Allied Products	6.4	
Chemical and Allied Products, Petroleum Refining	5.9	
Electrical Machinery, Equipment, Supplies	5.4	
Non-Electrical Machinery	4.3	
Communication	4.3	
Finance, Insurance, and Real Estate	3.7	(3.71)
Utilities	3.7	(3.65)

Furthermore, when compared to other industries having establishments in most American communities regardless of their size and location, utilities in 1966, had

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[1] Employment figures based on Employer Reporting Forms (EEO–1) filed annually with the Commission by employers of 100 or more (50 or more in companies with Federal contracts of $50,000 or more).

the highest incidence of establishments with no Negro employees. Almost half of utility establishments employed no Negroes.

Utilities offer few employment opportunities to the nation's Spanish-Surnamed minority. Mexican Americans, Puerto Ricans and other Spanish Surnamed persons held only one percent of industry jobs in 1966.

2. *Minority participation is particularly low in white collar and upper level blue collar jobs:*

	Percent
White collar:	
Negro	1.3
Spanish surnamed	0.7
Skilled blue collar:	
Negro	1.5
Spanish surnamed	0.8

Almost all minority white collar employees are clerical workers. In 1966, there were few Negroes or Spanish Surnamed Americans holding managerial, professional, technical or sales jobs.

	Total	Negroes	(Percent)	Spanish surnamed	(Percent)
Officials and managers	63,162	110	(0.2)	133	(0.2)
Professionals	39,141	152	(0.4)	166	(0.4)
Technicians	30,488	209	(0.7)	322	(1.1)
Salesworkers	13,476	81	(0.6)	51	(0.4)

3. *Women do not participate fully in employment in the utilities industry.* Almost all women in the industry are office and clerical workers, with the proportion in upper-level white collar jobs far below that for men. Occupational distribution is particularly disadvantageous for the 2,784 Negro women employees. While 90.4 percent of all women held clerical jobs, and 3.1 percent were service workers, 31.2 percent of Negro women were employed as service workers, and only 68 percent as clerical workers.

4. *Comparing utilities to other industries in areas with sizable minority populations, utilities fall consistently below area-wide rates of minority employment.*[2]

In each of these areas, utilities employed Negroes at a significantly lower rate than major private employers as a whole. In 27 of 39 areas, the utility rate of Negro employment was less than half the area-wide rate. The utilities' position was unfavorable in all occupational categories.

In areas where Spanish-Surnamed Americans constitute a significant factor in the population, utilities employ fewer members of this minority, proportionately, than industry as a whole. In 12 of 15 areas, Spanish Surnamed participation in utility employment was less than one-third the rate of participation in industry as a whole. Utilities fell below area-wide rates in all occupational categories.

5. *Minority employment patterns vary, depending on the type of utility.* Gas distribution companies employ more Negroes, proportionately, than gas pipelines, electric power companies or combination utilities. Combination utilities employ a higher percentage of Spanish Surnamed Americans than the other industry components:

[2] Standard Metropolitan Statistical Areas meeting the following criteria: (1) at least 100,000 population, (2) at least 10% Negro population; (3) at least 500 employees reported, in 1966, by utilities. There were 39 such areas. For analysis of Spanish Surnamed employment, further selection was made of SMSA's where this minority constitutes more than one percent of EEO–1 employment. "Industry as a whole," "private employees as a whole," etc. refers to employers filing EEO–1 forms in the area. This group does not include employers of less than 100 persons, thus excluding many which employ relatively large numbers of Negroes (e.g. Domestic services).

PARTICIPATION RATES FOR NEGROES, AND, SPANISH SURNAMED, AMERICANS

[In percent]

	All occupations		White collar		Blue collar	
	1966	1967	1966	1967	1966	1967
Negroes:						
Electric utilities	2.9	3.1	0.9	1.2	3.3	3.4
Gas distribution	5.9	5.7	2.0	2.4	8.6	8.1
Gas pipelines	2.5	2.8	.5	.7	3.0	3.3
Combination utilities	4.1	4.5	2.0	2.4	5.0	5.4
Spanish surnamed:						
Electric utilities	.5	.6	.4	.5	.6	.7
Gas distribution	1.1	.9	.8	.8	1.3	1.1
Gas pipelines	1.5	1.6	1.0	.9	1.8	2.1
Combination utilities	1.7	1.6	1.0	1.1	2.2	2.1

6. *Though there are differences in degree and a few individual company exceptions, data for each segment of the utility industry show striking underutilization of minority manpower resources at higher occupational levels.*

In 1966, electric companies employed only 41 Negro managers, out of almost 30,000, 59 technicians out of almost 15,000, and 27 sales persons out of over 6,000. The nation's 11 largest electric companies employed, in 1966 and 1967, over 8,000 officials and managers. Among them, were 13 Negroes in 1966, and 12 in 1967 (6 of these, in each year, employed by one company). Only 0.3 percent of the leading companies' employees were Spanish Surnamed.

Gas Distribution companies, in 1966, employed only 21 Negroes as officials and managers, out of approximately 11,000. There were 373 Spanish Surnamed persons in a white collar work force of 45,000.

In 45 gas pipelines, with total employment of 52,709, Negro representation in non-clerical white collar jobs was as follows:

	Number of employees	Number of Negro employees
Officials and managers	7,059	4
Professionals	3,789	3
Technicians	2,768	2
Sales	711	2

Of five pipelines operating in areas with large Mexican-American populations, four reported no Spanish Surnamed managerial employees, three employed no professionals, and two no craftsmen. Participation rates of less than one percent were reported as follows:

	Number of companies (out of 5)
All occupations	3
White collar	4
Craftsmen	5

The 8 largest combination utilities, all in metropolitan areas or states with significant minority populations, employed 43 Negro managers (out of 10,666) in 1966. In 1967, there were 50 Negroes in a total of over 11,000. If one company is excluded from the group, the number of Negro managers drops by over one half in each year. Negroes held only 2.1 percent of the group's skilled blue collar jobs, and 60 percent of the Negro craftsmen were employed by one company.

7. *From 1966 to 1976, there was little improvement in the minority employment record of the utilities industry.*

In the industry as a whole (and in each of its segments) the proportion of Negro employees failed to increase significantly, going from 3.7 to 3.9 percent. Even this small improvement, moreover, was not reflected in all categories and much of the improvement was concentrated among a few companies. Almost all

of the white collar increase was in clerical jobs, and both the number and proportion of Negro craftsmen declined.

For the nation's Spanish Surnamed minority, there was a similar lack of significant improvement. Spanish Surnamed participation in white collar employment went from 0.7 to 0.8 percent, and there was no relative gain in blue collar employment.

8. *Data for 1966 and 1967 show that some utility companies do manage to find and hire significant number of minority employees, while others, recruiting and operating in the same or similar areas, lag far behind.*

These variations indicate that qualified and qualifiable minority group persons *are* available for employment in the industry. The data show, further, that significant improvement can be made from one year to the next, and that those who did make significant gains from 1966 to 1967, were generally those with the best records in the former year.

APPENDIX X(D)

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

(Project No. 2467)

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Carl E. Bagge, John A. Carver, Jr., and Albert B. Brooke, Jr.

PACIFIC GAS AND ELECTRIC COMPANY

ORDER REJECTING PETITION TO INTERVENE

(Issued July 28, 1969)

On July 10, 1969, the California Rural Legal Assistance, Inc. (Petitioner), filed a petition to intervene in the proceeding on Pacific Gas and Electric Company's application for license for Project No. 2467. The period for timely intervention expired August 7, 1964, the petition is untimely, and no good cause has been shown for the untimely filing. Consequently, under Section 1.8(d), the petition for intervention shall be rejected.

The Commission finds:

The petition for intervention filed July 10, 1969, by the California Rural Legal Assistance, Inc. is untimely, and no good cause for the untimely filing having been shown, should be rejected under Section 1.8(d) of the Rules of Practice and Procedure.

The Commission orders:

The petition for intervention filed July 10, 1969, by the California Rural Legal Assistance, Inc., is rejected.

By the Commission. Chairman White concurring filed a separate statement appended hereto.

(SEAL)

GORDON M. GRANT, *Secretary.*

White, Chairman, *concurring:*

I concur in the rejection of the untimely petition for intervention in this case in view of the action of the Commission in granting CRLA's timely petition in Project 2687, raising the same general issue. I assume the Commission will now proceed to consider the important legal and policy questions raised by CRLA either in that proceeding, or, as may well be preferable, in a general rulemaking proceeding of the type recently initiated by the Federal Communications Commission. (Cf. Federal Communications Commission, *Nondiscrimination in Employment Practices of Broadcast Licensees*, 33 F.R. 9960; 34 F.R. 9284; 34 F.R. 9288.)

LEE C. WHITE, *Chairman.*

APPENDIX X(E)

No. 16226

FPC ISSUES 45-YEAR LICENSE TO PG&E'S MERCED FALLS HYDROELECTRIC POWER PROJECT

The Federal Power Commission has issued a 45-year major license to Pacific Gas and Electric Company, of San Francisco, Calif., for its constructed Merced Falls hydroelectric power project, on the Merced River in Merced and Mariposa Counties, Calif. The license is effective March 1, 1969.

Since 1938, Merced Falls has been operating under a 50-year minor-part license, which is to be surrendered on the effective date of the major license.

PG&E in April 1964 applied for a 50-year major license for the Merced Falls development, and requested that the license not expire later than the license issued for the Merced Irrigation District's upstream Exchequer project. The FPC said today that five years have elapsed since PG&E's application was filed, and since a license was granted the Merced Irrigation District for its Exchequer project. Accordingly, the Commission fixed the effective date of the Merced Falls license as March 1, 1969. Licenses for both projects will expire in 2014.

The Merced Falls project works include a concrete gravity dam 575 feet long and 34 feet high, a 1,000 foot long earth levee with a crest-width of eight feet, and a 900 acre-foot reservoir. Its powerhouse contains a 4,200 horsepower turbine.

The FPC said the Merced Falls license is designed to enable the more complete future development of the Merced River water resources, and contains provisions which provide for compensation to PG&E in the event the Merced Falls project is inundated as a result of future downstream development.

PG&E will increase its annual payments to the Merced Irrigation District by $15,000 annually under the terms of a power purchase contract between these two parties.

The Commission is requiring PG & E to file within one year a plan for public recreational facilities at Merced Falls. PG & E's application said it would open the project area to the general public without charge, where safe to do so, for fishing, boating, swimming and picknicking, and would consider providing recreational facilities when warranted.

In a separate action, the FPC denied an application by California Rural Legal Assistance (CRLA) to intervene in the proceeding. Chairman Lee C. White issued a concurring statement. The Commission said that the filing by CLRA—a legal service program for low-income persons in rural California counties—had not been timely filed and that no good cause for the tardy filing had been given. CRLA alleged that PG & E appeared to be engaged in discriminatory hiring policies and requested the FPC "to hold up the present application pending the submission to the FPC *and* the petitioner of PG & E's full and complete minority hiring policies, including statistical analyses of such hiring policies."

In his statement, Chairman White said, "I concur in the rejection of the untimely petition for intervention in this case in view of the action of the Commission in granting CRLA's timely petition in Project 2687, raising the same general issue. I assume the Commission will now proceed to consider the important legal and policy questions raised by CRLA either in that proceeding, or, as may well be preferable, in a general rulemaking proceeding of the type recently initiated by the Federal Communications Commission."

The Commission allowed a second CRLA request to intervene—based on the same grounds—in a PG & E major license application for its already constructed Pit 1 hydropower project, located on the Tule, Little Tule Fall and Pit Rivers, in Shasta County, California.

Appendix X(F)

Excerpts From D.C. Public Service Commission Order Requiring Equal Employment Opportunity Program by Regulated Utility

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

Order No. 5429

April 15, 1970

In the Matter of Application of Potomac Electric Power Company for an Increase in Rates for Retail Electric Service

Formal Case No. 541

FINDINGS, OPINION AND ORDER

Appearances: George F. Donnella, C. Belden White, II, Assistant Corporation Counsel, and Thomas J. O'Reilly, agent, for the Public Service Commission of the District of Columbia; Cornelius Means, Richard W. Emory, and W. John Kenney for Potomac Electric Power Company; Samuel S. Hollingsworth, C. Oscar Berry and Henry J. Krautwurst for Washington Gas Light Company; Leonard M. Shinn, Marvin H. Morse, Maurice J. Street, and Alan Goldberg for the Administrator of General Services, Acting on behalf of the Executive Agencies of the United States Government; Marsha Quintana and Glenn R. Carr for D.C. City-Wide Consumer Council; Anne Turpeau, Brin Hawkins, Timothy L. Jenkins, and Richard J. Hopkins for the Urban League; Jerry K. Emrich and Charles E. Hammond for Arlington County Board; Donald E. Leiter for Capitol Group Ministry, Inc.; Theressa H. Clark and James Williams for United Planning Organization; Stanley Sitnick, Jerome Akman, and Kelly C. Kammerer for Consumer Council, CHANGE, Inc.; David Blanken on his own behalf as customer and stockholder of Pepco; W. Frank Stickle, Jr., for Safeway Stores, Inc.

Equal employment opportunity

We turn now to the matter of the adequacy of Pepco's equal employment policies and practices. Serious questions concerning this subject were raised by certain intervenors, particularly the Washington Urban League. The Urban League offered in evidence the Equal Employment Opportunity Employer Information Report, EEO–1, filed by Pepco with the Joint Reporting Committee of the Equal Employment Opportunity Commission, Office of Federal Contract Compliance and Plans for Progress Program, on May 29, 1969 covering employment as of December 31, 1968. In addition, it offered testimony from three Pepco employees concerning their own employment experiences at Pepco. There was also considerable discussion of employment practices at Pepco during the evening session of December 17, 1969 when we provided an opportunity for interested members of the publice to present their views to us. The Company offered no evidence of its own on this subject nor did it cross-examine the witnesses called by the Urban League.

We have already indicated our concern with this subject. In Order No. 5419, in which we granted interim rate relief, we said that we found the testimony "deeply disturbing" and that ". . . the issue of employment practices will be the subject of a full treatment and the fullest exercise of the Commission's authority . . ." in our final order.

There are three major questions which we must resolve in dealing with this issue of equal employment opportunity. First, is this a subject matter with which we should be concerned, both in general, and particularly in the context of a rate case? Second, if so, is there sufficient evidence in this record to provide us with a basis for action? Third, if action is justified, precisely what action should be taken?

We have no doubt that we should be vitally concerned with Pepco's equal employment policies and practices. There can be no doubt that the provision of equal employment opportunity is required by the laws of the United States and of the District of Columbia. We refer specifically to the Civil Rights Act of 1964 (P.L. 88–352, approved July 2, 1964, 78 Stat. 241), Executive Order No. 11246, and D.C. Commissioners' Order No. 65–768. When it is brought to our attention that the requirements of the law are not being met by a utility subject to our jurisdiction, we are clearly expected to act. Thus, in creating this Commission, Congress said:

"The Commission shall have power, after hearing and notice by order in writing, to require and compel every public utility to comply with the provisions of chapters 1–10 of this title, and with *all other laws of the United States applicable, and any municipal ordinance or regulation relating to said public utility. . . .*" 43 D.C. Code § 303 [Emphasis supplied.]

Further, in defining our general powers, Congress gave us the power to investigate the methods used in manufacturing electricity and to order such improvements as will reasonably promote the public interest. (43 D.C. Code § 601) We believe that a concern with equal opportunity employment falls within that language.[8]

There can be no question, therefore, that this Commission should properly be concerned with any deficiency in Pepco's equal employment policies and practices. We turn next to the question whether there is evidence in this record of such deficiencies. We believe that there is.

Specifically, we find that the statistics set out on Pepco's Form EEO–1 as of December 31, 1968, offered in evidence by the Urban League, provide a sufficient basis to require Pepco to modify its employment practices. Those figures reveal the following picture:

	Total employees	Negroes	Percentage
Officials and managers	538	4	0.7
Professionals	80	3	3.75
Technicians	182	19	10.4
Office and clerical	873	165	18.9
Craftsmen (skilled)	1,134	21	1.8
Operatives	805	302	37.5
Laborers (unskilled)	138	136	98.6
Service workers	218	140	64.2
Total	3,968	790	19.9

The Company employs no Orientals, American Indians or Spanish surnamed Americans and those Negroes employed are concentrated in the lower income areas. We are particularly struck by the paucity of Negro employees in these categories listed above the "Operatives" classification. In this community, these statistics reveal a situation of serious concern.

Thus, these statistics reveal a vivid picture of inadequate performance of the Company's obligation to provide employment opportunities without regard to race, creed, or national origin. Further, we view these statistics in light of the real life experiences related to us in the sworn testimony of Pepco employees called by the Urban League. Those experiences, while limited in number, flesh out the statistical picture and confirm the inference that proper employment practices are not being pursued at Pepco.

In addition, we do not feel that we must ignore the unsworn statements made by Company employees and others at our evening hearing on December 17, 1969 as Company counsel suggests. For us to do this would make a mockery of our own rules which give every citizen a right to have his views considered by the Commission. This is especially true in view of the Company's failure to affirmatively attempt to refute any of the allegations made in regard to this issue. This is not to say that we have based our findings and conclusions directly on the statements made at that hearing session. However, these statements have been considered as providing a background in which to consider the exhibits and sworn testimony on which we do rely.

We have concluded, then, that we have the power to act and that the evidence of record justifies action. We now turn to what should be done.

It has been suggested that we should grant no rate increase until we can conclude that Pepco's equal employment practices have been corrected. We have rejected that course of action. First, we do not believe that this record contains

[8] The holding in *Re Capital Transit Co.*, 58 PUR(NS) 189 (Order No. 2912, April 20 1945) that we should not assume power in the equal employment area can no longer be regarded as having vitality. Since that decision was rendered, the provision of equal employment opportunity has not only become a matter of stated public policy, it is required by law. The "Congressional approval and direction" which the Commission found lacking in 1945 has now been amply provided.

a sufficient evidentiary basis for such action. There is no substantial evidence of a link between Pepco's employment practices and its cost of service. There was discussion of a possible cost impact but it was entirely on a theoretical basis. We do not reach the question, therefore, whether we have the power to refuse rate relief on the basis of Pepco's employment practices. We conclude simply that this record would not, in any event, support such an action.

Instead of dealing with the problem in rate relief terms, we will take action to deal with the problem directly. The issue has properly been raised before us. Indeed, Pepco raised no objection to its introduction into this proceeding. Hence we will, in our rate case order, direct that the necessary action be taken. Pepco suggests that we need take no action and that the matter should simply be referred to other organs of Government concerned with discrimination, *e.g.*, the Equal Employment Opportunity Commission, the U.S. Department of Labor or the D.C. Human Relations Commission. For the reasons already discussed, we do not agree. We have both the power and the responsibility to take action ourselves.

Our decision as to the action which should be taken has been shaped by two principal considerations. First, we are convinced that a successful program to provide equal employment opportunity must have as its impetus strong guidance and support from the highest echelons of Company management. If the Company's top management makes it known that it is strongly committed to these goals, then the barriers to equal employment opportunity which spring from attitudes or ingrained practices at middle or lower management levels will give way. Second, we believe that vague discussion or exhortation is not enough. There must be a program for affirmative action to eliminate employment discrimination. We have worked out such a program, having obtained assistance from the staff of EEOC, and we will direct the Company to institute it forthwith. We will monitor progress by means of regular reports and we will use the Commission's powers to further progress when necessary. Further, we will have continuing discussion with the Company's top management to assure ourselves that they are committed to the program and are communicating that commitment to their subordinates.

APPENDIX A TO ORDER NO. 5429 (APRIL 15, 1970) IN THE MATTER OF APPLICATION OF POTOMAC ELECTRIC POWER COMPANY FOR AN INCREASE IN RATES FOR RETAIL ELECTRIC SERVICE, FORMAL CASE NO. 541—AFFIRMATIVE ACTION PLAN FOR EQUAL EMPLOYMENT OPPORTUNITY, POTOMAC ELECTRIC POWER COMPANY

SECTION 1. GENERAL PROVISIONS

Potomac Electric Power Company (hereinafter referred to as the "Company") shall provide equal opportunity in employment to all qualified persons, and no person shall be discriminated against in employment because of sex, race, color, religion or national origin.

The Company shall establish, maintain, and carry out a positive continuing program of specific practices designed to assure equal opportunity in every aspect of employment policy and practice by:

(a) Defining the responsibility of each level of management to ensure a positive application and vigorous enforcement of the policy of equal opportunity, and establishing a procedure to review and control managerial and supervisory performance.

(b) Informing its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlisting their cooperation.

(c) Communicating the Company's equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to sex, race, color, religion or national origin, and soliciting their recruitment assistance on a continuing basis.

(d) Conducting a continuing positive campaign to exclude every form of prejudice or discrimination based on sex, race, color, religion or national origin from the Company's personnel policies and practices and working conditions.

(e) Conducting a continuing review of job structure and employment practices and adopting positive recruitment, training, job design and other measures needed in order to ensure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

(f) Posting notices in the Company's employment offices and in bold type on employment applications informing applicants of their equal employment rights and their right to notify the Commission or other appropriate agency if they believe they have been the victims of discrimination.

SECTION 2. SPECIAL ASSISTANT FOR EQUAL EMPLOYMENT

The position of Special Assistant-Equal Employment will be filled by an individual whose chief responsibilities will be to assist the Company in improving its compliance posture. He will function as Special Assistant for Equal Employment and his duties will consist of:

1. Recruiting minority candidates for jobs heretofore filled primarily by non-minority applicants.

2. Maintaining close liaison with Operating Management to facilitate the placement of recruited minority candidates in line with previously established goals and timetables.

3. Establishing and maintaining regular contacts with local community officials and with minority educational institutions in order to provide effective communications and full understanding of the Equal Employment Opportunity program.

4. The Special Assistant will function as a management liaison representative providing pertinent information or assistance in various equal employment opportunity matters of the Company as delineated elsewhere in this Order. Periodic management reviews of this function will be conducted to assure the adequacy of the support provided to it.

5. The Special Assistant will bring to the attention of the appropriate individual any problem which in his opinion needs the attention of said official, together with any appropriate recommendations.

SECTION 3. JOB QUALIFICATIONS

A. The Company shall examine its minimum qualifications for employment in each job. Where no written standards exist for a job the Company shall develop written standards.

B. Said written minimum qualifications must be reasonably necessary for the performance of each job. The Company shall eliminate any job qualifications which will have the effect of disqualifying a disproportionate number of minority group members unless such qualification is *compelled* by business considerations.

C. The Company shall furnish the Public Service Commission of the District of Columbia (hereinafter referred to as the "Commission") the minimum standards adopted pursuant to this agreement by June 15, 1970.

D. The Company shall consider applicants and employees for jobs on the basis of these minimum standards.

SECTION 4. TESTING

A. The Company shall identify by specific name (including form designation) those written tests that it uses and intends to use for pre-employment and promotional purposes.

B. A file of all test validation studies will be maintained.

C. If written tests for pre-employment or promotional purposes are deemed advisable, the Company shall use only professionally developed tests which conform with the Guidelines on Testing of the EEOC.

D. The Company shall use qualified and competent personnel in the administration, scoring and interpretation of all tests and scores derived from them.

SECTION 5. RECRUITING

A. The Company shall use as one of the factors to test the sufficiency of its affirmative action plan to recruit minority employees, the ratio of minority employees in its work force to the ratio of minority workers in the labor market.

B. Employment representatives will consult with local minority group leaders and organizations and maintain liaison for the purpose of obtaining applicants for employment from these sources.

C. Employment representatives will maintain a continuing liaison with minority group schools and colleges, public and private, in the labor market area, for the purpose of obtaining applicants for employment from these sources. A record of significant contacts with these schools will be maintained.

D. The Company shall identify itself as an equal opportunity employer in all advertising. The Company shall advertise in minority group media in proportion to its other advertising efforts.

E. A record of open jobs will be maintained in the employment office.

F. All minority group persons contacting the Company will be specifically requested to file an application for employment regardless of whether vacancies exist. Applications for employment made by members of minority groups will be promptly reviewed by the Company. All applications will either be accepted, rejected, or held pending a vacancy or further evidence of qualifications. An applicant will not be rejected because the position applied for has been filled. All such applications will be reviewed to determine if some position other than that applied for is available, either presently or prospectively for the applicant. If it is or may be, he shall be so advised. If the applicant is not hired at once, the application will be placed in an Affirmative Action File for consideration for such position. Applicants will be notified in writing of the Company's decision within five working days of the making of the application.

1. Applicants who are hired will be treated with respect to all terms, conditions and privileges of employment without discrimination on the grounds of race, color or national origin.

2. If the applicant is rejected the Company will:

(a) Advise him in writing of the reason;

(b) Send a copy of that rejection notice and information on the reason for rejection to any organization which referred said applicant;

(c) Retain a copy of the rejection notice as required by the regulations of the Equal Employment Opportunity Commission (29 CFR 1602.14); and

(d) Submit a copy of the rejection notice to the Commission in its quarterly report.

3. If the application is held pending a vacancy, or for other cause not involving the disqualification of the applicant, it shall be processed in the manner described below in Paragraph G.

G. The Company shall maintain an Affirmative Action File.

1. Applications of members of minority groups which are not accepted or rejected shall be placed in a separate file, to be known as an Affirmative Action File. This file shall consist of the applications of all minority group applicants who are qualified for any position with the Company, and those applicants whose qualifications have not yet been established.

2. As job vacancies occur for which no minority group applicant is then presently available, the Company will first consult the Affirmative Action File to determine if qualified applicants are available from the minority group members listed therein.

3. Before consulting other sources for applicants, the employer will give every consideration to the hiring of applicants from this file.

4. If, after further review at the time a vacancy is available, the Company concludes that the applicant is not qualified, and cannot become qualified, the Company should remove his name from the file and notify him and the appropriate organization and agencies in accordance with Paragraph F.2. above. If the applicant is still considered qualified, the Company shall note on the file the date of each review and the reason for rejection. If the Company is of the view that certain steps taken by the applicant could qualify him for employment, the Company shall so inform the applicant and the referring or sending institution, in writing, maintaining a copy in his file.

SECTION 6. TRAINING

A. General

1. When an analysis of manpower projections reveals skill shortages, and an accompanying need for training, the Company will review its training programs to determine where additional programs will be necessary.

2. All Company sponsored training, on-shift or after hours, will be recorded on personnel records and will be considered when evaluating an employee's promotional potential to an open job. Non-company sponsored training will be recorded on personnel records upon receipt of the information from the employee.

B. Training Staff.

1. As a need for additional training staff arises, the Company will attempt to seek out and hire qualified minority group representatives. The Special Assistant will be consulted for recommendation of qualified applicants.

C. After-hours Training.

1. Through established channels, the Company will accept from any employee, a statement of the employee's desire for off-shift training.

2. In order to enhance job retention, and consistent with workload and skill requirements, the Company will encourage, through supervision, an employee whose performance has fallen below typical standards to enroll in available and applicable after-hours training.

3. As necessary, the Company will initiate and join with local educational institutions in establishing after-hours training which will be available to all employees. Emphasis will be directed toward having a broad range of available training courses.

4. Appropriate publicity will be given to available training opportunities and employees will be encouraged to participate through articles and schedules printed in the Company newspaper, by counseling, through the Training Department, by word-of-mouth, and by whatever other practical means the Company devises.

D. On-shift Training.

1. The Company will coordinate on-shift training requirements with affected operating organizations. Selection of employees for such training, either individually or from existing crews, will be in accordance with production and contractual requirements and will include consideration of employees regardless of race, color, sex, national origin, religion or age.

2. Any employee, including but not limited to minority employees, not selected through the process indicated in item 1 above, may contact the Special Assistant for further explanation or counseling regarding this matter.

3. The Company will maintain a record of participants in entry level on-shift training programs, including names, race and sex. Local minority group organizations will be contacted and encouraged to refer applicants for training consideration.

4. When requirements for trainee hires exist, the Company will consider transferring non-skilled employees, including but not limited to minority employees, to the training course, if the training will enhance the up-grade possibilities of the employee.

E. Effects of Past Programs.

1. The Company shall examine its past training programs. To the extent that past training programs for employees have under-utilized minority group employees, the Company shall undertake a study to identify those employees. The Company shall give minority employees so identified priority in future training programs.

2. The Company shall furnish the Commission by September 1, 1970, the names of all employees to be given priority in training.

SECTION 7. ADVANCEMENT

A. The Company will continuously review personnel records of minority employees identifying their skills and qualifications and provide equal consideration for advancement of those employees found to be qualified for promotion.

B. Employees found to have advancement potential as a result of the above described review of qualifications, will be encouraged to participate in up-grade training opportunities where such training would enhance their promotional possibilities.

C. Information regarding open jobs to be filled will be maintained and made available to employees.

D. Employee placement reviews will include as appropriate, coordination and agreement of available supervisors the employee may have had during his employment and will be conducted in a non-discriminatory manner.

E. The Company will maintain a Transfer Request Program. Any employee filing such a request will be given consideration for any existing open job included in his request as well as counseling. The Company will review the request, and, at the employee's request, he will be apprised of minimum job requirements, and also his deficiencies if he is not selected. If accepted for a vacancy, the employee's relative position on the seniority roster of the job he is seeking will be explained.

SECTION 8. EMPLOYEE CLASSIFICATION

A. The Company shall in good faith administer its affirmative action program so as to staff each job classification with minority employees at a minimum ratio as minorities relate to whites in the labor market area.

B. The Company shall establish projected targets for achieving full integration in each work classification and shall submit to the Commission by September 1, 1970, a specific schedule for meeting the projected targets.

C. The Company shall review its seniority and transfer rules. The Company shall modify those rules which act to perpetuate under-utilization of minorities in certain job classifications. Such modifications shall encourage full utilization of minorities in all job classifications.

D. The Company shall submit to the Commission by September 1, 1970, the results of its study of the seniority and transfer rules and the Company's modifications of those rules.

SECTION 9. COUNSELING

A. Job counseling services will be made available to employees who desire to investigate the requirements and/or possibilities for promotion to a higher level hourly classification or a salaried position. Counseling will take place when a specific job opening occurs for which the requesting employee could be considered. Counseling will be of a specific nature pointing out background deficiencies and means for up-grading qualifications.

B. Training Counseling Services will be provided to employees rejected for training. Counseling will be of a specific nature and designed to apprise the individual of his background deficiencies. Emphasis will be placed on counseling the employee on the types of training he would need to enter the Training Programs which he desires.

1. Upon satisfactory completion of Training Program for any particular classification, a participant will become a candidate for openings that become available in such classification. Participation in a Training Program will not preclude selection for promotion prior to the completion of that program.

2. If an individual becomes a candidate for promotion after completing a specified Training Program, and is not selected, he will receive additional counseling and guidance. Counseling will include guidance on filing of appropriate Transfer Request forms where promotion to higher positions is concerned.

SECTION 10. ADJUSTMENT OF COMPLAINTS

A. The Company shall ensure that all employees have full opportunity to bring to the attention of management, through the Special Assistant, any complaints regarding alleged discrimination.

B. Any employee who has such a complaint first may attempt to resolve the complaint with his supervisor. If, after having the opportunity to discuss the matter with his supervisor, the employee is not satisfied he may file a written statement of complaint with the Special Assistant. The Special Assistant will conduct an investigation and endeavor to resolve the complaint. Based upon a review of the complaint and all documentation, the Special Assistant will reach a proposed solution which will be communicated to the employee.

C. The filing of a complaint will in no way waive the employee's right to elect to proceed separately and/or simultaneously under (1) the established union grievance procedure, and (2) under (1) the established union grievance procedure, and (2) the provisions of Title VII of the Civil Rights Act of 1964.

D. The Company shall publicize to employees the above complaint procedure.

Section 11. The Company shall hereafter submit to the Commission, quarterly, a report on the operation of its equal employment opportunity program along with a copy of its Equal Employment Opportunity Commission Report, EEO 1, or its equivalent.

APPENDIX XI(A)

STATEMENT OF BENNY L. KASS BEFORE THE SENATE SUBCOMMITTEE ON SURFACE TRANSPORTATION

Mr. Chairman and Members of the Committee. My name is Benny L. Kass, and I appear today on behalf of the Ad Hoc Committee on Consumer Protection, a coalition of more than 40 local organizations created in 1963 for the protection of the consumer.

The bill presently pending before this subcommittee, S. 2355, would establish an advisory commission to make a study and report with respect to freight rates. Although we certainly endorse the concept of studying freight rates, after almost eight months of direct involvement in one rate case regarding an increase in the price of vegetables and melons, the Ad Hoc Committee is not sure that another study will correct the many problems we have encountered.

You have heard the Nader students charge that the Commission is the servant of private interests. As a result of our experience before the Interstate Commerce Commission, we must confirm this charge. Furthermore, we must report to this Committee that the ICC has done everything in its power to thwart others who try to represent the public interest, why try to fill the void that exists in the Commission.

Permit us to summarize our involvement. I might add, however, that the Ad Hoc Committee is presently in court challenging the Railroads in a given rate increase, and thus my remarks will be most general.

In late July, 1969, we learned of a proposed railroad rate increase for the transportation of fresh vegetables and melons from the West Coast to the East. The Ad Hoc Committee filed a protest before the Commission, stating our concern "that any increase in rates—especially one as high as the proposed 21% increase presently pending before the Commission—will be passed on to the consumer." We further added:

> Without taking a position on the merits of the increase, we believe there is merit alone in asking the Commission to suspend the rate increase and make a full investigation—including full hearings—of this proposed rate. This investigation and hearing must take place prior to allowing the rate increase to take effect. We would consider it unconscionable if such investigations and hearings were not conducted. (Ad Hoc Committee letter to ICC, July 29, 1969.)

We were pleased to learn that the Commission in fact suspended the rates, and we became formal protestants in the case. It is important to note that this was the first time in the history of the ICC that a consumer organization had ever protested a rate increase, leading the publication *Traffic World* to comment that "Consumer Protest a Factor in ICC Suspension Order on Rail Vegetable Rates." (August 2, 1969)

The Ad Hoc Committee participated fully in the subsequent hearings that took place. Then, on February 25, 1970, the ICC permitted the rates to be increased. The Ad Hoc Committee just last Friday sought a temporary restraining order in the District Court, and appealed its denial to the Court of Appeals on Monday.

In order to avoid specific references to the pending case, we propose to outline our experiences under general categories:

I. PROCEDURAL OBSTACLES TO THE PUBLIC INTEREST

A. Notice of Public of Proposed Increases.—In fiscal year 1968–1969, over 270,000 schedules and tariffs were filed with the Commission, involving hundreds of thousands of rates. Although most—if not all—of these filings represent added costs to the consuming public, they are not published in the Federal Register nor in any newspaper which can be easily read by the American consumer. For the Ad Hoc Committee—or anyone else for that matter—to be kept informed of new rate proposals, one has to subscribe to such publications as *Traffic World* at a

yearly cost of about $140. This is not expensive to the railroads or to some shippers, for this too is passed on to the consumer; but it is prohibitive to the average citizen, and thus, the public is not kept informed of these pending rate increases.

The Ad Hoc Committee will soon petition the Interstate Commerce Commission to issue a rule, pursuant to the Administrative Procedure Act, to wit:

> Every proposed rate increase filed with the Interstate Commerce Commission will be published in the Federal Register, with an explanation as to its effect on the American consumer.

We might add, however, that the ICC Act is as much an obstacle as is the Commission. Section 6(3) provides that if the Commission does not act to suspend rates within 30 days from the date they are filed, the rates are permitted to go into effect. In this day when consumer interests are starting to be recognized, we respectfully suggest that this is a very backward procedure. Rates proposed by the railroads go into effect unless suspended; the burden of proof is on the carrier to show that the proposed changed rate is "just and reasonable" (Section 15(7)), but *only* in the event the rate increase goes to hearing. We submit that Section 15(7) must be turned around. If the Railroads want to change their rates, the burden must be on them from the very beginning to prove that it is, indeed, just and reasonable. And, if this Committee will be reexamining Section 15(7), we submit that 30 days is too short a period in which to permit protestants to file a proper manner. Six months notice seems more reasonable, but certainly not less than 90 days.

B. Public Counsel.—During the hearing on Vegetables and Melons, the Ad Hoc Committee petitioned to proceed *in forma pauperis*, but this was denied. We also sought free legal counsel to be supplied us by the Commission, but this too was denied. As a result, the Ad Hoc Committee was required to spend considerable time preparing papers and briefs, and considerable dollars sending them to all parties of record. We asked the Commission to at least assist us in sending copies of our correspondence and other materials to other protestants and respondents, stating that "the Xerox cost to us alone is prohibitive." The Commission responded as follows:

> . . . the Commission will not prepare copies of your pleadings or serve them on the parties to the proceeding. Attorneys are required to effect service of their pleadings in accordance with the provisions of the Commission's General Rules of Practice applicable to the type of proceeding involved. (Letter of February 10, 1970.)

In the absence of public counsel assigned to help consumer organizations adequately participate in rate cases, the cost of such participation is prohibitive. The Ad Hoc Committee has already incurred considerable expense, expense which cannot be passed onto the consumer because *we are* the consumer. If consumers, and the public generally, are to participate properly in rate cases, the Ad Hoc Committee submits that free legal assistance is mandatory.

We tried. We wrote the Department of Transportation and asked them to intervene as a protestant. But the Department informed us that their "participation in matters before the transportation regulatory agencies, which because of staff limitations has to be on a selective basis, has generally been limited to cases in which we believe far-reaching precedent is involved." Apparently, in most railroad rate increases involving food and other commodities of vital importance to the American consumer, the Department of Transportation takes the position that these are not important.

Mr. Chairman. It is our conclusion that the Interstate Commerce Commission was not candid with this Committee when it reported last year that:

> Since increases in rates ultimately are reflected in retail selling prices, the poor have an important interest in proceedings of this type. This interest is now protected . . . . (2) by the increasing participation of the Department of Transportation as a party in proceedings before the Commission . . . (p. 31, Report of Basic Policy Matters under Consideration by the Interstate Commerce Commission).

Here is yet another example of buck-passing the question of public interest. And yet, when a reporter for the Washington Daily News asked a representative of the Transportation Department about this, he said, "We participate in relatively few cases before the regulatory commission." (*Washington Daily News*, July 31, 1969.)

It is our understanding that Senator Metcalf is presently considering legislation to create a Consumer Transportation Counsel similar to his proposed Consumer Utility Counsel (S. 607). Based on our own very frustrating experiences, we certainly support this approach.

C. Cost of Transcript.—Here is what some might consider a petty matter, but to a lawyer trying to adequately represent his client, it is highly significant. I refer to the availability and cost of transcript to a hearing. I cannot go into all the details, for there is a case pending and I soon will seek a copy of the transcript pursuant to the Freedom of Information Act. But suffice it to say that the transcript was available to me only during the business hours of the Commission at the offices of the Commission. If I wanted to copy the transcript, it would cost me about $.85 per/page, since the ICC has a contract with a private reporting company, which makes its money from the sale of copies of the transcript to interested persons. Clearly, this is prohibitive; lawyers for respondent railroads—and even other protestants such as food chains—are able to purchase the transcript so that they can confer with their clients at their home offices, in privacy, with other resource material available. And the cost of this transcript is not only tax-deductible as a business expense, but it too is passed on to the consumer. If we are to adequately represent our clients, we either have to spend the money or bring them all down to the offices of the ICC.

We might add, however, that we attempted to purchase the transcript at the Commission's usual photocopy rate of $.30 per/page, but we were flatly turned down—again because of the "overriding importance" of the contract with the private reporting company. The Ad Hoc Committee is making an analysis of the different ways in which regulatory agencies handle this important problem, and will report back to this Committee at a later date. Already, however, the Federal Trade Commission has granted us permission—in the public interest—to take advantage of their lower per/page copying costs.

II. SUBSTANTIVE OBSTACLES TO THE PUBLIC INTEREST

The Interstate Commerce Act itself contains many provisions which have the effect of precluding public participation. For example:

Section 5(a) agreements.—pursuant to this section, carriers can sit down and agree among themselves as to fixed rates, without regard to the anti-trust laws of the United States. Commissioner Walrath, in his testimony to this subcommittee last year (Review of I.C.C. Policies and Practices, June 24–25, 1969) highlighted the problem:

> . . . under the 5(a) agreement if (the carriers) use this business of sitting down and talking together in a region, or nationally even, they must then put that on the public docket and hear the shippers before they can file for that. (Answer to Sen. Hartke, p. 79).

Herein lies perhaps the biggest difficulty. Congress—and of course the Commission—has always equated the shippers with the public interest. Senator Hartke responded to this last year, and it is worthwhile to quote:

> You see, always you come back to these two groups of people, the carriers and the shippers. What disturbs me is that it appears that this process has gone on so long, in an atmosphere of adjudicating the rights between individuals, that the economics of the shipper and the economics of the carrier become paramount and the consumer or the public generally has been lost sight of, not from any conscious misdoing, but as just the very nature of the apparatus and the way it works. (*Ibid.*, p. 59)

Rebates.—Section 15(7) of the Act provides a formula for refunding "such portion of such increased rates or charges as by its decision shall be found not justified." Obviously this was enacted with the shipper in mind, for how can the consumer ever be made whole for the extra prices he pays as a result of any unjustified or illegal increase. Can the consumer keep accurate records on prices of the meats he buys in the supermarket, for example, so that he can claim the rebate? What statutory scheme can be devised so that the consumer who purchases coal will know the date purchased and its origins? We submit that Section 15(7) is shipper-oriented, and not totally in the public interest.

Mr. Chairman. We have not even touched on the many substantive difficulties involved with freight rates, difficulties which we hoped will be thoroughly analyzed by the advisory commission which is the subject of S. 2355. We have attempted to present to this Committee a list of the actual problems we have encountered these past eight months, problems which raise serious obstacles to the direct—and full—participation by the American consumer in the regulatory process. Ultimately, it is the consumer who has to pay the price of this process, and surely he should be allowed to raise his voice in protest.

The Ad Hoc Committee on Consumer Protection appreciates this opportunity to discuss our difficulties with the Committee.

APPENDIX XI(B)

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C., February 10, 1970.

Re: I & S Docket No. 8536—Meat and Packinghouse Products, West and Southwest to the East.

BENNY L. KASS, Esq.,
Chairman and Counsel, Ad Hoc Committee on Consumer Protection,
Washington, D.C.

DEAR MR. KASS: This is in reply to your letters of January 19 and February 2, 1970, relating to participation in the above captioned proceeding by the Ad Hoc Committee on Consumer Protection particularly with respect to your request for "free legal counsel", assistance in serving copies of pleadings and also your petition for rulemaking.

It appears that your request for "free legal counsel" stems from a recent Federal Trade Commission ruling in the American Chinchilla Corporation Case (FTC Docket No. 8774), where that agency dismissed a complaint against one of the respondents on the ground that the hearing examiner should have considered the respondent's request for counsel because of indigency and that his failure to do so deprived the respondent of protection of his rights.

The situation in the FTC proceeding is not analogous to the subject proceeding now pending before the Commission for investigation. The proceeding before the FTC arose out of a complaint which named a corporation and several individuals as respondents to a charge of violating Section 5 of the Federal Trade Commission Act. It was the duty of the named respondents to answer the allegations or suffer a default judgment to be entered against them. Where a named respondent could not answer and defend himself due to his indigency, he was compelled to surrender his rights under a cease and desist order without being afforded due process of law. The proceeding before this Commisison is an investigation proceeding in which any person may intervene and participate under the provisions of Rule 73 of the Commission's General Rules of Practice (49 CFR § 1100.73).

Pursuant to section 15(7) of the Interstate Commerce Act, 49 USC 15(7), the Commission is empowered to make the determination whether the suspended schedules should be permitted to become effective. The burden of proof relative to the lawfulness of the proposed schedules is on the proponents of the rate change. If the Commission finds after investigation that the rates are shown not to be unlawful, protestants have further recourse to judicial review of the Commission's determination.

It is noted that you are an attorney and registered to practice before this Commission. As an attorney you may enter an appearance in the investigation proceeding on your own behalf or on behalf of the Ad Hoc Committee on Consumer Protection. For that matter, any individual member of the Committee may appear in his own behalf. Therefore, your request for "free legal counsel" is inappropriate.

With regard to your petition for rulemaking which was included in your protest against the proposed rates which have been suspended and which are now the subject of an investigation in Investigation and Suspension Docket No. 8536, your attention is directed to the provisions of Rule 42 of the Commission's Rules of Practice (49 CFR § 1100.42). Subsection (a) of this rule provides in part: ". . . and no protest shall include a prayer that it also be considered a formal complaint."

Accordingly, if you wish to file a formal petition for the institution of a rulemaking proceeding which is, in this case in the nature of a complaint, you should do so in a separate pleading.

Regarding your suggestion relative to notice of proposals for rate increase; you suggest that every proposed rate increase filed with the Commission be published in the Federal Register with an explanation as to its effect on the American Consumer. Perhaps you are unaware of the magnitude of what you suggest. For example, in fiscal year 1968–1969, over 270,000 schedules and tariffs were filed with the Commission (ICC 83rd Annual Report p. 122), involving hundreds of thousands of rates. To attempt to publish and to show the possible effect on the consuming public of each of these proposals would be an intolerable burden both physically and financially. Additionally, the requirements regarding notice insofar

as tariffs changes are involved are specifically provided in section 6 of the Interstate Commerce Act, 49 USC section 6.

I would like also to call your attention to the impracticability of attempting to publish in he Federal Register proposed changes in rates and schedules. As you are aware, the Commission must act on tariff proposals within a very limited time frame according to the provisions of section 6(3) of the Act. Under this section if the Commission does not act to suspend rates within 30 days from the date they are filed with the Commission, the rates are permitted to go into effect. The suspension procedures provided by Rule 42 of he Rules of Practice (49 CFR § 1100.42) in accordance with the authority vested in the Commission by section 15(7) of the Interstate Commerce Act require that persons desiring to challenge the lawfulness of proposed rates must file their protests and requests for suspension at least 12 days prior to the effective date of the intended rate changes. If the Board of Suspension declines to suspend the proposed changes, all interested parties are promptly notified. The protestant may petition for reconsideration of the decision not to suspend the rates provided the petition reaches the Commission at least not later than 4:00 p.m. the second work day prior to the effective date of the tariff or schedule in question. The petition must then be acted upon by the Commission within the very limited period of time prior to the expiration of the 30 day notice period. In view of these stringent time limitations, the delay occasioned by your suggestion of publishing all proposed tariff changes in the Federal Register would so shorten the time for filing pleadings and consideration of them by the Commission that the entire suspension procedures would become unworkable and meaningless.

In conclusion, Mr. Kass, I must advise that the Commission will not prepare copies of your pleadings or serve them on the parties to the proceeding. Attorneys are required to effect service of their pleadings in accordance with the provisions of the Commission's General Rules of Practice applicable to the type of proceeding involved.

Sincerely yours,

H. NEIL GARSON,
Secretary.

[From the Washington Post, Feb. 12, 1970]

ICC BARS FREE AID TO GROUP—AGENCY SAYS FTC RULING IS DIFFERENT

The Interstate Commerce Commission yesterday refused to provide free legal services for a consumer group appearing before the regulatory agency.

The group, represented by Washington attorney Benny Kass, claimed that the costs required for full participation in an ICC rate investigation automatically excluded consumer interests from playing an active role.

The request stemmed from proposed 17 percent increases in rail freight rates for meat shipments from the West and Southwest to the Northeast. The ICC has suspended the higher rates pending an investigation, which can last as long as seven months.

In a reply to Kass, ICC Secretary H. Heil Garson said anyone—whether or not he is an attorney—can make a statement before the commission. But he rejected the idea that the agency should supply free legal counsel, which would enable the consumer group to become a full-fledged "party" to the investigation.

As such, the group would be entitled to make formal legal pleadings to the commission and to receive automatically the pleadings of other parties.

In his letter, Garson mentioned a recent decision by the Federal Trade Commission requiring facing an FTC charge and unable to pay for an attorney. But in this case, Garson said, the defendant actually faced a stiff FTC penalty and, without a lawyer, was being denied "due process of law."

Kass yesterday expressed disappointment but not surprise at the ICC's decision. Repeated attempts to secure counsel may, he said, convince regulatory agencies that they should appoint "peoples' counsel" for important issues.

Kass also said he would not drop the idea of having the ICC publish all new requests for rate increases—from railroads, bus companies and truckers—in the federal register.

The ICC also rejected that suggestion as impractical. Some of the rate filings, one ICC staff member said, are "like telephone books."

Each day's filings are now kept separate for nearly a week and can be examined by anyone, according to Edward H. Cox, director of the ICC's Bureau of Traffic. Many private companies, he said, subscribe to "Traffic World," a service organization which sells weekly summaries of the new rate proposals.

Spokesmen for "Traffic World" said yesterday that the weekly report costs $140 a year and goes to about 11,000 subscribers—most of them large transportation users.

FEBRUARY 2, 1970.

Re: I. & S. No. 8536.

Hon. H. NEIL GARSON,
Secretary, Interstate Commerce Commission,
Washington, D.C.

DEAR MR. CARSON: The Ad Hoc Committee is delighted to hear of the above-cited suspension, and wish to go on record as wanting an opportunity to present both oral and written testimony on behalf of the Washington meat-consuming community.

Needless to say, although we cannot afford to attend a hearing even in Washington, we see no other place where it would be less expensive; accordingly, we ask that the hearing, if any, be held at the Commission's offices in Washington.

We asked the Commission, by letter dated January 19, 1970, for free legal counsel to be assigned us in the event that these tariffs were suspended. We renew this request at this time.

We also request the Commission to assist us in sending copies of our correspondence, briefs, and other material to other protestants and respondents. The Xerox cost to us alone is prohibitive. If possible, we would hope that the Commission could send our statements out for us.

Kind regards.

Sincerely,

BENNY L. KASS,
Chairman and Counsel, Ad Hoc Committee on Consumer Protection.

WASHINGTON, D.C., *January 19, 1970.*

Hon. H. NEIL GARSON,
Secretary, Interstate Commerce Commission,
Washington, D.C.

DEAR SECRETARY GARSON: The Ad Hoc Committee on Consumer Protection, a local coalition of organizations founded in 1963 for the protection of District of Columbia consumers, wishes to protest the proposed railroad rate increase on meat and packinghouse products effective January 30, 1970, listed as ICC A–4609.

We protest this proposed rate increase because we do not understand it. There is no present way, short of a public hearing, to obtain the needed information on which to evaluate the effect of these increases on the consumer. We did not see any public notice of the proposed increase filed in the Federal Register, nor published in any newspaper which can be easily read by the American consumer.

We are, however, concerned that an increase in rates, especially following so closely upon the heels of two Ex Parte across the board increases, will be passed on to the consumer. This includes a proposed increase in meat products, including hot dogs.

Accordingly, as we stated in I & S 8486, "without taking a position on the merits of the increase, we believe there is merit alone in asking the Commission to suspend the rate increase and make a full investigation—including full hearings—of this proposed rate."

Furthermore, we ask the Commission, if the rate is suspended, to assign the Ad Hoc Committee "free legal counsel" so that we may adequately participate in the case. As you know, we are a protestant in I & S 8486, and this has caused us considerable expense, expense which cannot be passed on to the consumer because we *are* the consumer. If we are to participate properly in this, and in other rate cases, we feel that free legal assistance is needed. As you know from reading the transcript of I & S 8486 (a transcript which we cannot afford to purchase), we were forced to stop attending the hearings because of financial restrictions.

And finally, pursuant to the Administrative Procedure Act, we wish to petition the Commission to issue a rule, to wit:

Every proposed rate increase filed with the Interstate Commerce Commission will be published in the Federal Register, with an explanation as to its effect on the American Consumer.

Thanking you in advance for your consideration,

Sincerely,

BENNY L. KASS,
Chairman and Counsel, Ad Hoc Committee on Consumer Protection.

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C., January 12, 1970.

Re: I & S Docket No. 8486, Vegetables and Melons, Transcontinental Eastbound.

BENNY L. KASS, ESQ.,
Washington, D.C.

DEAR MR. KASS: In your letter of December 30, 1969, you make the alternative requests for either:

(1) A free copy of the transcript in the subject proceeding for use during the pending of the proceeding.

(2) Pursuant to the Freedom of Information Act, photocopies of designated portions of the transcript at the usual photocopy rate.

In reply, I wish to reiterate my statement to you in my letter of December 19, 1969, wherein I disapproved your initial request for a free copy of the transcript namely:

Of overriding importance is the matter of our contract with a private company, CSA Reporting Company, which acts as the official reporter of the Commission and which makes its money from the sale of copies of the transcript to interested persons. Our contractual relationship with CSA is such that we cannot issue free copies without jeopardizing the reporting services required by the Commission.

With regard to your request pursuant to the Freedom of Information Act, I must disagree with your interpretation of the intent of the "public records" provisions of § 552(a)3 of the Act (5 USC § 552). The Act did, in fact, contemplate an exemption from the copying requirement of transcripts of Agency proceedings in situations such as the one which exists between the Interstate Commerce Commission and CSA Reporting Company.

The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act dated June 1967 at page 25 states in part as follows:

"Where an agency's contract with a reporting service requires that copies of transcripts be sold only by the service, the copy in the possession of the agency should be made available for inspection. If a copy of the transcript is requested, the agency may refer the applicant to the reporting service."

As I previously indicated, the Commission does have such a contractual agreement with CSA. Accordingly, your requests pursuant to the Freedom of Information Act are denied.

Sincerely yours,

H. NEIL GARSON,
Secretary.

WASHINGTON, D.C., *December 30, 1969.*

Hon. H. NEIL GARSON,
Secretary, Interstate Commerce Commission,
Washington, D.C.

DEAR SECRETARY GARSON: Thank you for the letter of December 19, 1969, whereby I am informed that you are unable to furnish me (for my consumer client's use) a free copy of the transcript of I & S No. 8486, *Vegetables and Melons, Transcontinental Eastbound.* I appreciate your concern, however, for my needing the transcript, and will no doubt take up your kind offer of assistance as this case proceeds.

You must recognize, of course, that lack of a transcript for use in my office is not just an inconvenience. Counsel's role in any administrative matter is to confer with and obtain guidance from his clients. Respondent railroads, in I & S No. 8486, and other protestants who are able to purchase a transcript can confer with their clients at their home offices, in privacy, and with other recource material available. If I am to adequately represent my clients, I am forced to bring all of them down to your office, a scene which I submit would probably subject them to official red-tape in light of current rules regarding "demonstrations." Be that as it may, your decision of December 19, 1969, has the effect of denying my clients a form of administrative due process—because they are unable to pay for the transcript.

There is a more serious issue at stake here. We recognize the need for competent reporting services. We do not quarrel with the Commission's right to enter

into contractual relationships with private reporting companies. But, "of overriding importance" is not— or should not be—the matter of your contract with a private reporting company. In this regard, the Commission's primary concern should be the right of the public to be adequately represented before Commission proceedings—which should include having full access to transcripts.

The Freedom of Information Act requires that public records be available for inspection and copying "unless the materials are promptly published and copies offered for sale." I doubt, seriously, that the Act contemplated such exemption for reporting companies, and accordingly I must make two alternative requests of the Commission:

First: On behalf of the Ad Hoc Committee on Consumer Protection, protestant in the above cited case, we request that the Interstate Commerce Commission furnish us with a free copy of the transcript, for our use during the pendency of the entire case.

Second: If the above request is denied, we ask the Commission—pursuant to the Freedom of Information Act—to photocopy portions of the transcript (which we shall designate following our inspection) and to bill us at the usual photocopy rate, which we understand to be substantially less than the per page rate charged by the reporting service.

Your prompt response to these requests would be appreciated, in light of our need to continue as an active protestant in I & S No. 8486.

Kind regards,

Sincerely,

BENNY L. KASS,
Chairman and Counsel, Ad Hoc Committee on Consumer Protection.

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE SECRETARY,
Washington, D.C., December 19, 1970.

BENNY L. KASS, Esq.,
Washington, D.C.

DEAR MR. KASS: I have tried to reach you by telephone but I was unable to do so.

Hearing Examiner R. M. Glennon has brought to my attention a request which was made by you on the record in I & S 8486, *Vegetables and Melons, Transcontinental Eastbound*, that you desire a copy of the transcript for your personal use without cost to you or your clients. While I appreciate the fact that the lack of a transcript for use in your office may be an inconvenience, nevertheless, I am unable to furnish you with a copy for the reason that the Commission does not have budgetary appropriations for such purpose. However, the official docket of the Commission contains the transcript and is always available at the Commission for study by anyone interested in the proceeding. A Public Docket Room containing tables and chairs is available for use by the public and attorneys during the business hours of the Commission. Additionally, I have made arrangements on occasion for attorneys to utilize the official docket of the Commission here at the Commission's offices on weekends upon request.

Of overriding importance is the matter of our contract with a private company, CSA Reporting Company, which acts as the official reporter of the Commission and which makes its money from the sale of copies of the transcript to interested persons. Our contractual relationship with CSA is such that we cannot issue free copies without jeopardizing the reporting services required by the Commission.

Whenever possible, I shall try to work with you to overcome your cost problems because I am also concerned with reducing the costs of litigation. If you have any questions is this regard, please call me.

Sincerely yours,

H. NEIL GARSON,
Secretary.

ICC TO HEAR CONSUMERS ON FREIGHT-RATE BOOST

Prices for lettuce, other fresh vegetables and melons in Eastern supermarkets will be the unusual subject tomorrow before an examiner of the Interstate Commerce Commission in what will be landmark hearings in the age of the consumer.

For the first time, a group speaking for everyday housewives and shoppers has filed a protest in a railroad freight rate case, charging that "only the consumer in this case has the public interest at heart."

The group, called the Ad Hoc Committee on Consumer Protection, is a coalition of District organizations founded in 1963. Attorney Benny L. Kass heads the organization, which includes the Council of Churches of Greater Washington, the United Planning Organization, Office of Urban Affairs of the Archdiocese of Washington, Americans for Democratic Action, NAACP, and the District Democratic central committee.

What consumers oppose is a plan by railroads for increases of 3-to-21 percent in rates for shipping farm goods from the West Coast to Eastern cities. Major supermarket chains are also opposing the increases. The shopper, however, would end up paying the freight bill.

Opponents have alleged that Western farmers decided to support the new rates—the largest in the history of food items—in return for a secretly-negotiated deal on illegal rebates with nine Eastern rail roads. Previously the farmers had generally opposed higher rates.

The rebates, called "market decline payments," did not appear in the new rate schedules published last summer (the rates were supposed to go into effect in early August, but were suspended after the ICC was flooded with protests). The payments are made to compensate growers when trains are delayed and prices drop in the meantime. Such payments were routine until 1964, when the Eastern rail roads dropped them. Ever since, the Western farmers have been trying to get the payments reinstated.

Noting the situation of the farmers and the allegedly secret deal on rebates, one lawyer last week predicted the rail roads had launched their "Bay of Pigs" in freight rates, so unprepared were they for the protest filed before the ICC.

YOU, THE CONSUMER

He was jokingly referring to another freight rate case recently decided by the full ICC, which one commissioner called the " 'Gulf of Tonkin Resolution' in the field of national rate making."

In a split decision earlier this month, the ICC granted an "emergency" request from the nation's railroads for an across-the-board 6 percent increase in all freight rates, that will add an estimated $600 million a year in revenues.

The general rate increase approved by the ICC—pending a forthcoming investigation—was the third such "emergency" request by the railroads since May, 1967. In brief, the rail lines argued that increased costs and a sharply reduced rate of return had reached the point that even minimum earnings would disappear if the increase was not approved.

ICC chairman Virginia Mae Brown, in a dissent, strongly disputed the railroads view. "No emergency exists to justify making these rates effective at this time," she stated.

Moreover, Mrs. Brown saw in the railroad's persistent "emergency" approaches a "divide and conquer" situation in which the rails join together, subverting their separate situations, "and appear of record united in a common cause." "In opposition thereto," she continued, "are arrayed the numerous and diverse shipping interests, each evaluating the proposal as it affects them separately (which) weakens the shippers' presentation, but it does not remove from the commission, the responsibility of considering the diverse shipper positions and the effect of the proposed increase upon them."

Three other ICC members did not vote with the majority of six: Willard Deason, who also favored suspension of a rate increase pending a full study; Dale Hardin, who disagreed with the final order because it did not provide for hold-downs on such commodities as coal, grain and scrap iron; and Kenneth H. Tuggle, who did not participate.

It was Tuggle who accused the majority of formulating the "Gulf of Tonkin resolution" of freight rate making. In essence, he agreed with Hardin that the final decision was objectionable because it did not provide for hold downs—or smaller increases—on important commodities. But he was so disturbed by the "precipitant" action that he decided to be shown as "not participating in this proceeding."

In both cases, there have been other expressions of alarm, particularly about the inflationary impact of more and more rate increases. The Department of Transportation, while not objecting to the general increase (and declining to

participate in the vegetables case) were embarked on a program of annual "emergency" requests of the ICC unless the agency conducted a thorough study of the problem of rate making and established new procedures for establishing equitable rates in the future.

The National Industrial Traffic League, representative of large shippers and manufacturers, criticized the lack of an orderly procedure for considering general rate increases.

And, in a brief filed in the vegetable case, attorney Kass charged the railroads' arguments—that present service is inefficient and that railroads have no incentive to improve this service unless they get more money—means it "would only be a matter of time before the railroads returned to the commission seeking additional revenues."

"We are deeply concerned with inflationary trends in this industry: too often, the real loser is the American consumer," stated Kass, charging that the proposed increase in food shipping rates is "neither just nor reasonable."

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., August 26, 1969.

BENNY L. KASS, Esq.,
Washington, D.C.

DEAR MR. KASS: Thank you for your recent letter to the Secretary of Transportation urging that this Department intervene in I. & S. Docket No. 8486, the pending investigation before the Interstate Commerce Commission into various railroad rate increases applicable to eastbound fresh vegetable and melon traffic.

The Department does not represent particular interests as such, whether those interests are those of carriers, shippers, regions, or receivers. Our participation in matters before the transportation regulatory agencies, which because of staff limitations has to be on a selective basis, has generally been limited to cases in which we believe far-reaching precedent in involved. Thus, in the recent motor carrier rate increase cases, our purpose in intervention was to encourage the Commission for the first time to set out, as it did, clear, comprehensive and sufficient guidelines for determining whether proposed increases in the motor carrier industry were just and reasonable. We were not primarily concerned with the specific rates themselves.

Our role before a regulatory agency is to present on the record views and evidence, pertaining to the broad policy questions involved, which we consider necessary to enable the agency to render a decision in the public interest and which we believe would not otherwise likely be available on the record.

Prior to the recent action of the Commission suspending the proposed rate increases, now under investigation in I. & S. Docket No. 8486, the counsel for certain large food chains actively opposing the rates discussed them with our office and urged the Department to intervene. We advised him then, and still believe, that under our intervention policy set forth above, appearance by the Department in this case was not necessary.

Your interest is appreciated.

Sincerely,

R. TENNEY JOHNSON,
Deputy General Counsel.

WASHINGTON, D.C., *August 15, 1969.*

Hon. JOHN VOLPE,
Secretary, Department of Transportation,
Washington, D.C.

DEAR MR. SECRETARY: This letter is a request, on behalf of the Ad Hoc Committee on Consumer Protection, for the Department of Transportation to intervene and testify in a pending matter before the Interstate Commerce Commission.

On July 29, 1969, the Ad Hoc Committee filed a letter of protest with the ICC on a proposed 21% railroad rate increase for the transportation of fresh vegetables and melons from the West Coast to the East. We were successful in having the increase suspended, and the matter has been tentatively designated for oral hearing. Its docket number is: I&S Docket No. 8486.

Representation of the consumer interest is not easy when funds are not available, when legal research is time-consuming and costly, and when government agencies—which claim they are acting in the public interest—pick and choose

the type of case they will enter into. I quote the Washington Daily News of July 31, 1969 (attached), which quoted Mr. Stephen Gross of the Litigation Office of your agency: "We participate in relatively few cases before the regulatory commission."

If this latter statement is correct, it is in direct conflict with what the ICC told the Senate Commerce Committee in a recent report entitled "Report of Basic Policy Matters under Consideration by the Interstate Commerce Commission":

> Since increases in rates ultimately are reflected in retail selling prices, the poor have an important interest in proceedings of this type. This interest is now protected . . . (2) by the increasing participation of the Department of Transportation as a party in proceedings before the Commission . . . (p. 31).

If the Department participates in "relatively few cases", however, not only was the Senate Commerce Committee misled, but the American consumer is being ignored.

Your comments on this matter would be appreciated, and the interest by your Department in rate increases is encouraged.

Sincerely,

BENNY L. KASS,
Attorney at Law.

APPENDIX XII

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REPRESENTATION FOR THE POOR IN FEDERAL RULEMAKING

*Arthur Earl Bonfield**

I. THE PROBLEM

A. *Generally*

THE sound operation of the federal administrative rulemaking system demands that all relevant interests and viewpoints be considered prior to the formulation and promulgation of its product. Only after such an examination can the responsible officials have any confidence in the soundness of the rules they create. Officials engaged in rulemaking for the federal government are usually apprised of the various interests and viewpoints deserving consideration in that process by representatives of individuals affected by their actions.

The ample personal economic resources and relatively well-financed organizations of middle and upper income Americans usually assure their particular interests adequate representation in federal administrative rulemaking. The norm is that middle and upper income individuals, or their personal or organizational representatives, directly or indirectly monitor all agency activities. These persons attempt to protect their interests through formal or informal participation in rulemaking affecting them. But federal rulemaking very frequently affects large numbers of individuals who lack the personal economic resources and organized associations of middle and upper income Americans. These economically underprivileged persons are usually unable to keep themselves adequately informed of the numerous actual or proposed exercises of rulemaking

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* Professor of Law, University of Iowa Law School. B.A. 1956, Brooklyn College; LL.B. 1960, LL.M. 1961, Yale University.—Ed.

This Article is based upon a report prepared under the auspices of the Administrative Conference of the United States. The Conference, however, does not in any way approve it or evaluate its content, which is the sole responsibility of the author. Official recommendations made by the Conference on this subject may be found in Appendix B of this Article. Those specific recommendations are the only statements attributable to the Administrative Conference of the United States with respect to representation for the poor in federal rulemaking. The Administrative Conference of the United States [*see* 5 U.S.C. §§ 571-76 (1964)] was established by Congress in 1964 to study the efficiency, adequacy, and fairness of federal administrative practices and procedures. It is specifically empowered to make recommendations to the President, the Congress, the Judicial Conference of the United States, and the executive departments and administrative agencies for improvements in those procedures by which the administrative bodies of our national government determine private rights and obligations.

authority affecting their interests. Normally the poor are also unable to communicate effectively to the appropriate authority their views about proposed rules, or to petition in their own interest for new rules or for the amendment or repeal of old rules.

An agency promulgating rules affecting the poor cannot assume that it automatically knows what is best for such people. Government administrators are usually persons with middle-class backgrounds, experiences, and associations; therefore, they tend to have middle-class viewpoints, orientations, and understandings. This means that the personnel of federal agencies may be expected to reflect more accurately the interests of the affluent than those of the economically underprivileged. Consequently, there is a special reason for concern when, as is now the case, the interests of poor people are inadequately represented in the rulemaking process.

The administration of government undoubtedly suffers as a whole from the inability of the economically underprivileged segment of our society to represent adequately its group interests in the rulemaking process. The inability of the poor in this respect is injurious to the government's sound administration because it sometimes results in the formulation and promulgation of policy without consideration of all the relevant viewpoints. Recent responses of the poor to the product of such an improperly functioning process have been expensive, time-consuming, and unfortunately, too often destructive. Ill-considered rules have frequently caused litigation, civil disobedience, and on occasion, riot. Some of this might have been avoided if the views of the poor were considered in the initial formulation of agency policies affecting them.

This conclusion does not ignore the many well-intentioned and often considerable efforts of the appropriate officials to ascertain, by their own investigations, the views of the economically underprivileged concerning administrative rulemaking that affects them. But available evidence establishes that these official efforts have been insufficient to compensate for the inability of the poor affirmatively to represent their own interests in rulemaking. The fact is that government administrators are too often inadequately apprised of the poor's views respecting the desirability of existing or proposed rules.

B. *General Summary of the Evidence*

Substantial evidence supports the conclusion that the poor of our society have been inadequately represented in federal rulemak-

ing. Some original data on this subject was obtained from a questionnaire entitled "Survey of Participation of the Poor in Agency Rulemaking of Particular Interest to the Poor" distributed to some forty federal agencies during the summer of 1968.[1]

Each federal agency surveyed was asked the following initial question:

1. What programs does your department or agency administer
   a. that are directed primarily at the economically underprivileged segments of our society, or,
   b. although not directed primarily at such segments, may have a very substantial impact on them?

Most agencies listed those programs under their respective jurisdictions reasonably falling within the above categories. However, the questionnaire responses indicated that a few agencies administering programs in class (1)(b) above do not recognize that they are in fact doing so. That is, even though they are administering some programs having a very substantial impact on the poor, a significant number of agencies replied to question (1)(b) by stating that they administered no programs of that type.[2] In addition, a few

1. The following agencies responded to the questionnaire which was distributed as a survey of the Rulemaking Committee of the Administrative Conference of the United States: Department of Justice; Civil Service Commission; Post Office Department; Department of Agriculture; Department of the Interior; Department of Health, Education, and Welfare; Tennessee Valley Authority; Department of Labor; Office of Economic Opportunity; Equal Employment Opportunity Commission; Federal Power Commission; United States Commission on Civil Rights; Small Business Administration; National Capital Planning Commission; Federal Communications Commission; Securities and Exchange Commission; Foreign Claims Settlement Commission of the United States; National Science Foundation; National Advisory Council on the Education of Disadvantaged Children; Smithsonian Institution; President's Council on Youth Opportunity; Department of State; Washington Metropolitan Area Transit Authority; Department of the Treasury; General Services Administration; Appalachian Regional Commission; Interstate Commerce Commission; Farm Credit Administration; Federal Reserve System; Veterans Administration; Federal Home Loan Bank Board; Department of Commerce; Department of Housing and Urban Development.

2. The following examples are illustrative:

"Concerning the study that your Committee on Rulemaking is making of participation of the poor in agency rulemaking . . . [the U.S. Civil Service Commission is] declining to attempt to fill out the questionnaire because we do not believe it is applicable to us." Yet that body makes the general rules for government hiring and classification of employees, and it administers nondiscrimination in government employment [under Exec. Order No. 11,246, 30 Fed. Reg. 12319 §§ 103, 104 (1965)].

"Please be advised that the General Services Administration does not appear to have programs of the nature contemplated by the Survey of Participation of the Poor in Agency Rulemaking." Yet many of the programs administered by this agency undoubtedly fit within class (1)(b) of the question in the text since the manner and conditions under which the national government purchases and sells supplies and property and cares for and constructs federal buildings undoubtedly has a substantial impact on the poor.

"This is in reply to your letter of July 18 which requested responses to a survey questionnaire dealing with programs administered by [the Post Office] Department

agencies that did list some programs having a substantial impact on the poor neglected to list all of their programs fitting into that category.[3] If the agencies involved do not understand that some of their programs have a substantial impact on the poor, or cannot determine which of their programs have that effect and which do not, the interests of such persons are inadequately represented in rulemaking for those programs.

The questionnaire also asked the agencies surveyed:

> 5. Does your agency now attempt to ascertain the views of poor and economically underprivileged persons in respect to rules and policies proposed to be issued to implement the programs listed in response to question 1 above? If so, please describe in detail the procedures you use in each program to ascertain these views.

About one third of the agencies claiming to administer programs substantially affecting the poor indicated that they had not previously attempted to ascertain the views of economically underprivi-

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which are directed at or have a very substantial impact on the poor. The Department does not administer any such programs. Our primary activity, moving the mail, and our programs to effect that end, are not directed at any economic group and do not have the impact on the poor contemplated by your questionnaire." Yet the Post Office is one of the largest actual or potential government employers of "poor" people. Its part-time hiring during Christmas, for example, has a substantial impact on the poor. In addition, whether it delivers mail on five or six days a week may have a qualitatively greater impact on the poor than on others. If the poor cannot get their welfare or social security checks on time because mail is delivered only five days a week, they have no other resources to fall back on.

3. The following examples are illustrative.

While the Department of Labor lists enforcement of Title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000 (1964)] implemented by regulations found in 29 C.F.R. pt. 31 (1968), it does not list its role as implementor of Executive Order No. 11,246, 30 Fed. Reg. 12319 (1965). The former program is to effectuate the policy of the Civil Rights Act of 1964 that no person shall, on the ground of race, color, etc. be excluded from participation in or discriminated against in any program receiving federal financial assistance from the Department of Labor, while the latter is a program administered by that Department to assure nondiscrimination in employment by government contractors and subcontractors. In addition, while the Department of Labor does list the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. § 2041 (1964), implemented by regulations found in 29 C.F.R. pt. 40 (1968), it does not list as a program substantially affecting the poor the *bracero* program partially administered by that department under 20 C.F.R. § 602.10 (1968). The former program requires certain persons to obtain certificates of registration prior to performing any activities which constitute engagement in farm labor contracting, while the latter requires that the Secretary of Labor certify certain facts as a condition for the admission of aliens to perform certain temporary agricultural or logging industry services.

While the Department of Agriculture lists many programs it administers having a substantial impact on the poor it does not list the price support and production stabilization programs administered by the Commodity Credit Corporation and the Agricultural Stabilization and Conservation Service. Also omitted from the Department's enumeration of its programs having a substantial impact on the poor are the Rural Electrification Administration programs and Federal Extension Service programs. *See* 1968-69 UNITED STATES GOVERNMENT ORGANIZATION MANUAL 273-77, 283, 294.

leged persons with respect to rules and policies proposed by the agencies to implement those programs. A typical response of this kind stated that "We do not now attempt to ascertain the views of the poor and economically underprivileged, as such."[4]

About two thirds of the agencies reporting that they administered programs substantially affecting the poor stated that they had made some efforts to ascertain the views of those people with respect to rulemaking for such programs. In most cases, however, the efforts described are totally inadequate for the purpose. They are frequently haphazard, unsystematic, and sporadic.[5] The means used have sometimes been so informal and unstructured as to achieve the result only incidentally and accidentally if at all.[6] Furthermore, agencies frequently seem to have sought information about the views of the poor from persons who are neither poor nor reliable spokesmen for the mass of the poor affected by those agencies' actions.[7] The answers to question 5 also indicate that very few

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4. Veterans Administration. Responses of a significant number of other agencies were similar. The following examples are illustrative:

The Federal Home Loan Bank Board reported that it "makes no special provision to secure the views of poor persons." The Tennessee Valley Authority simply answered question 5 "No." "The [Federal Power] Commission does not make an overt effort to solicit the advice of the poor as such . . . ." "The Department [of Transportation] does not, by regulation, specifically, attempt to ascertain the views of the poor in regulatory activities listed in paragraph 1." "The views of poor and economically underprivileged persons have not been actively solicited [by the Federal Reserve System] in respect to rules and policies regarding the program mentioned in 1b, above . . . ." "There is no regular procedure in effect whereby the views of the poor are obtained in connection with the issuance of policies and procedures" of the Department of Housing and Urban Development.

Many of the above responses do, however, go on and assert specifically that this does not mean that the interests and views of the poor are ignored with respect to that portion of the agency's policy-making which affects them.

5. The following examples are illustrative:

For three out of the five programs reported by the Small Business Administration as having a substantial impact on the poor, it answered question 5 "No." While it claimed to make an effort to ascertain the views of the poor with respect to some programs, the Department of Health, Education and Welfare reported that it did not make a specific attempt to solicit regularly the views of the poor as such with respect to rulemaking for the Old Age Survivors and Disability Insurance Programs and the Social and Rehabilitation Services Programs. The Department of Agriculture reported that it "has not heretofore, on its own initiative attempted to ascertain the views of poor and economically underprivileged persons in respect to rules and policies proposed to be issued to implement the listed [food distribution] programs," but it has attempted to do so with respect to programs administered by the Farmers Home Administration.

6. For example, the Equal Employment Opportunity Commission reported that "[o]ur agency ascertains the views of economically underprivileged persons in respect to rules and policies informally insofar as these views are elicited in the course of investigation of charges of unlawful practices."

7. For example, the Department of Agriculture reported that it ascertains the views of the poor with respect to programs administered by the Farmers Home Administration (FHA) from its Technical Action Panels, County FHA Committees, and

of those agencies stating that they attempt to ascertain the views of the poor make any consistent efforts to do so through means *specifically and specially* tailored to accomplish that result in a reliable way. For example, some agencies claimed that they attempted to ascertain the views of the poor by issuing general public invitations to all interested people, including the poor, to submit their views upon particluar rules proposed by the agency.[8]

Responses to a further question are also instructive because they indicate that, in fact, the interests of the poor have rarely had any continuous and systematic affirmative representation in the federal rulemaking process. That question asked:

> 7. Have any particular groups or organizations intervened or otherwise participated for the purpose of representing the views of the poor in rulemaking or in proposing rules in connection with any of these programs? If so, please identify the groups or organizations and indicate the frequency of such participation and the method by which each such group or organization has participated.

About half of the responses from agencies acknowledging that they administered programs substantially affecting the poor indicated

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State FHA Advisory Committees. Yet these bodies rarely if ever have members who are poor persons themselves, that is, members "of the poor"; and these bodies rarely have adequate representatives of the poor's views as such among their membership. Some Technical Action Panels may have the Directors of local Community Action Program (CAP) organizations and welfare agencies among their number. But these officials do not necessarily represent the views of the mass of the poor since their CAP or welfare agency positions are controlled by the establishment, they are not themselves poor, and frequently their outlook may be middle-class- and establishment-oriented. This is especially true with respect to the Directors of CAP programs since the Green Amendment, 42 U.S.C. § 2790 (Supp. III, 1965-1967), *amending* 42 U.S.C. § 2790 (1964).

In addition, the Department of Health, Education, and Welfare reported that:

> The Social Security Administration [with respect to Medicare] consults with the Health Insurance Benefit Advisory Counsel, a panel of 19 persons outstanding in fields related to hospital, medical and health activities, on matters of general policy and in the formulation of regulations. The panel includes representatives of public and private medicine, hospitals, nursing homes, health insurance, labor, and the general public. The poor, as such, are not represented on the panel—the public, as such, is represented on the panel.

Obviously, attempts to ascertain accurately the views of the poor from these people are not likely to be very successful.

8. For example, the Department of Labor reported:

> When notice of proposed rulemaking is given, the Department of Labor invites every interested person to submit written data, views or argument, and, when an opportunity is provided for oral presentations, to participate orally. Special notice is customarily given labor unions where interest of their members is involved.

And the Federal Trade Commission reported that it attempts to ascertain the views of the poor "through building up of public records contributed by members and representatives of all sectors of the economy and through the holding of public hearings in some cases." According to the questionnaire responses, no special effort seems to be made by these two agencies to notify the poor or solicit their views as distinguished from the public generally. Certainly the unions are not adequate representatives of the poor's interests before the Department of Labor.

that no particular groups or organizations had intervened or otherwise participated in their rulemaking for this purpose.[9] An additional number of respondents indicated that outside organizations had participated, on behalf of the poor, in agency rulemaking for some programs substantially affecting such people, but not at all in the rulemaking for other such programs.[10]

According to the responses received to another interrogatory contained in the questionnaire, the present situation is not likely to change very much without external stimulation. The agencies were asked:

> 6. Does your agency contemplate using any particular means not utilized at the present time by it to insure that the views of the poor are adequately ascertained prior to the promulgation of any rule intended to implement or affect these programs? If so, please explain in detail.

A number of very important agencies from the point of view of the poor indicated that they intended to institute new and more effective means by which to ascertain the views of the poor with respect to rulemaking substantially affecting those people.[11] However, most agency respondents indicated that they had no such plans, and that they were satisfied with their present efforts in this regard.[12]

In addition to the responses gleaned from the questionnaire distributed to the various federal government agencies, other evidence directly or indirectly supports the proposition that the interests of

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9. For example, the Department of Transportation reported that: "No particular groups have intervened or otherwise participated for the purpose of representing the views of the poor in rulemaking in this Department"; the Equal Employment Opportunity Commission reported that "[n]o group or organization has formally intervened or participated for the specific purpose of representing the views of the poor in rulemaking"; and TVA simply answered question 7, "No."

10. For example, the Small Business Administration reported that no groups participated to represent the poor in rulemaking for any of its programs except the Economic Opportunity Loan Program, where many groups have participated for this purpose. Similarly, the Department of Agriculture reported that for food distribution programs, some groups had participated, but for Farmers Home Administration programs, "[t]he answer to this question is in the negative."

11. The Department of Health, Education, and Welfare, the Department of Agriculture (but only in regard to consumer food programs), and the Department of Labor reported such plans.

12. For example, the Veterans' Administration stated that: "[w]e have no plan at present to use any particular means other than those explained above, to insure that the needs of the poor veterans, as such, are ascertained prior to the promulgation of rules." The Equal Employment Opportunity Commission reported that: "[o]ur agency does not at present contemplate utilization of other means to insure that the views of the poor are ascertained prior to promulgation of rules." And the Small Business Administration and Tennessee Valley Authority both simply replied "No" to question 6.

the poor have had inadequate representation in federal rulemaking important to them. Officials of a number of major organizations purporting to represent some segment of the poor were questioned.[13] They indicated that poor people's organizations had only rarely participated in federal administrative rulemaking, and then only very recently and on an ad hoc basis. The reasons most often cited for the failure of the poor to participate more extensively in that process were their lack of knowledge that rules of interest to them were being considered, their lack of money to finance such participation, their lack of knowledge of the means by which they could participate, and the relevant agencies' lack of interest in ascertaining their views.

The representatives of those poor people's organizations questioned during this study also made another significant point. They insisted that one of the most important deficiencies of the federal administrative process is the inability of economically underprivileged persons to have their views adequately represented in the formulation of policies affecting them. In this connection it should be noted that the Poor People's Campaign of 1968 specifically and repeatedly demanded that there should be greater consultation with the poor and greater consideration of their views in the formulation of administrative regulations affecting them.[14] In responding to these

13. Among the people questioned, either in person or over the telephone, were Clarence Mitchell, NAACP; Cenoria Johnson, Urban League; Tim Sampson, National Welfare Rights Organization; Philip Ryan, in the offices of Marian Wright, Counsel to the Poor People's Campaign; Steven Rosenfield, Citizens Advocate Center; Norman Kurland, Citizens Crusade Against Poverty; and Larry Silver, Neighborhood Legal Services Program. All of the above are located in Washington, D.C. Also questioned were Gary Bellow of the California Rural Legal Assistance Program, McFarland, California; Junius Allison of the National Legal Aid and Defender Association, Chicago; and Leroy Clark, formerly of the NAACP Legal and Educational Defense Fund of New York.

14. For example, the Poor People's Campaign demanded of the Department of Labor "[i]nvolvement of the poor in decision making about manpower training and other employment programs"; of the Office of Economic Opportunity "that the O.E.O. reorder its priorities so that the consumers of services be involved in the policy making . . . of those programs which continue to be administered by the agency"; of the Department of Health, Education, and Welfare (1) "that the Department of Health, Education and Welfare require of grantees that poor people be included in planning bodies under the comprehensive health planning and Medicare programs which have provisions for citizen membership on their planning boards" (2) that HEW "[e]stablish a national structure and mechanism which provides for continuous input by poor black, brown, and white people in the design, development, operation and evaluation of all federally funded education programs" and (3) that HEW "requir[e] that [welfare] recipients be involved in making policy and program decisions about how the program will be carried out by the states and localities."

The quoted demands may be found in the mimeo sheets entitled "Statement of Demands for Rights of the Poor Presented to Agencies of the U.S. Government by the Southern Christian Leadership Conference and Its Committee of 100, April 29-30, May 1, 1968" presented by the Poor People's Campaign to each of the above agencies.

demands, some federal agencies tacitly admitted that the poor had been inadequately represented in the formulation of administrative policy. Those few agencies stated that they intended to adopt new means to enhance the poor's participation in that process.[15] This fact correlates with the previously reported responses to question 6 of the questionnaire.

The official agency responses to some of the specific substantive demands made by the Poor People's Campaign of 1968 may also constitute some evidence that the poor have been inadequately represented in the federal rulemaking process. After examining objections raised by the poor, a number of agencies admitted that several of their substantive policies questioned by that Campaign were inadequate and should be changed.[16] This indicates that these

15. For example, note that the Department of Health, Education, and Welfare replied to the Poor People's Campaign by stating that (1) "We will increase our efforts to involve persons representative of the poor in our activities and on our Advisory Committees," (2) "we will establish, and require each state to establish, some vehicle for obtaining the advice of the poor, especially recipients in program and policy development," and (3) "the Commissioner [of Education] and members of his staff will meet with a group of persons broadly representative of the poor and arrange for continued participation of such a group with respect to all federally funded education programs in the Office of Education"; the Department of Labor responded by stating that "[a]dditional efforts to reach and to communicate with the poor must be made so that their needs are understood"; and the Office of Economic Opportunity responded to the Poor People's Campaign by stating that "[t]he Community Action Program is instituting a system by which drafts of major policy instructions will be circulated for comment to all grantees and national organizations interested in community action before becoming official. Representatives of the poor on C.A.A. boards and advisory counsels shall thus have a chance to discuss policy and make their views known to O.E.O. before the policy is formally adopted. . . . The O.E.O. will involve the poor as consultants in O.E.O. program development."

The above quotations may be found in the official responses from each of the above agencies to the demands of the Poor People's Campaign. Letters to the Reverend Ralph Abernathy from Wilbur Cohen, Secretary of Health, Education, and Welfare May 25, 1968, and June 18, 1968; from Willard Wirtz, Secretary of Labor, dated May 27, 1968; from Bertram Harding, Acting Director of OEO, undated and titled "Office of Economic Opportunity Response to Poor People's Campaign."

16. For example, in response to a request for more stringent enforcement of fair employment by federal government contractors, the Department of Labor stated that it "will issue new guidelines requiring firms holding government contracts to use hiring and promotion tests that are racially culturally fair." It also stated that it "will issue new regulations to tighten the Labor Department equal opportunity programs," expanding coverage from first level to all levels of subcontractors and requiring positive action programs from contractors. Letter from Willard Wirtz, Secretary of Labor, to the Reverend Ralph Abernathy May 27, 1968. Similarly, in response to a demand that health services be made available to poor through comprehensive neighborhood health centers, the Department of Health, Education, and Welfare responded that it will pool funds from different sections of HEW and other agencies to support comprehensive health services in poor urban and rural areas. And in response to a demand that only declarations of facts be required of recipients under federally financed state welfare programs the Department promised to institute such a system. For both of the above HEW replies, *see* letter to the Reverend Ralph Abernathy from Wilbur Cohen, Secretary of Health, Education, and Welfare May 25, 1968. Note also that of the five high-priority changes in the size, shape, and location of food distribution

agencies may not have been properly apprised of the relevant interests of poor people when the administrative decision makers first formulated the policies involved. A few officials have privately admitted that this was the case in some of those situations. (Of course, in other of those situations the decision makers may have been adequately apprised of the relevant interests of the poor and simply made unwise policy decisions. High quality representation of the poor's interests in rulemaking cannot invariably assure that administrators will make wise decisions!)

Similarly, a number of recent lawsuits may also attest to the inadequate representation accorded the poor in the federal rulemaking process. These suits indicate, in one way or another, that certain federal administrative action or inaction did not properly protect the interests of poor people.[17] A possible implication may be that the interests of the poor were so inadequately represented in those agencies' policymaking processes that a lawsuit was required to induce proper protection for the economically underprivileged.

To all the above evidence may be added the fact that many scholars studying the poverty problem agree that the interests of the poor are inadequately represented in the rulemaking process. Moreover, in some situations the administrative rules or lack of administrative rules implementing a particular program affecting the poor treat the interests of those people in such a way that the poor were not likely to have been properly represented in their formulation.[18] It should also be recalled, as noted previously, that administrative policy makers almost always have middle-class backgrounds and therefore are not usually personally familiar with, or natural advocates for, the interests of the poor.

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programs demanded by the Poor People's Campaign of the Department of Agriculture, four were at least partially met. Des Moines Register, Nov. 16, 1968, at 8, col. 4, 5; Wall St. J., Dec. 12, 1968, at 2, col. 3.

17. *See, e.g.*, King v. Smith, 392 U.S. 309 (1968), holding that the Alabama substitute-father regulation (which requires disqualification of otherwise eligible children from federally supported aid to dependent children if their mother cohabits with a man not obligated by Alabama law to provide support) defines "parent" in a manner inconsistent with the national Social Security Act and is therefore invalid with respect to the program. 392 U.S. at 333 n.4. To the extent HEW approved any man-in-the-house provision in state plans that conflicted with the Social Security Act that approval was improper because it was inconsistent with the controlling federal act. After *King v. Smith*, HEW issued new regulations outlawing such substitute-father rules. 33 Fed. Reg. 11290. In Thorpe v. Housing Authority, 386 U.S. 670 (1967), a tenant in federally assisted low rent public housing was given notice of eviction without explanation after being elected president of a tenants' organization. The Supreme Court vacated the judgment below affirming eviction and remanded for a reassessment of that judgment in light of directive issued by the Department of Housing and Urban Development after grant of certiorari requiring that no tenant be given notice to vacate without reasons for eviction and a chance to explain.

18. *See, e.g.*, Note, *Welfare's "Condition X"*, 76 YALE L.J. 1222 (1967).

C. *Some Definitions*

In light of the above evidence, a number of specific recommendations with respect to representation for the poor in federal rulemaking seem appropriate. To assure precision, several terms utilized in the attached recommendations (see Appendix A) and in the remainder of this Article deserve definition. The words "poor" and "economically underprivileged" are used as synonyms. They refer to that group in our society unable to represent adequately its collective interests in federal rulemaking because its members lack the individual or organizational financial resources to do so. Consistent with this definition some groups of individuals may be poor or economically underprivileged in relation to certain rulemaking and not in relation to other rulemaking. This Article and the accompanying recommendations assume that people will be treated as poor only in the rulemaking situations where they are unable to represent themselves adequately because of their financial incapacity. Depending on the circumstances it is possible, therefore, that those who are deemed poor for present purposes may vary to some extent with the particular rulemaking involved.

The "rulemaking" referred to is that defined by section 2(c) of the Federal Administrative Procedure Act (APA).[19] "Rulemaking" therefore means "agency process for the formulation, amendment or repeal of a rule." The word "rule" refers to "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency . . . ."[20]

D. *The Precise Scope of the Task*

The purpose of the appended recommendations is to assure that the interests of the poor in our society are adequately represented in all federal rulemaking having a substantial impact on them. In doing so, the primary concern is the ability of the economically underprivileged to participate in rulemaking both for those programs directly aimed at them and for those which, although not directed at the poor, substantially affect them as a separate group. However, the need for adequate poor people's representation in rulemaking extends beyond this. Rulemaking for some programs thought not to concern the poor and usually not affecting the poor may, on occasion, have a large impact on them. Consequently, an

19. 5 U.S.C. § 1001(c) (1964), *as amended*, 5 U.S.C. § 551(5) (Supp. III, 1965-1967).
20. 5 U.S.C. § 1001(c) (1964), *as amended*, 5 U.S.C. § 551(4) (Supp. III, 1965-1967).

adequate remedy must include a mechanism for monitoring, on behalf of the poor, *all* federal rulemaking; and it must assure, insofar as practicable, representation for the poor in *all* rulemaking having a substantial impact on them, even though that rulemaking occurs in a particular program not normally having that kind of effect. The need to secure representation for the poor for all rulemaking of this sort is especially critical when it is remembered that rulemaking is frequently not an on-going process. It may be a one-time affair resulting in a rule to last for the indefinite future. Failure to assure adequate representation for the poor's interests in all rulemaking having a substantial impact on them as a separable group may, therefore, have long-term rather than short-term deleterious consequences in many situations.

It would be simple to formulate a nearly perfect solution to the problem under consideration if the poor were a monolithic or homogeneous group with its own democratically elected representative structure which could be called upon to articulate the particular interests of the poor wherever they were affected. The fact is that no organization, group, or individual can rightfully assert that it speaks for all the poor of this country in any truly democratic or representative sense. The poor are too heterogeneous and diverse; their interests too disparate and fractionalized. Even the sum total of all groups or organizations purporting to represent the interests of the American poor do not do so in any really democratic sense since most poor people are not members of any such group or organization. The interests of the majority of poor may also sometimes diverge from the views of the many organized groups purporting to speak for some segment of them or for all of them. In addition, the leadership of some so-called "poor people's groups" may fall into the hands of persons who are in fact out of touch—or simply not concerned—with reflecting the views and promoting the welfare of the mass of the economically underprivileged. For these reasons, the creation of a truly representative agent to articulate and represent the heterogeneous interests of the poor is both impractical and infeasible. Consequently, the most satisfactory means of assuring adequate representation for the poor in federal rulemaking substantially affecting their interests will necessarily be imperfect. It also may have to be, in at least one sense, artificial and imposed from above.

Efforts to secure adequate representation for the economically underprivileged in all federal rulemaking having a substantial impact on them will have to move on two fronts to be successful. An attempt must be made to assure that federal agencies making rules

of this kind independently seek to ascertain from the poor their views with respect to such rules. In addition, an attempt must be made to help the poor obtain affirmative representation for their interests in the rulemaking process. That is, some means must be devised by which to assure that these people have a competent, consistent, and aggressive advocate for their interests before federal agencies. Within the limits set by this two-pronged approach, a desirable solution should also be feasible—that is, realistically achievable; should take account of the fact that the interests of the poor needing representation may often be fractionalized and diverse; should be workable in an everyday, operative sense; and should be as economical as possible. Moreover, such a solution should be practical in the sense that the positive contribution it may make to the administrative process should overbalance any negative impact it may have on that process or other societal values. A desirable resolution of the problem under consideration should also make it as obvious as possible to the poor that their views will be adequately represented in rulemaking. This particular requirement may not directly enhance the proper functioning of the administrative process as such. It may, however, help to eliminate that portion of the poor's distrust of and dissatisfaction with government which stems from their perception that officialdom does not adequately consider their views when it makes policy affecting them.

II. Assuring Affirmative Agency Action To Ascertain the Views of Poor People

A. *Generally*

Officials responsible for promulgating rules substantially affecting the economically underprivileged segment of our society should, where feasible, increase their existing efforts to ascertain independently the views of poor people. They should also devise additional effective means by which to do so. This approach stresses the ability of the several agencies involved to develop and utilize affirmative procedures for obtaining, through direct and continuing contact with the poor themselves, the specific information that they should consider when they formulate their programs affecting the poor.

There is an analogy in Budget Bureau Circular A-85, which is entitled "Consultation with Heads of State and Local Governments in Development of Federal Rules, Regulations, Procedures and Guidelines." This document orders federal agencies to follow certain procedures geared to assure that there is adequate consultation

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with the heads of state and local governments prior to the promulgation of rules for the implementation of specific kinds of federal programs vitally affecting them. The Defense Production Act of 1950 also provided that "[a]ny rule, regulation, or order, or amendment thereto, issued under authority of this Act shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations . . . ."[21] Similarly, federal agencies should follow procedures with respect to rulemaking that will assure, where feasible and practicable, independent agency efforts to ascertain directly from the poor their views with respect to proposed rules substantially affecting them.

B. *Some Specific Suggestions*

Agencies administering programs of concern to the poor should be urged to hold formal hearings—that is, oral public hearings—on proposed rules in close geographic proximity to the poor people affected. They should also be urged to obtain witnesses and solicit written views from among the affected poor and organizational representatives of the affected poor. Federal agencies should use special notice and hearing arrangements tailored to meet the peculiar problems of economically underprivileged persons in order to assure their effectiveness in accurately and successfully obtaining the views of such people. As an illustration, publication of a proposed regulation and notice of a public hearing in the Federal Register may constitute adequate notice for middle and upper income Americans whose agents or group representatives read that periodical, but it is usually inadequate by itself to apprise the poor. To faciliate affirmative agency action to ascertain the views of the poor, increased use of field surveys should also be encouraged. In addition, or as an alternative to some of the above suggestions, agencies should hold very informal conferences with the poor in their own neighborhoods in order to discuss with them contemplated rulemaking affecting such persons' interests.

Agencies should also be urged to pay certain of the personal expenses of economically underprivileged witnesses in rulemaking hearings where that would help assure adequate representation for the poor. In this way the federal agencies may facilitate the appearance of an adequate number and variety of poor people's represen-

21. Act of Sept. 8, 1950, ch. 932, § 709, 64 Stat. 819.

tatives in such proceedings. If economically underprivileged individuals must incur transportation, meal, or babysitting costs in order to testify on behalf of the poor, of if they must lose a day's wages, they should be reimbursed. Unlike the more affluent members of our society, poor people cannot afford to finance the extra costs involved in representing their own interests. At the present time most agencies are probably unable or unwilling to pay such expenses incurred by underprivileged persons seeking to represent the interests of the poor in rulemaking hearings. In order to remove any doubts as to their authority, federal agencies should be expressly empowered, in their discretion, to pay the basic personal expenses incurred by poor persons acting in such a capacity.

Each agency administering programs with a high impact on the poor should also be urged to constitute, where practicable, a formal advisory committee to apprise the agency of poor people's interests that should be weighed in the operation of its programs. These committees should be composed of persons who are themselves economically underprivileged, or the direct and close representatives of such persons. The committees should be continually kept informed of those activities of their respective agencies that specially concern them; and they should be consulted for their views before the agency makes any rules substantially affecting the interests of the economically underprivileged segment of our society. All expenses incident to the operation of such advisory bodies should be borne by the respective agencies. "Regulations for the Formation and Use of Advisory Committees" already exist.[22] These might be revised, expanded, and reoriented for this purpose.

In the future, the Administrative Conference of the United States should monitor the extent to which federal agencies actually do institute specific procedures like those just discussed. Government officials must be induced to increase their own affirmative efforts to ascertain the views of the poor with respect to rulemaking which affects them substantially. If the Conference finds that the recommendations urging voluntary agency action in this regard are not adequately affecting official behavior patterns in practice, it might then recommend that agencies be required to follow certain of the above specific procedures with respect to particular programs.

Although federal agencies might, if necssary, be required to follow some of the procedures outlined above in specific programs or situations, there are a number of reasons why federal agencies

22. Exec. Order No. 11,007, 27 Fed. Reg. 1875 (1962).

should not be *required* to follow certain of those procedures *in every case* where they engage in rulemaking substantially affecting the poor. These procedures may be completely superfluous in a number of cases because the views of the poor are unmistakably clear and a matter of public record. In addition, many of the specific procedures outlined as possible means to induce affirmative agency ascertainment of the poor's interests in agency rulemaking may be very impractical. The agencies have an undisputed need to conduct their affairs inexpensively, simply, conveniently, flexibly, and expeditiously. Requirements of the sort outlined above may be unusually difficult to draft and administer because of the peculiar problems in defining precisely those whose views the agency must solicit or appoint as representatives of the poor, when or where oral hearings or conferences must be held or field surveys taken, and the like. Whether an oral hearing should be held with respect to a certain proposed rule, precisely where and when it should be held, who exactly should be invited to testify, and whether a field survey should be made are all judgment questions. Someone, probably the rulemaking agency, must exercise some discretionary judgment. And to require useless hearings, conferences, or field surveys, endless lines of repetitive and inarticulate witnesses, and the like, would be to interject the worst kind of mischief into the administrative process, hamstringing rather than improving it.

However, if federal agencies will voluntarily follow the previous suggestions in all those situations where they are feasible, practicable, and necessary to assure that officials are fully informed about the relevant interests of the poor, the agencies will help solve the problem under consideration. The proposals outlined in this section have the advantage of assuring self-starting and independent affirmative agency action to secure information directly from the poor concerning their position with respect to rulemaking substantially affecting them. An effective pipeline from the poor to those who are responsible for rulemaking decisions could result. The fact that the government would bear the sole or primary financial burden for this mode of assuring consideration of the poor's interests in rulemaking also enhances its attractiveness and effectiveness.

C. *The Inadequacy of Affirmative Agency Efforts*

Procedures to assure self-initiated affirmative official action to ascertain from the poor their views with respect to agency rulemak-

ing will, if sound in their details, undoubtedly be helpful; but such procedures are entirely inadequate solutions for the problem at hand in at least one major respect. They do not completely compensate for that which the poor currently lack. Economically underprivileged people do not have the resources necessary to assure a technically sound and consistently available articulate presentation of their views concerning rulemaking to the appropriate agencies. Those segments of our society with adequate economic resources have long employed legal counsel—with their special technical proficiencies, knowledge, and skill as advocates—for these purposes. By the use of lawyers' professional abilities, the well-financed have assured that the kind of representation actually afforded their interests before government policy makers is qualitatively high, and much more effective than it could possibly be otherwise.

The poor are entitled to, and must have in order to make their interests known effectively, both the quantity and quality of representation in rulemaking before federal agencies that commercial corporations and labor unions consistently utilize. That necessitates furnishing the poor, in one way or another, with legal counsel for this particular purpose. Because the poor lack the personal and organizational resources to hire such skilled, persistent, and knowledgeable help, affirmative agency efforts of the kind discussed above, although useful, would still result in qualitatively inadequate representation in rulemaking for the economically underprivileged segment of our society. The reason for this is that existing sources of public and private legal aid to the poor, such as legal aid and public defender programs, do not usually provide the economically underprivileged segments of our society with representation in rulemaking. These programs are primarily, if not exclusively, concerned with serving the interests of individual poor clients in adjudicative or potentially adjudicative situations.

III. A Clearinghouse Coordinator?

The poor might obtain the quantity and quality of representation they need for their views in federal rulemaking if a well-financed clearinghouse-coordinator organization was created. Such an organization could systematically furnish all poor people's groups in this country with information concerning existing or proposed federal administrative regulations having a substantial impact on the poor. In addition, it could encourage and coordinate participation in federal rulemaking by organizations representing the eco-

nomically underprivileged. Where necessary, this entity could also finance participation in rulemaking by various poor people's groups. That is, the clearinghouse coordinator might make conditional limited-purpose grants to poor people's organizations so that they could individually hire personal legal counsel to represent their views in a particular rulemaking matter. Such a clearinghouse coordinator would not itself attempt to play any direct role as an advocate in the rulemaking process. It would not act as a separate representative of the poor. An organization of this type could be financed by private contributions, government grants; or both, and, it could be constituted as an independent private body under the control of all of its constituent users in order to assure the maximum satisfaction of its clients.

Utilization of this kind of clearinghouse coordinator has several advantages as a solution to the problem of improved representation for the poor in federal rulemaking. It would encourage and facilitate more frequent and continuous representation of poor people's interests in the rulemaking process by organizations and groups representing some segment of the economically underprivileged. The clearinghouse coordinator might also result in representation for more of the many divergent and disparate interests present in that group in our society loosely characterized here as "the poor" than would otherwise be the case. In addition, the existence of such a body might induce a better and more accurate presentation of the views of the poor on many matters than might be the case with some other solutions. This is true because the source of the views and the representation of those views would be relatively close to the poor themselves. Since this solution would provide poor people's groups with funds to engage their own separate and personal counsel for the purposes of representation and advocacy in rulemaking proceedings, it would assure that the views of those organizations are accurately, articulately, knowledgeably, and aggressively presented to the agencies in question.

Still, such a clearinghouse-coordinator organization is probably an inadequate and inefficient solution to the problem at hand. It assumes that existing organized groups purporting to represent the poor can or will do an adequate job of protecting those people's interests with respect to federal rulemaking if such bodies are kept informed of the facts, their efforts are coordinated, and sufficient financing is made available to them. This is a questionable assumption, although admittedly it is hard to prove or disprove entirely on the basis of undisputed evidence. Existing poor people's organizations

have sometimes been aware of proposed or existing rules of special concern to the poor generally, and yet have failed to act.[23] In many of these instances, their failure cannot be attributed entirely to a lack of organizational resources.

It should be reiterated that most poor people do not belong to organizations dedicated to protecting and advancing their interests; and the views of "poor people's groups," or of the controlling leadership of such groups, may frequently be out of touch with, or divergent from, the interests of the mass of the poor. The clearinghouse-coordinator proposal will not, therefore, consistently assure adequate representation in rulemaking for the collective interests of the poor as a general group. The device may assure representation in rulemaking only for the views of organized poor people's groups, or for the views of the leadership class of those groups. Depending on the specific case, that kind of representation may or may not be adequate to protect the interests of the mass of the poor people in this country.

The grant-financed efforts of numerous poor people's groups, each seeking to represent separately the interests of the economically underprivileged in federal rulemaking, may also be unduly duplicatory and therefore wasteful and unnecessarily burdensome to the administrative process. Furthermore, many administrative difficulties will appear in any effort to entrust a mandatory grant-making responsibility to the clearinghouse coordinator. Must every organizational applicant seeking funds with which to represent the poor in federal rulemaking be financed? If not, which groups in any given situation should be financed? These difficulties could be largely avoided if, depending on the facts of each case, the clearinghouse coordinator had the option of representing the interests of the poor itself or contracting with others to do so. In addition, freedom for each poor people's organization to hire its own separate lawyer for these purposes may be much more expensive and less effective than providing the poor with one specialist law firm working full time to represent their collective interests in federal rulemaking.

For all of the above reasons the clearinghouse-coordinator approach to solving this problem is inadequate. It is too likely to result in uneven and inconsistent representation for the collective interests

23. The Department of Agriculture's Commodity Distribution and Food Stamp programs for the poor are an example. Although poor people's organizations were aware of the existence of those programs and the Department rules under which they were operated, they did not seem to take any active interest in those programs until the last year or so.

of the poor as a class in federal rulemaking. Moreover, it seems relatively uneconomical and inefficient. As subsequent discussion will demonstrate, a more desirable solution to the problem under consideration can be formulated. That solution could assure more adequate representation for the poor in federal rulemaking than the clearinghouse coordinator. At the same time, it could also incorporate, by one means or another, most of the special advantages of the clearinghouse coordinator.

IV. The Independent Poor People's Counsel

A. *Generally*

The most desirable solution to the problem under consideration would seem to be the creation of a people's counsel organization which would hire a staff to represent the interests of the poor in all federal rulemaking that substantially affects them.[24] Such a counsel would be an artificial representative *for* the poor in this process without any pretense of being a democratically chosen spokesman *of*

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24. This seems to be the general philosophy of the Feighan Bill, H.R. 17974, 90th Cong., 2d Sess. (1968), the text of which follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is fundamental to wise administrative rulemaking that, except in limited or unusual circumstances, persons whose interests may be affected be assured of an opportunity to participate in rulemaking through submission of data, views, or arguments to the responsible rulemaking agency. Rulemaking frequently affects persons without the resources necessary to keep themselves informed concerning proposed rules or to petition for rules or amendment or repeal of rules. Hence it is necessary that means be provided whereby, insofar as feasible, the interests of such persons may be protected in rulemaking and whereby the rulemaking process may be benefited by advocacy on behalf of such interests.

SEC. 2. Section 553, in chapter 5, Administrative Procedure, of title 5, United States Code, is hereby amended by adding thereto the following subsection:

"(f) The Attorney General is directed to enter into contracts with, or to make grants subject to appropriate conditions to, the National Legal Aid and Defender Association, or such other nationally organized nonprofit bodies with generally similar objectives as he may deem desirable, whereby such body or bodies may be provided with funds to enable them to participate in rulemaking in accordance with this section on behalf of interested persons who, because of their lack of personal resources, are unable effectively to do so. Any such body shall be deemed to be an interested person for the purpose of this section. Such body or bodies may contract with other persons to aid in effectuating the purposes of such contract or grant. The Attorney General is authorized to adopt such rules or regulations as may be appropriate to the administration of this subsection. He is authorized, further, after consultation with the agency involved, by order to make this section applicable to matters relating to public property, loans, grants, benefits, or contracts in circumstances where he determines that such matters so affect the interests of persons of limited means as to make it appropriate that, in connection with rulemaking with respect to such matters, a body or bodies receiving a contract or grant under this subsection should have an opportunity to represent such interests."

SEC. 3. There are hereby authorized to be appropriated such funds as are necessary to carry out the provisions of section 2.

Senator Hart introduced the same bill in the Senate as S. 3703, 90th Cong., 2d Sess. (1968).

the poor. This counsel, as an advocate, would be charged with the responsibility of separately and independently representing the collective interests of the poor as a class in all federal rulemaking. Where the interests of the poor on a pending rule are divergent, it would also be responsible for assuring the representation of those disparate views either in its own presentation or by other individuals or organizations. In performing its representational responsibility for the economically underprivileged, such an advocate would be under an affirmative duty to seek the advice and help of relevant sources of every kind, whether private or governmental, individual or organizational. It would be obliged to use every device available to keep in as close touch as possible with the needs and views of those whose interests it purports to represent. Although such a counsel's staff would probably be middle class, great pains should be taken, and special procedures instituted, to prevent it from being captured or dominated by a middle-class point of view.

As an aid in this respect, it might be desirable to establish official advisory committees to the poor people's counsel in each area of major concern such as welfare programs, housing, employment, education, and so forth. The membership of such committees should be composed of individuals who are as representative of the poor of this country as possible. These committees should not, however, become the exclusive source for the poor's communication with their people's counsel. There is always a danger that committee members, regardless of the care exercised in their appointment, may have divergent views and interests from the mass of the economically underprivileged. For this reason, the people's counsel should hold informal hearings among the poor on the larger and more important issues so that it can better represent their interests on those subjects. Close liaison between the people's counsel and Office of Economic Opportunity (OEO) community action groups, legal aid societies, civil rights organizations, and other poor people's groups throughout the country is also crucial. This will help to assure that the people's counsel will remain as reflective as possible of the real interests, views, and needs of those people in our society that it ultimately must serve.

B. *Specific Functions of the Poor People's Counsel*

The people's counsel would do everything necessary to represent effectively the interests of the poor in all federal rulemaking substantially affecting them. Such a body would perform most of the

same functions for the poor with respect to the federal rulemaking process that Washington law firms perform for their well-financed clients. It would monitor the activities of federal agencies to assure that it is fully informed with respect to all rulemaking or potential rulemaking affecting the interests of the poor. When a federal agency proposes new rules of concern to the economically underprivileged, counsel for the poor would present their views on the desirability of the proposed regulations and actively lobby for the interests of the poor. This would include the drafting of substitute rules for the ones suggested by the government agency. Additionally, the people's advocate would formulate, and urge the appropriate authorities to adopt, entirely new rules and revisions of old rules substantially affecting poor persons. To perform these functions, the people's counsel would need an adequate staff not only of lawyers, but also of economists and other social scientists. This would assure that it will be capable of competently responding in kind to the arguments and technical data presented by the personnel of the various agencies with which it must deal.

In addition, the poor people's advocate would be charged with some of the specific obligations of the clearinghouse coordinator. That is, it would keep organizations representing the poor informed as to all federal rulemaking affecting their interests, and it would coordinate and facilitate those organizations' separate participation in such rulemaking if any of them had the desire and capacity to do so.

The people's counsel should also be authorized, in its discretion, to make contracts with other organizations as a means of helping to represent, in the rulemaking process, minority or divergent viewpoints with respect to the interests of the poor. Interjection of such minority or divergent views into the rulemaking process may be a function that the people's counsel will want to contract out to others because, by doing so, it might avoid some possible internal conflicts of interest in its organizational setup. The extent to which this contracting power is actually used ought to be left to the sole discretion of the people's counsel. Nevertheless, the expectation is that the staff of the people's counsel will normally perform all of the representation functions assigned to it.

The people's counsel would occasionally propose to the President or Congress, or both, new legislation (or executive orders) geared to institute reforms in administrative programs substantially affecting the poor. An agency may refuse to exercise its existing authority to make the kind of rules deemed necessary by the people's advocate

to protect the interests of its constituency. Or an agency willing to make such rules may not have the authority to do so because legislation forbids it or fails to authorize it. In all of the above cases Congress can correct the situation by statute and thereby ensure the promulgation of rules satisfactory to the people's counsel. As a result, the advocate of the poor should be empowered to propose legislation to Congress or the President when that would be an aid in performing its primary responsibility—effectively representing the poor's collective interests in federal rulemaking.

The people's counsel should also be empowered to play an independent role in the judicial review of federal administrative rules. As a representative of the poor, the counsel should be able to challenge in court, under its own name, the validity of any federal rule substantially affecting poor persons. Only with this authority will the views of the people's counsel have any creditable weight with the agencies before which it is to operate. The image and attendant effectiveness of the people's advocate will be greatly enhanced if federal agencies know that the people's counsel can freely institute judicial review of agency rules under its own name and solely on its own initiative. Absent that authority, the people's counsel might be totally ignored by the administrative establishment; officialdom would know that there is little bite behind the counsel's bark. Power to seek judicial review of an agency's rules on the grounds that they are unauthorized, are in conflict with a statute, are unconstitutional, or have been promulgated without the required procedure is, therefore, very important. The poor's advocate should not be forced to give up after it unsuccessfully opposes the promulgation of a certain rule that is antithetical to the interests of the economically underprivileged if that rule is vulnerable to attack in the courts.

The ability to sue in its own name as an official representative of the poor is also especially important to the people's counsel because that right frees the counsel from any dependency on particular poor persons who would otherwise have to be the named plaintiffs in such suits. Since it is responsible for representing the collective interests of the poor, the people's counsel should not be put in the position of having to reconcile that duty with the individual interests of a particular poor person acting as official plaintiff in a court case. In addition, if the poor people's advocate can sue in its own name, many administrative difficulties and extra expenses can be avoided. Congress should, therefore, specifically vest the people's counsel with this right. Delegation of that authority to such a counsel would not, of course, preclude other individuals and organizations with

standing from seeking judicial review of federal agency rules on behalf of poor people's interests.

A very broad precedent supporting the right of a representative body to seek judicial review of administrative action adversely affecting those whose interests it seeks to protect is *Office of Communication of the United Church of Christ v. FCC.*[25] That case held that a church has standing as a "party in interest" to seek judicial review as a representative of its members as listeners whose interests the FCC is required to protect. Since that organization was a voluntary-membership body seeking to assert the rights of persons who freely chose to join it, the *Church of Christ* case might be distinguished from the situation under consideration here. However, if an act of Congress expressly authorized the people's counsel to seek judicial review of federal rules having a substantial impact on the poor, in its own name as an official representative of such persons, the standing of that counsel would be clear. Of course, a question might be raised whether a case or controversy exists in a judicial proceeding pitting an artificial poor people's representative accorded such a statutory right to judicial review against an agency whose rules are challenged on behalf of the poor. However, it seems clear that one exists. A statute of Congress would impose a legal duty on the people's counsel to protect the interests of underprivileged persons in federal rulemaking—a duty that would include attempts to invalidate improper rules in court; and the various federal agencies have an adverse legal obligation to defend the integrity of their rules against attack by others. Some might argue that *Muskrat v. United States*[26] casts doubt upon the ability of such a people's counsel to sue in its own name as a representative of the poor, even after Congress specifically empowers it to do so. But that case is probably no longer the law.[27]

As a wise allocation of its resources, the people's counsel may frequently elect to assist other agencies representing the poor to prosecute court cases relating to the validity of federal administrative regulations instead of instituting such suits itself. To this end it might distribute to appropriate legal aid organizations memoranda explaining that specified regulations may be subject to successful attack in the courts. In addition, the people's advocate could give

25. 359 F.2d 994 (D.C. Cir. 1966).

26. 219 U.S. 346 (1911) (holding that Congress could not authorize named Cherokee Indians to institute suits on their own behalf and on behalf of other Cherokees having similar allotments to determine the validity of acts of Congress restricting alienation of certain land and increasing the number of persons entitled to share in it).

27. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 374 (1959).

technical or financial aid to a local legal aid organization attempting to prosecute, on its own, a test case concerning some federal rule that is inconsistent with the poor's interests. The people's counsel could also generally coordinate the efforts of legal aid groups with respect to the judicial review of federal agency rules.

The people's counsel should also be empowered to intervene under its own name on behalf of the poor in those agency adjudicative proceedings substantially affecting the economically underprivileged. The poor as a group may have as vital an interest in the outcome of certain agency adjudication as they do in most rulemaking proceedings affecting them. Many very important administrative policies are established as a result of ad hoc agency adjudication. At present, the collective interests of economically underprivileged people are inadequately represented in such federal administrative adjudication; effective participation in those proceedings requires certain skills and expertise not available to most local legal aid societies who have had little experience with the intricacies of adjudication before federal agencies. Therefore, apportioning this function to the poor people's counsel seems wise.

Representation of the poor in agency adjudicative proceedings is closely and intimately tied to the counsel's other responsibilities. Assigning this function to the people's advocate will economically utilize the expertise in federal administrative law that it will necessarily acquire through the performance of its other duties. However, the people's counsel will not be empowered to *initiate* adjudicative proceedings before federal agencies in its own name; as an official representative of the poor, it will be limited to participating in such proceedings as an intervenor. Where necessary, traditional channels of legal aid can be expected to initiate such agency adjudicative proceedings in the name of individual economically underprivileged clients.

Ordinarily the people's counsel should not perform the responsibilities of an ombudsman or personal legal counsel. That is, it should not normally handle the individual grievances of, or seek remedies for, particular poor clients. An ombudsman or personal legal counsel becomes preoccupied with the details of numerous individual claims and is therefore likely to lack a sufficiently broad independent perspective about the best ways of serving the poor as a whole. If it acted to represent particular clients, the proposed body's individual caseload would be much larger than its job of affirmatively representing the poor as a class in federal rulemaking. As a result, the latter function may be obliterated by the former function. In

addition, since all citizens, rich or poor, may experience administrative arbitrariness and ineptitude, all should have access to an ombudsman. But to be effective, the office contemplated here must concentrate on and become expert in the special problems of the poor. It must look at these problems and proposed solutions solely from the viewpoint of the poor. Furthermore, the people's counsel should be primarily concerned with affirmatively representing the interests of such individuals prior to, and as a means of avoiding, their need for an ombudsman; but because of the nature of an ombudsman's responsibility, a people's counsel charged with that additional function may see the needs for affirmative representation in rulemaking primarily in terms of the poor's appearance in its office for ombudsman's help. However, there may be very rare occasions when the people's counsel should be able to represent a particular person because that is the best or only means by which to test a certain agency policy affecting the poor as a class. In those cases it should be free to do so, but only if absolutely essential to its primary function as advocate for the collective interests of the poor in federal rulemaking.

Finally, it should be recognized that the interests of the poor and the interests of higher income groups may sometimes be identical with regard to certain rulemaking or agency adjudication. To assure adequate representation for the economically underprivileged, the people's counsel must have the independent authority to participate on behalf of the poor in *all* rulemaking and agency adjudication of concern to those people. However, a wise allocation of the advocate's resources should lead it to concentrate its efforts on representation of the poor in those situations where the interests of the poor are not adequately protected by the endeavors of other more affluent groups.

C. *Locating and Structuring the People's Counsel*

1. *A Government Office of People's Counsel*

The proposed people's counsel might be constituted as a permanent, single-purpose, and relatively independent federal government office located outside of any agency before which it would have to represent the poor. A number of arguments of varying merit have been made in favor of making the poor's advocate an integral part of the governmental establishment. It has been contended that federal agencies might be more receptive to a presentation of the poor's views by another part of the official establishment than by outsiders. Therefore, the argument continues, as a part of the

governmental structure the people's counsel might be more effective than if it were outside of that structure. If it were part of the official establishment, such a people's counsel might also be accorded access to useful information and resources that it otherwise might not be able to obtain. Furthermore, indicating that representation of the poor's interests has special importance by making it a part of the government itself might give the economically underprivileged the feeling that the official establishment really cares about their interests. As a government office, the people's counsel might also have a certain prestige and respectability not otherwise obtainable which would facilitate the recruitment and retention of a competent staff.

In practice, many of these assertions about the advantages of placing the people's counsel inside of government may prove to be unrealistic or erroneous. Moreover, location of the people's counsel as a part of government may actually be disadvantageous for a number of reasons. As a full-time employee of the United States Government, the poor's advocate is more likely than otherwise to become, at least over time, a captive of the establishment—out of touch with the poor, docile, and therefore ineffective. After all, a certain *in terrorem* effect would always exist because the appropriations for the office would continually be subjected to congressional approval. And the professional associations of the staff of the people's counsel under these circumstances would be with other government officials, all working for the same principal, and all having common interests and problems in the long run.

The idea that a government agency can do an effective job because it would be a member of the team is chimerical. One of the basic strengths of our legal system is its reliance on the adversary system. The handling of things by a member of the team smacks of "Big Brotherism." The poor would probably lack confidence in a people's counsel who, although charged with representing their interests, was part of the very government establishment they wanted to influence. The poor might well believe, regardless of actual performance, that any full-time government employee purportedly representing their interests was really not doing so. Furthermore, the underprivileged segments of our society seem to reject the basic philosophy underlying the approach that would appoint a government official to represent their interests. In the past few years the more militant elements of the poor have demanded that the poor themselves be accorded a direct voice in controlling their destiny. Finally, locating the people's counsel as a part of the federal establishment may make it less effective than otherwise possible because

its freedom to innovate and experiment may be curtailed by government red tape and bureaucratic requirements.

There is some precedent supporting the suggestion that a special government house counsel be created to represent a group unable to represent effectively its own interests before federal agencies because of its large size, amorphous nature, and lack of organization. There was an independent Office of Consumers' Counsel charged with asserting consumers' interests in bituminous coal proceedings before the National Bituminous Coal Commission.[28] The Department of Agriculture also had, at one time, a Division of Consumers' Counsel which participated in proceedings within that department on behalf of consumers.[29] A similar position seems to have existed for a period in the National Recovery Administration, the Department of Labor, and the Department of the Interior.[30] More recently, President Johnson announced the creation of the Office of Consumer Counsel in the United States Department of Justice.[31] This new office did not begin to function until the very end of 1968 because the first appointee died before he could assume his duties. The status of the office is now unclear due to the change in national administrations. In any case, the newly created Office of Consumer Counsel would not be an adequate solution for the problem at hand since the interests of the poor affected by the rulemaking process are substantially broader than those interests deriving from their status as consumers.

History may support the idea that a people's counsel of the sort contemplated here should not be constituted as a part of the government establishment. Almost all of the consumer's counsel offices organized as separate entities within the federal establishment have atrophied and disappeared. Most of them seem to have faded because, among other things, they were ineffective and made no significant contribution to the administrative process. Although not completely clear, the reasons for the conspicuous lack of success of these offices seem to have included their intimate connection with the government establishment (as an official and integral part of it), and their structural position within that establishment—that is, the fact that they were located inside of the very agencies before which they were to represent the consumer's interests.[32]

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28. 1968-69 U.S. GOVERNMENT ORGANIZATION MANUAL 687, 708.

29. *Id.* at 691.

30. *Id.* at 687.

31. *See* White House Press Conference of Betty Furness, Special Assistant to the President on Consumer Affairs, and Attorney General Ramsey Clark discussing the establishment of this office (mimeo Feb. 6, 1968).

32. On the operation of these consumer counsels *see generally* R. BAKER, THE

2. *A Private Office of the People's Counsel*

A second means of constituting the people's counsel is to utilize a private organization outside of government for these purposes. By relying on a body outside the federal establishment, the people's representative in rulemaking proceedings may be able to be more closely tied to and identified with the needs of the poor than would be possible if it were an official organ of the United States Government. A nongovernmental body may also be able to communicate more effectively with the poor than an official one. As a private organization separated from the government hierarchy, it may be less susceptible to being captured by the ideas and values of the government agencies before which it would represent the interests of the poor. A private people's counsel may also be less susceptible than a similar public counsel to intimidation by government agencies; if so, the private organization would be a more aggressive and persistent representative of the poor's interests in rulemaking than a public body.

As suggested above, such a private body may also be more flexible and thus better able to experiment and innovate in the performance of its assignment than a government-based equivalent. This greater freedom may be especially useful with respect to recruiting a staff and administering its activities. Moreover, this freedom may mean that a private people's counsel would be more efficient in the long run than a government body. As noted earlier, the poor are likely to have greater confidence in a private counsel's representation of their interests than in a public counsel's performance of that job because their advocate would not be part of the very establishment which they are trying to influence. The actions of a private counsel may also be more visible to the poor than the actions of a public counsel which could easily get lost in the huge federal bureaucracy and become relatively invisible to outside viewers. This greater visibility might make a private counsel more responsive to the interests of the poor and a greater source of satisfaction to them.

On the other hand, it has been urged that such a private organizational representative of the poor might not be as influential or effective in rulemaking proceedings as an official agency of the

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NATIONAL BITUMINOUS COAL COMMISSION: ADMINISTRATION OF THE BITUMINOUS COAL ACT, 1937-1941 at 221-53 (1941); H. JOHNSON, THE BLUE EAGLE FROM EGG TO EARTH 295-96 (1935); L. LYON, P. HOMAN, G. TERBORGH, L. LORWIN, C. DEARING, & L. MARSHALL, THE NATIONAL RECOVERY ADMINISTRATION 123-28, 210-14 (1935); Lewis, *The "Consumer" and "Public" Interests Under Public Regulation*, 46 J. POL. ECON. 97, 103-06, 106 n.10 (1938); E. NOURSE, J. DAVIS, & J. BLACK, THREE YEARS OF THE AGRICULTURAL ADJUSTMENT ADMINISTRATION 391-95 (1937).

United States charged with the same obligation. By virtue of its official status, a public people's counsel charged with representing the poor may be offered greater cooperation and opportunity for participation in rulemaking affecting the poor than a private organization charged with the same duty. In addition, a private people's counsel may not be, in and of itself, as effective a mechanism as a public people's counsel to convince the poor that the federal government really wants their interests represented in its rulemaking process. A more likely disadvantage of a private body might be its greater susceptibility to capture by the interests of some small segment of the poor, with the result that it would only serve the interests of that special group among the poor rather than the interests of the poor as a whole. However, this disadvantage can be offset by structural devices geared to avoid that situation; and it must be weighed against the specific advantage that the private organization is less susceptible to being captured by the "government view" and more likely to be in close touch with the real needs of the poor.

3. *The Public Broadcasting Corporation Model: A Compromise Solution*

A third solution to the problem of properly positioning the people's counsel is a beneficial compromise between the alternative of locating the advocate for the underprivileged inside the federal government and locating it entirely outside and separate from that establishment. The poor's representative described herein could be constituted as a completely independent, federally chartered corporation similar in most respects to the recently created Corporation for Public Broadcasting[33] or the long established American National Red Cross.[34] These organizations are hybrid public-private bodies. As such, they provide a model for the people's counsel which may combine the advantages of the purely public body with the advantages of the purely private body and minimize the disadvantages of each.

The Corporation for Public Broadcasting, for example, was created by a special act of Congress as an independent, nonprofit, and no-stock entity.[35] It is headed by a bipartisan body of fifteen members whose qualifications and fixed terms of office are set by statute. They are appointed by the President with the advice and consent of the Senate and are authorized to make policy for the body

33. 47 U.S.C. § 396 (Supp. III, 1965-1967).
34. 36 U.S.C. § 1 (1964).
35. 47 U.S.C. § 396 (Supp. III, 1965-1967).

and direct its affairs. The act creating the corporation specifies its purposes and powers. It also expressly authorizes the body to obtain grants from, and make contracts with, individuals and private and governmental organizations and institutions. According to the statute, the Corporation for Public Broadcasting must submit detailed annual reports to the President and Congress outlining the activities, financial condition, accomplishments of the organization, and any recommendations it deems appropriate. In addition, the statute requires an annual audit of the corporation's books by an independent certified public accountant. The financial operations of the body and its grantees' use of corporation funds may also be audited by the United States Government for those fiscal years during which federal funds are involved.

But the public broadcasting body is otherwise independent of federal authority and is more nearly private than public. The statute specifically declares that it is not "an agency or establishment of the United States Government."[36] Neither the directors of the corporation nor its agents are federal employees by virtue of their connection with the organization. In addition, full-time federal government employees are specifically excluded from appointment to the governing board of the corporation. Finally, the enabling act expressly notes that nothing contained in any of its provisions "shall be deemed . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control . . . over the Corporation or any of its grantees or contractors . . . ."[37]

The private corporate structure of a people's counsel modeled after the Corporation for Public Broadcasting assures it the advantages of a purely nongovernmental body. An organization of this kind is effectively insulated from federal control of its day-to-day policy determinations. It can aggressively represent the interests of the poor before federal agencies and advocate views distasteful to officialdom without fear of crippling government intervention. Such a body is also free, because of its private organizational structure, of all of the operational rigidities and inflexibility associated with a government agency. Like a purely private entity, such a corporation is not bound by the rules of the federal bureaucracy with respect to such things as the hiring and compensation of staff, and the means by which its business is conducted. Consequently, this corporate entity will have as much freedom to experiment and

36. 47 U.S.C. § 396(b) (Supp. III, 1965-1967).
37. 47 U.S.C. § 398 (Supp. III, 1965-1967).

adapt its practices to changing exigencies as a purely private organization. The structure of a corporation of this kind also permits it to draw very easily on both public and private means of support without unduly complicating the organization's affairs or threatening its independence in the way that a government agency's independence would be threatened.

In addition, a people's counsel corporation of the type under discussion here, like a purely private entity of that sort, can be more closely tied to, and identified with, the needs of the poor than a similar government body. This can be achieved by stipulating certain specific qualifications for appointment to the organization's private governing board. Similarly, an entity modeled after the Corporation for Public Broadcasting may also be able to communicate with the poor more easily and flexibly than if it were a direct part of the federal establishment. Because this kind of entity is not part of the "official government team," it may be less susceptible than a purely public body to being intimidated or captured by the ideas, values, and interests of the agencies with which it deals. The economically underprivileged may also have more confidence in a people's counsel structured in this way than in one located within the federal government; it is apparently independent of federal influence and is controlled by a private board structured to reflect the interests of the poor. The actions of such a government-chartered but independent counsel may also be more visible to the poor than a similar government counsel lost inside the vast federal establishment.

If the people's counsel were constituted as a body like the Corporation for Public Broadcasting, it would also have many of the important advantages of a government-based people's counsel. In quasi-public form, it may have higher status and prestige than a purely private people's counsel. Thus, it might well be able to secure a more qualified staff and a stronger board of directors than could a private body. Such an organization can easily be funded by the national government and can deal to some extent as an official equal with federal agencies. As a quasi-official body, federal agencies might be more receptive to its presentation of the poor's views than if those views were presented by a purely private body; and, a quasi-official people's counsel might be accorded access to information and resources not as easily obtainable by a purely private entity. This seems to have been true of the Red Cross, for example. Constituting the people's counsel as such a quasi-official body might also give the poor a feeling that the federal government itself really cares

about them and is attempting to ensure fair representation for their views with respect to rulemaking that vitally affects their interests. At the same time, the independent structure of the people's counsel organization assures the poor that a meaningless "Uncle Tom" has not been created.

The above discussion suggests that the best way of structuring the people's counsel is to establish it as a quasi-public body modeled on the Corporation for Public Broadcasting. At the start, such a body would, of course, require action by Congress. After it was set up, it would not be dependent on the government to any appreciable extent except perhaps for part of its financing—an aspect which will be discussed below. Careful drafting of the enabling statute should assure the creation of an effective and meaningful advocate for the poor in all federal rulemaking substantially affecting them.

D. *Financing the People's Counsel*

Financing the people's counsel raises additional problems. It is clear that a rather large infusion of new money will be needed to support such an entity on a long-term, continuing, and effective basis. Resources currently available to the poor and their organizational representatives are totally inadequate to support this new responsibility in any satisfactory way. The source of the extra money required could be federal, private, or both. Utilization of federal money for this purpose has some distinct advantages. The function which must be performed is too important and urgent a part of the federal administrative process to entrust its support to the uncertainties of private fund raising. Only an infusion of federal money can guarantee, relatively soon, the kind of funding that is necessary for this project to assure proper, immediate representation of the type contemplated here. The circumstances of the era in which we live suggest that it is too late to talk solely in terms of a short-term demonstration project. What is needed—and needed now—is adequate representation for the poor in federal rulemaking on a permanent, reliable, and quantitatively sufficient basis.

However, it may be possible to secure the funds needed to promote a quasi-public people's counsel from nongovernmental sources. Large charitable foundations might provide a long-term guarantee of adequate revenue, especially if they understood the vital and special importance of this particular project. In addition, individual and business contributors might be induced to support

such a body in the same way that they support charities such as legal aid societies. However, to attract substantial gifts of private funds from individual or business donors, the people's counsel corporation must be a tax exempt charity. In order to clear up any doubts on that subject, Congress should specifically stipulate in the statute creating the people's counsel that it is tax exempt for these and other purposes.

A number of arguments suggest the long-term desirability of financing such a people's advocate exclusively from nongovernment funds if that should prove practical, feasible, and realizable sufficiently quickly. As a contractor with the federal government—bound to provide in return for monies furnished the representation required—the people's counsel becomes, to some extent at least, a tainted instrument of the government in the eyes of the poor. Even if it is not true, the poor may feel that their counsel will not bite the hand that feeds it. Furthermore, because of the grant-making agency's authority to discontinue grants to the people's counsel, that agency will be in a position to exert pressure on the advocate for the poor which might be deleterious to the most vigorous performance of its duties. If the people's counsel even fears that aggresive and persistent representation in rulemaking of certain unpopular views favoring the poor might induce a withdrawal of federal funds, it may become timid, lethargic, and unnecessarily cautious. In addition, a grant of federal funds is rarely made without relatively detailed conditions, and such strings might remove some of the desirable flexibility and capacity to innovate and experiment normally possessed by a privately financed operation of the same sort.

However, the above objections to the use of federal funds are not sufficiently important to be controlling if government money is in fact necessary to finance such a people's counsel quickly, adequately, and on a long-term basis. If government financing is required, the OEO might logically be considered as a funding agency. The sole purpose of the OEO is to help the impoverished of this country. In addition, it is in an especially good position and has the specialized resources to evaluate the faithfulness and effectiveness with which the people's counsel represents the interests of the poor. Through its Community Action Programs, Vista Volunteers, Legal Services Offices, and Job Corps Centers, the OEO is in daily, intimate contact with the poor. It also has the advantage of a broad and continuing experience with the poor and their special needs and problems, and a particular interest in providing funds to secure adequate legal representation for the economically underprivileged. Empowering

the OEO Legal Services Program to make grants to a people's counsel for the purposes outlined in this Article might just round out this federal agency's current attack on inadequate legal representation for the poor generally.

On the other hand, there is a very persuasive reason to appoint another federal agency as the grant-making body. The OEO is one of the most significant federal agencies making rules with a substantial impact on the poor. That body will, therefore, be one of the agencies before which the people's counsel will continuously have to represent the collective interests of the poor. If the OEO were designated as the agency to finance the people's counsel, it would necessarily be put in a position whereby it could influence—perhaps detrimentally—its grantee's representation of the poor with respect to the OEO's rulemaking. Regardless of the purity of the OEO's actions in this regard, such a structural situation might cause the people's counsel to be unnecessarily timid in representing the poor's interests before the OEO. Designation of the OEO as grant maker for this purpose would also make less credible to the poor the efforts of the people's counsel to represent their interests before the OEO. Even if it were untrue, the poor might think that their counsel would be likely to play ball with its benefactor. For these reasons, any government grantor of funds to support the people's counsel should not be an operating agency whose programs have a large impact on the poor.

V. Section 4 of the Administrative Procedure Act

A. *Generally*

Even if the above recommendations are adopted, there is inadequate assurance that the interests of the poor will be represented in federal rulemaking unless some means is devised by which to guarantee such persons notice of proposed regulations substantially affecting them and an opportunity to submit their views to the proper authorities. The required notice and opportunity-to-participate provisions of section 4, subsections (b)-(e) of the APA might be adequate for this purpose were it not for the blanket exemptions from those provisions found in section 4(a).[38]

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38. Administrative Procedure Act § 4, 5 U.S.C. § 553 (1964):

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—
  (1) a military or foreign affairs function of the United States; or
  (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served

A majority of the federal administrative programs substantially affecting the poor are excepted from the notice and opportunity to participate requirements of subsections (b)-(e) by the exemption for matters relating "to public property, loans, grants, benefits or contracts" found in subsection (a)(2). This means that in rulemaking for most programs of special concern to the poor, federal agencies need not give any notice of proposed regulations in the Federal Register. Similarly, in the excepted situations, federal agencies need not allow "interested persons," including the poor or their representatives, to participate in rulemaking "through the submission of written data, views, or arguments" or through "the right to petition for the issuance, amendment, or repeal of a rule." Of course, the relevant agencies have the discretionary authority to give notice and allow participation in the excepted situations, but they are under no obligation to do so.

B. *Should the APA Be Modified To Cure this Problem?*

Question 3 of the special questionnaire sent to the relevant federal agencies as part of this study asked:

> In developing and promulgating rules for the implementation of each of these programs [with a substantial impact on the poor], does your department or agency follow the provisions of 5 U.S.C. 553(b)-

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or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rulemaking proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

> 553(e) [APA section 4, subsections (b)-(e)], even when the rulemaking proceeding is excepted from these provisions by one of the exclusions in 5 U.S.C. 553(a) [APA section 4(a)]? If you do not do so, please describe the procedures you do employ in rulemaking in each of these programs.

The overwhelming majority of answers to this question indicated that the reporting agencies do not follow the notice and opportunity-to-participate procedures of subsections (b)-(e) when their rulemaking is excepted from them under section 4(a).[39] Only a very few agencies indicated a contrary practice, and even these confessed to inconsistency in this regard.[40] In addition, rulemaking procedures actually utilized by the agencies in the excepted situations are inadequate substitutes for those found in subsections (b)-(e) of APA section 4. Substitute procedures are not consistent and do not, in most cases, assure adequate notice to the poor or a sufficient opportunity for their participation. In some cases not governed by subsections (b)-(e), the agencies simply determine the rule they think appropriate and promulgate it without notifying or consulting with anyone outside the agency.[41] In other cases, agencies give notice to, and engage in informal consultation with, whomever they happen to think appropriate under the circumstances.[42]

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39. The Department of Agriculture, for example, reported that "the Department does not follow the provisions of 5 U.S.C. 553(b)-553(e) in developing and promulgating rules for the programs listed above"; the Department of Housing and Urban Development reported that "the provisions of 5 U.S.C. 553(b)-(e) are not followed for programs covered by the exemption"; and the Veteran's Administration reported that "in developing and promulgating rules for the implementation of veteran's programs we do not generally follow the provisions of 5 U.S.C. 553(b)-553(e), as our rulemaking procedures are excepted by the provisions of 5 U.S.C. 553(a)(2)."

40. For example, the Department of Labor reported that "in cases of rulemaking excepted from 5 U.S.C. 553 the Department of Labor does nevertheless follow the provisions of section 553 when it deems it appropriate or desirable to do so." The Department of Transportation also reported that while it does follow § 553(b)-(e) [APA § 4, subsections (b)-(e)] for some programs exempted from § 553 (APA § 4), at the present time it does not do so for most such exempted programs.

41. For example, the Small Business Administration reported that "under the exemption in 5 U.S.C. § 553(a), rules for [the Local Development Company Loan Program and the Economic Opportunity Loan Program] are initially published and issued in the form adopted by the agency." The Department of Labor reported as to rulemaking exempted from § 553 (APA § 4) that it "frequently gives public notice of proposed rulemaking and invites public participation therein when the proposed rule is expected to have widespread effects and when for any other reason it is considered desirable to obtain the views and objections of those to whom the rules would apply. Otherwise, the rules are evaluated by the bureau concerned, and are adopted and published in the Federal Register."

42. For example, the Tennessee Valley Authority reported that "the formulation and implementation of TVA policies in carrying out its program of resource development use are excluded from the rulemaking procedure of 5 U.S.C. § 553 by the provisions of subsection (a). Such policies and the implementations thereof are determined by the TVA Board and are recorded for internal guidance in an administrative code.

Question 4 of the questionnaire asked the same federal agencies responding to the prior question the following:

> What disadvantages, if any, do you see in a statute which would eliminate the exclusions now in 5 U.S.C. 553(a) [APA section 4(a)] *as they may apply to* . . . [your programs with a substantial impact on the poor], and thereby would make the provisions of 5 U.S.C. 553(b)-553(e) [APA section 4, subsections (b)-(e)] applicable to all rulemaking relating to these programs? (Assume that the several exceptions now in sections 553(b) through (e) would remain unchanged.)

Although a number of agencies saw no substantial disadvantages in eliminating the blanket exclusions of subsection (a) under the specific conditions indicated in the above question,[43] most respondents thought it undesirable to eliminate any of these exclusions. The reasons advanced for maintaining the section 4(a) exceptions to the requirements of subsections (b)-(e) varied: elimination of the exceptions is unnecessary;[44] it would make rulemaking too cumbersome and thereby deprive the agency of desirable and necessary flexibility in the adoption of its rules;[45] it would cause needless and injurious delay in the final promulgation of rules for some programs;[46] it

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They are brought to the attention of interested units of government, organizations, and institutions, through discussion and negotiation and appropriate press releases." The Department of Agriculture responded with respect to its food programs that it does not follow § 553(b)-(e), but that "before their adoption, proposed regulations and amendments thereto are discussed with district personnel of the Department and with representatives of the State agencies, in general conferences, regional conferences or operating as task force groups." (Note that recipients of these food programs or their representatives were not among those listed as being consulted.)

43. The Department of Labor reported that it "does not anticipate substantial disadvantages to the programs listed in response to question 1 from the elimination of the exclusions now in 5 U.S.C. 553(a)" and the Department of Transportation reported that "we would not object to elimination of the exemptions for loans and grants. The Department is, in fact, not taking advantage of the exclusion in the case of Federal airport aid, and is considering following this course in the case of its other grant and loan programs."

44. For example, the Department of Health, Education, and Welfare replied that "we have found that in the grant-in-aid field, publication of notice of proposed rulemaking in the Federal Register is not the most suitable way to focus the attention of interested persons, agencies and groups on the proposal."

45. For example, the Tennessee Valley Authority responded that "application of the rulemaking procedures of 5 U.S.C. § 553 to the TVA resource development program would decrease its flexibility and hinder its effectiveness." Similarly the Department of Agriculture reported that "it would be unnecessarily cumbersome to apply the procedures of the statute and might deprive the Department of a desirable flexibility in the adoption of rules."

46. The Department of the Interior stated, for example, that "we would not favor the elimination of the exclusions in 5 U.S.C. 553(a) since to do so could produce injurious delays in the adoption of regulations." Similarly, the Small Business Administration replied that "it could complicate or delay rulemaking," and the Department of Agriculture reported that the "F.H.A.'s operations would be seriously delayed

would cause a tremendous increase in agency work and operating costs;[47] it would be insufficient as a means to assure in all cases adequate participation by the relevant people in rulemaking and, therefore, might sometimes needlessly require an agency to follow two sets of procedures in order to involve properly the right persons;[48] it might put the agency and those most directly affected by its policies in an adversary position, thereby discouraging mutual cooperation toward obtaining the best solutions to common problems;[49] and, it might conflict with some specific provision of the agency's enabling act.[50]

In light of the injurious effect which these exemptions have on the ability of the poor to represent their interests in rulemaking, the above reasons for continuing them for programs substantially affecting the poor do not seem persuasive. It should be noted that elimination of the across-the-board exemptions in section 4(a) would still leave section 4(b)(B) in force. This provision states that "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore, in the rules issued) that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest," it does not have to utilize such procedures in its rulemaking. Furthermore, if the policies expressed in subsections (b)-(e) are presently sound respecting unexcepted situations, they should be equally sound with respect to "public property, loans, grants, benefits and contracts." The reason

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and reduced in effectiveness if its rules were subjected to the mandatory notice and public procedure requirements."

47. For example, the Veteran's Administration responded that elimination of the section 553(a) exclusions "would lead to heavier workloads within the agency and a resulting increase in cost, as well as delay in implementation of newly enacted laws with a resulting delay in awarding benefits thereunder." In addition, although the Department of Labor saw no substantial drawbacks to repeal of the exemption in section 553(a) it did note that it "would, of course, substantially increase the cost of Government."

48. For example, the Office of Economic Opportunity responded that "the major disadvantage in a statute which would eliminate the exclusions now in 5 U.S.C. 553(a) is that it would require OEO to follow two sets of procedures, those of 5 U.S.C. 553, which would generally prove ineffective in reaching the poor, and those currently followed, particularly by CAP, which have proved effective and are constantly being made more effective."

49. The Tennessee Valley Authority responded that "procedures for the formulation of policies under the rulemaking requirements of 5 U.S.C. § 553 would place TVA and its distributors in an adversary position where the tendency would be for each distributor or group of distributors to try to gain an advantage in the formulation of the policy rather than working with TVA and other distributors in a mutual effort to find the best possible solution to each problem as it arises."

50. For example, the Department of Health, Education, and Welfare reported that with respect to some programs, "the authorizing statute provides for rulemaking procedures other than those provided by the APA . . . ."

for this is that the previously noted objections to the application of subsections (b)-(e) to the classes now excepted by subsection (a) can also be leveled against the applicability of the former provisions to rulemaking not presently excepted by subsection (a). Consequently, there are no persuasive arguments which preclude repeal of all exemptions contained in section 4(a) *as they may apply to programs with a substantial impact on the poor.*

The exemptions contained in section 4(a) of the APA might, therefore, be amended to require federal agencies to follow the provisions of subsections (b)-(e) in *all situations where their rulemaking has a substantial impact on the poor.* A statutory change of this kind is somewhat broader than, but generally similar to, that contained in a recent bill introduced by Congressman Feighan of Ohio.[51] Congressman Feighan's bill would authorize the Attorney General of the United States to lift the exemption contained in section 4(a) whenever he deems that desirable to protect the interests of the poor. Once the Attorney General lifted the exemption as to a particular rulemaking situation because the "interests of persons of limited means . . . make it appropriate," any "interested person," rich or poor, could presumably assert rights to participate under subsections (b)-(e). As noted earlier, agencies have unlimited discretion to permit public participation in situations excepted by section 4(a), but they are not required to do so; the Feighan bill would only extend this same discretion to the Attorney General where he decides the interests of the poor require it.

Some might argue that the Feighan bill, or a broader revision of section 4(a) expressly requiring federal agencies to follow the provisions of subsections (b)-(e) for *all* rulemaking having a substantial impact on the poor, raises serious fifth amendment due process questions of an equal protection nature. The argument is that statutory revisions of this sort give the poor an unfair and irrational advantage over all other Americans. The proposed modifications would require federal agencies to provide notice and an opportunity to participate in normally exempted situations where the poor would be benefited by such rights; but these modifications would not oblige agencies to provide these opportunities where they would only benefit the more affluent. However, this classification is rational because, unlike the poor, the American upper and middle classes have adequate alternative means for protecting their interests in rulemaking.

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51. H.R. 17974, 90th Cong., 2d Sess. (1968); *see* note 24 *supra.*

To protect their collective interests, the more affluent members of our society do not need formal notice of proposed rules and an official opportunity to present their views to the appropriate authorities. After all, most official policy makers are middle-class persons who have had middle-class experiences and daily associations. Consequently, those who are responsible for making administrative regulations are oriented toward the middle-class point of view and are generally conversant with the collective interests of that group. They are, therefore, likely to understand and protect the collective interests of the more affluent, even where such persons do not have a chance to represent their interests formally in rulemaking proceedings vitally affecting them. In order to equalize the poor's position in rulemaking with that of better financed segments of society, the poor may need special guarantees to assure full consideration of their views.

Modification of the section 4(a) exemptions along the lines suggested above would assure that the poor and their representatives, including the people's counsel, would have a reliable means by which to discover and participate in proposed rulemaking of concern to them; they could simply watch the Federal Register. Such a change could probably be effected either by statute or by an executive order, since the President has the authority to command his subordinates to do that which they now have the discretion to do. Since a purely procedural requirement of this type would not seem to interfere with the substantive policy-making functions of the independent federal agencies, they may also be bound by such an order.

However, there is a substantial evidence that section 4(a) needs a general legislative overhaul. Alteration or repeal of that provision has been proposed apart from any more specific consideration of its effect on the ability of poor people to represent their interests adequately in the rulemaking process.[52] Testimony adduced in the course of congressional hearings suggests the possible desirability of across-the-board revisions of the section 4(a) exemptions.[53] Consequently, it may be wise to leave the provision as it is pending further inquiry into the advisability of amending it generally. Instead of narrowly altering the provision at this time in order to solve the particular

52. *See, e.g.*, S. 163, 88th Cong., 2d Sess. § 4 (1964) (Comm. Revision); S. 518, 90th Cong., 1st Sess. § 4 (1967).

53. *Hearings on S. 1663 Before the Subcom. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964); *Hearings on S. 518 Before the Subcom. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967).

problem under consideration, federal agencies should simply be urged, in strong terms, to follow the provisions of subsections (b)-(e) for all rulemaking substantially affecting the poor.

C. *Special Notice and Hearing for the People's Counsel*

For the present purposes, another proposal can be made which would partly obviate the need to amend the current exemptions contained in section 4(a). All federal agencies contemplating the promulgation of rules substantially affecting the poor should be *required* to notify the people's counsel of the pendency of such rules and to give this advocate for the underprivileged an opportunity to present the views of the poor. Imposition of this type of duty on a federal agency is not unprecedented. For example, Budget Bureau Circular A-85, discussed previously,[54] directs federal agencies to follow specific procedures with respect to the development of rules and policies for federal assistance programs that include among their eligible recipients state or local governments or quasi-public agencies. Unless special circumstances preclude it, issuing agencies are required to provide the Advisory Commission on Intergovernmental Relations (ACIR) with a copy of all proposed regulations—usually not less than forty-five days prior to their intended promulgation. The ACIR is then under a duty to transmit that information to various state and local government associations which have, normally, three weeks in which to comment to the agencies on the proposed regulations or policies. Another similar obligation to provide special notice and opportunity to appear is imposed by statute on the Interstate Commerce Commission:

> Before hearing or disposing of any complaint (filed by any person other than the Secretary) with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, the [Interstate Commerce] Commission shall cause the Secretary [of Agriculture] to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard.[55]

A similar requirement should now be adopted for all federal agencies with reference to their proposed promulgation of rules substantially affecting the economically underprivileged. If such a procedure were made mandatory, the present exceptions contained in section 4(a) would not seriously prejudice the ability of the poor to

54. *See* page 523 *supra*.
55. 7 U.S.C. § 1291(a) (1964).

have their views represented in the formulation of rules substantially affecting them. When it received notice of such contemplated rulemaking, the people's counsel would disseminate that information to all interested poor people's organizations. After obtaining feedback from them, the people's advocate would affirmatively represent the views of the economically underprivileged to the relevant agency. The effective and economical operation of the people's counsel therefore makes it desirable to impose the following requirements on federal agencies: they must notify the poor's "official" group counsel of all proposed rulemaking substantially affecting poor persons and give it an opportunity to communicate to appropriate officials the views of the economically underprivileged with respect to those proposed rules.

It is true, of course, that this limited requirement would not be as satisfactory a cure for the problem as an outright modification of section 4(a) in all cases where poor people's interests are concerned. A substitute provision of the kind suggested above would not assure notice of proposed rulemaking to anyone but the people's counsel and those informed by the people's counsel; and in such circumstances no one but the people's counsel would have a right to present formally the views of the poor with respect to those rules. However, pending general revision of section 4(a), this seems a desirable requirement and a minimally satisfactory substitute guarantee for present purposes.

To ensure that the administrative process is not unreasonably burdened in some situations, an exception similar to that found in APA section 4(b)(B) should be engrafted onto the narrow requirement discussed above. Federal agencies should be allowed to promulgate rules substantially affecting the poor without giving prior notice and an opportunity to be heard to the people's counsel "where the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and . . . [an opportunity for the people's counsel to present its views prior to promulgation of the rules] are impracticable, unnecessary or contrary to the public interest." In cases of this sort, agencies should be required to notify the people's counsel, as soon as practicable, of any consumated rulemaking substantially affecting the poor. Moreover, they should also be required to provide it an opportunity to present the views of the poor with respect to the desirability of amending or rescinding any such rules. This require-

ment will at least facilitate a reconsideration of accomplished rulemaking in light of the views of the poor where presentation of their position is impractical prior to rulemaking.

The specific requirements suggested here with respect to giving the people's counsel notice and an opportunity to be heard could be imposed by statute or executive order. The latter method might be as efficacious as the former in binding independent regulatory agencies, since the order would deal only with a matter of procedure and would not attempt to invade their substantive policy-making functions. The ease with which such an order could impose or remove these requirements, or modify them as the need dictates, may also make it a more desirable tool for this purpose than a statute.

VI. Conclusion

Any attempt to cure the poor's lack of representation in federal rulemaking substantially affecting their interests requires a number of remedies rather than a single one. Congress should institute procedures to facilitate and encourage greater self-initiated efforts by relevant administrative agencies to ascertain the views of the poor. Some body must also perform the functions of a clearinghouse coordinator in order to facilitate greater affirmative participation by the poor and their organizational representatives in rulemaking. To ensure consistent, affirmative representation of high quality for the collective interests of the poor, Congress should create a people's counsel with the responsibilities described above. To perform its function properly, the people's counsel must receive notice of contemplated rulemaking affecting the poor, and must have an opportunity to present poor people's views on the proposed rules to the relevant agencies.

All of these measures in combination should—if properly executed in light of their purposes—provide an adequate remedy for the problem at hand. These recommendations are desirable because they will improve the administration of government. They will assure that the administrative decision makers in the federal establishment are better informed about the interests of the poor than at present. These proposals should also eliminate one source of unnecessary tension between the poor and the federal establishment. They will provide procedures whereby the poor can get a fair hearing on the formulation of significant public policies affecting them. The specific proposals made here will not create any sub-

stantial negative impact on the rulemaking process. They will make important affirmative contributions to that process. Since the lack of representation for the poor in federal rulemaking is a critical problem, these proposals should be implemented as swiftly as possible.

APPENDIX A

Recommendations Suggested to the Administrative Conference of the United States on the Basis of the Above Study of Representation for the Poor in Federal Rulemaking.

In this context the term "poor" refers to that group of persons in our society unable to secure adequate representation of its collective interests in federal rulemaking because its members lack the individual or organizational financial resources to do so.

The rulemaking referred to is that defined by the Federal Administrative Procedure Act § 2(c), 5 U.S.C. § 551(4).

I (a) Federal agencies should engage in more self-initiated affirmative efforts to ascertain directly from the poor their views with respect to rulemaking substantially affecting them. For this purpose agencies should increase their use of existing procedures and should devise and utilize new procedures.

(b) Where feasible and practicable agencies should do as many of the following as are necessary to assure that they are fully informed with respect to the relevant interests of the poor.

(1) Agencies should make a special effort to assure that the poor are effectively informed of all proposed rulemaking substantially affecting them, and should provide opportunities for the poor to submit their views with respect to such rulemaking.

APPENDIX B

Recommendations Adopted December 10 and 11, 1968, by the Administrative Conference of the United States With Respect to Representation of the Poor in Agency Rulemaking of Direct Consequence to Them.

(These are the only statements on this subject attributable to the Administrative Conference of the United States.)

A. Agency Efforts

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

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

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

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

(3) Agencies should specially invite individuals constituting a representative cross section of the poor to submit their views orally or in writing with respect to proposed regulations substantially affecting the poor.

(4) Agencies should conduct field surveys among the poor to discover their attitudes with respect to particular government policy-making substantially affecting them.

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

(6) Agencies should, when necessary to assure adequate representation for the poor, pay the personal expenses and wage losses incurred by poor individuals incident to their representation in agency rulemaking hearings of such people's interests. Congress should clearly authorize federal agencies to make, in their discretion, such payments.

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

III (b) Federal agencies should follow the provisions of 5 U.S.C. § 553(b)-(e) for all rulemaking with a substantial impact on the poor, even though some such rule-

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

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

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

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

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

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

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

3. Agencies should be encouraged in appropriate circumstances to determine that the exemptions in 5 U.S.C. 553(a)(2) should not be applied with respect to

making is presently excepted from those provisions by the exemptions contained in § 553(a).

II (a) (1) An organization should be created to employ a staff to act as "people's counsel." The people's counsel should represent the collective interests of the poor as a class in all federal administrative rulemaking substantially affecting them.

(2) The people's counsel should be charged with assuring that the views of significant separable minority interests among the poor are represented in that process.

(3) The people's counsel should be required to act as an information clearinghouse, disseminating intelligence respecting rulemaking substantially affecting the poor to all interested poor people's organizations.

(4) The people's counsel should be authorized to intervene in its own name to represent the interests of the poor in federal agency adjudicative proceedings substantially affecting those persons.

(5) The people's counsel should be empowered to seek judicial review of federal agency rules in its own name, and on its own motion, as a representative of the poor. This recommendation is not intended to alter the kinds of agency action amenable to judicial review or the scope of that review.

(6) As an incident to its main responsibilities the people's counsel should be empowered to recommend to Congress or the President, or to both, such legislation or other action as it deems appropriate to solve problems of the poor.

(b) (1) To provide for the performance of the functions outlined in recommendation II (a) Congress should create a new single-purpose people's counsel corporation modeled on the Corporation for Public Broadcasting (47 U.S.C. § 396 et seq.).

rulemaking which may have a substantial impact on the poor.

B. People's Counsel

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

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

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

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

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

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

5. (a) Congress should provide for an appropriate body to perform the functions outlined in Section 4. Deserving of consideration as such body would be a new single purpose corporation, to be created by Congress, modeled on the Corporation for Public Broadcasting, Pub. Law 90-129, 81 Stat. 368 (1967), 47 U.S.C. (Supp. III) 396, and to be known as

(2) The people's counsel corporation should be made tax exempt and authorized to accept grants of private funds. Gifts to the corporation also should be made deductible as charitable contributions for federal income tax purposes.

(3) Federal financing of the people's counsel corporation should be made available to the extent necessary to assure its effective operation.

(4) The governing board of the people's counsel corporation should be constituted to give the poor meaningful representation thereon. It should also be constituted to ensure close communications and an identity of viewpoint between the poor and the people's counsel provided to represent their collective interests.

III (a) An executive order should require all federal agencies to notify the people's counsel of any rules they propose to promulgate that would have a substantial impact on the poor. They should also be required by that executive order to give the people's counsel an opportunity to present the views of the poor with respect to such proposed rules. Exceptions to these obligations should be permitted only "when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that [such] notice and . . . [an opportunity for the people's counsel to present its views] thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). In these exceptional cases agencies should be required to notify the people's counsel, as soon as practicable, of any consummated rulemaking substantially affecting the poor, and required to give that counsel, as soon as practicable, an opportunity to communicate to the agency its views with respect to the desirability of amending or rescinding any such consummated rulemaking.

the People's Counsel Corporation. In the event this form of organization is adopted, the following considerations should apply:

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

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

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

6. All Federal agencies should be required by Executive order to notify the People's Counsel of all proposed rules which would have a substantial impact on the poor. Agencies also should be required by that Executive order to give the People's Counsel an opportunity to present the views of the poor with respect to such proposed rules. Exceptions to these obligations should be permitted only "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that [such] notice and . . . [an opportunity for the People's Counsel to present its views] are impracticable, unnecessary, or contrary to the public interest." (See 5 U.S.C. 553(b)(B).) In these exceptional cases, agencies should be required to notify the People's Counsel as soon as practicable of any consummated rulemaking substantially affecting the poor, and should be required to give the Counsel as soon as practicable an opportunity to communicate to the agency its views concerning the desirability of further action with respect to such rulemaking.

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

APPENDIX XIII

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Public Interest Law

EDWARD BERLIN
ANTHONY Z. ROISMAN
GLADYS KESSLER

Introduction

The legal profession is very slowly, rather painfully, beginning to follow the advice of another, equally conservative profession: "physician, heal thyself." Lawyers throughout the country, and in particular the younger generation of lawyers, are recognizing that the legal profession, to a very substantial extent, has not fulfilled its responsibility to provide quality legal services to those who need them and to those who can benefit from the affirmative assertion of their rights.

In part, the problem is one of economics. The poor cannot afford lawyers and, until recently, have been forced to rely on second-rate legal services provided by institutions with a noblesse oblige attitude toward their clients. The plight of the middle class is not much better: Only the most dire emergency involving loss of personal liberty or grave economic loss can justify legal expenses which are otherwise vastly disproportionate to the economic value of the wrong suffered. And it is simply unthinkable for members of either group to hire lawyers to affirmatively establish innovative causes of action or to assert rights which do not immediately and economi-

cally affect them. Finally, the legal resources of giant corporations and governments can out-motion and outlast virtually any private citizen seeking to defend his rights against them.

In part, the problem is one of the institutional breakdown of our court system. There are too many cases, not enough judges, not enough money for courtrooms, court clerks and court stenographers. Delay is usually just another word for injustice, and the massive traffic jam in our courts spawns one judicial accident after another.

In part, the problem is one of legal philosophy and attitude. We are not comfortable talking about the "rights" of the poor to welfare, of the "rights" of the consumer to fair dealing, the "right" of the individual to privacy, and the "right" of everyone to a decent and habitable environment. We are so accustomed to equating legal rights with private property rights that we tend to distrust and demean the assertion of these less tangible but far more fundamental rights. Moreover, we have grown to accept the fact that litigation is proper only if and when the individual perceives that he has been injured by another and seeks out a lawyer to represent him. Consequently, until recently we have conveniently rejected the notion that people must be informed of their legal rights and that the lawyer has a vital role to play not only in educating those who are not yet clients, but in vigorously representing them after they realize they have been injured and want redress.

Businessmen are never criticized when, after their trade associations have taught them how to take advantage of every loophole in the tax law, they then fight the Internal Revenue Service every inch of the way. How strange that we roundly criticize the welfare recipient for insisting on a hearing before being arbitrarily deprived of his benefits or a consumer group for complaining about unsafe products or usurious interest rates on consumer loans.

A very small segment of the liberal legal community has always been aware of the grave deficiencies in the system we have devised for the delivery of legal services. These in-

dividuals have dedicated some portion of their efforts to the realization of particular social and moral goals, often at significant financial and professional sacrifice. This has been particularly true in the civil rights struggle, in the fight for criminal justice, and in the area of civil liberties. In almost all instances, the commitment has been on an ad hoc basis and, in the final analysis, subject to the necessities and demands of carrying on a traditional "straight" law practice of one specialty or another.

More and more lawyers who are dedicated to achieving particular social and political changes have become convinced that this arrangement can not continue in the future if the phrase "equal justice under law" is to be anything but a hollow mockery. The emergence of the "public interest law firm" suggests that there is an alternative. The purposes of this article are to discuss some existing varieties of public interest law firms and to explore their weaknesses and strengths. The entire concept of the public interest law firm—its viability, its effectiveness, its propriety—is novel and it is hoped that the following discussion will open up new approaches and thinking in an area that has no dogma and has not yet acquired any "conventional wisdom."

Without a doubt nothing before has captured the imagination of the emerging young lawyers as has the possibility of practicing public interest law. Everyone is talking about doing it although there is no uniform definition of public interest law. A pitiful handful of lawyers is attempting to do it, but very few have thought through the implications and requirements of that type of practice.

The Need for Public Interest Law

Preliminarily, the "why" of this phenomenon should be explored. In previous years law graduates so inclined would have found their way into government service. In the early 1960's we were on the threshold of a not so subtle bureaucratic revolt. Dean Landis told us in no uncertain terms of the sad state of our regulatory agencies—supposedly the

guardians of the public interest. But we had new inspiring leadership in the Kennedy years and we were optimistic about change. Government service therefore became not merely acceptable, but desirable to the activist young lawyer. It was anticipated that the government attorney would be permitted to develop into the true ombudsman.

Today, those hopes have been shattered. The 1970's seem destined to be an unparalleled era of government-industry fraternization. We view this as being the single largest contributor to the public interest law movement. To be sure, there is concern over the growing industrial complex, but that growth is not at all new. We had similar experiences in the years preceding enactment of the Public Utility Holding Company Act. Yet it was not until the end of the 1960's that the public interest law movement took hold. Why?

There were a number of contributing factors. Those who were already working in government saw, time after time, the failure of political figures to make use of their power to accomplish desired ends. Idealistic government lawyers saw bureaucratic inertia and timidity, rather than out-and-out corruption or incompetence, hamstring effective enforcement of regulatory statutes. For instance, it can be argued that there are enough civil rights laws on the books to deal with existing problems, and that the real issue is whether those statutes will be aggressively enforced or consigned to oblivion by overly restrictive interpretations by the Justice Department. Thus government lawyers were forced to conclude that government service was no longer an effective vehicle for expressing social concern.

At the same time, the legal services program of the Office of Economic Opportunity was blossoming and for the first time militant and purposeful legal activity was being brought to bear on the problems of the unrepresented. The successes of a few outstanding crusaders helped overcome the feelings of impotence that many young lawyers feel when faced with our well-entrenched institutions. And finally, some foundations which had been partially supporting civil rights litigation and the lawyers who had been working for foundation-funded

projects became interested in broadening their activities.

As a result of these new stirrings in the public interest law field, lawyers have begun to look for a more permanent public interest law practice. The result has been a growing interest in institutions which can represent all aspects of the public interest. The most frequently discussed possibility is a public interest law firm. All these lawyers face a basic organizational question: How must a public interest law firm operate in order to realize the objective of assuring equal representation to the nonvested interests of the general public? Here we can and should draw upon the experience of our adversaries at the bar. The successful private Washington law firm has made it abundantly clear that full representation of a client's interests requires vigorous and usually simultaneous representation before four independent forums: the courts, administrative agencies, the legislature, and the public itself (principally through the press). The effective law firm is the one that can supply the appropriate orchestration to achieve a result harmonious with its client's interest.

This attempt at full orchestration of the client's interest must also be the objective of the public interest law firm, with perhaps one added dimension. Private industry, with the counsel of Madison Avenue, tries its case, justifies its position and commands understanding through its huge advertising expenditures. The public interest client cannot afford to respond in equal volume but it must nevertheless respond in kind. Let there be no mistake about it—judges, legislators and administrators keep a close ear to the public pulse. Therefore, eloquently pleading a cause before the bar without simultaneously capturing the public imagination affords your client but a portion of the representation he requires to succeed.

The Madison Avenue campaign of vested interests is offset by going directly to the people. Consumer boycotts, tenant strikes and the like are the tools of the public interest attorney. He must become skilled in advising their use in order to construct an effective broad-range strategy for his client. Thus, an attorney for a tenants' union must carefully plan

with his clients precisely when it would be most effective to provoke the direct confrontation which may land the rent strike leaders in jail. Similarly, for a consumer group fighting certain retailing prices or practices, an open hearing before an administrative agency may prove the most effective way of presenting its case to the public, even though the group holds no illusions as to its chances of success before that particular agency.

Types of Public Interest Law Organizations

The premise that this kind of blending of activities is required necessarily implies that certain organizational structures can better supply the "full range" of representation. Essentially, the practice of public interest law has taken three forms (excluding OEO legal service programs). First, there is the public interest or pro bono segment of the traditional establishment law firm, which is proliferating on almost a daily basis in most large cities across the country.[1] Second, there is the foundation-supported firm which, although representing clients in particular cases, is not at all dependent upon fees (and indeed may not ordinarily accept fees). Third, there is the private public interest law firm, that is, a firm operating in the traditional attorney-client mode with the object of making public interest work self-sustaining or at least partially sustaining, with ancillary funding coming from compatible "straight" work such as negligence cases, wills and criminal cases.

Each of these three public interest endeavors can make a significant contribution to public interest law. But it is a mistake to believe that each is equally capable of filling the long-term representation gap. Inherent in the structure of each are weaknesses which necessarily have inhibiting effects. As we explore these weaknesses we must caution the reader to be sensitive to our own preconceived prejudices. We have selected the type of firm we view as best suited to the effective practice of public interest law, and while we remain, after

1. Pro bono work is often defined to include work done at reduced rates as well as work done for no compensation.

fifteen months of experimentation, convinced of the correctness of our judgment, the reader should not ignore the possibility that our outlook may have been significantly colored by our choice.

Pro Bono Services by the Traditional Firm

The experiments now being initiated by the traditional, establishment firms include the manning of a separate public interest office (usually in the inner city), the establishment of a separate pro bono department, or the dedication of a fixed percentage of every member's time, with a whole range of variations in between. All such efforts involve certain inherent deficiencies. The most obvious problem is conflict of interest between private and public interest clients. Naturally, where there is a clear-cut conflict between a contemplated public interest client and the interests of an existing fee-paying client, the firm will decline to volunteer its efforts in that area. No one would expect otherwise. This restriction alone will seriously limit the nature and extent of pro bono work which most firms could take in the environmental, consumer or plaintiff antitrust fields.

However, potential conflicts of interest are not always apparent. How should a firm resolve a conflict that arises after considerable work has been done for the public interest client? For example, suppose a pro bono firm gave considerable assistance to a locally owned food cooperative which then prospered sufficiently to compete with the local stores of a national food chain represented by the same firm? Will the food cooperative be abandoned? And if it is, what about the fact that the law firm has been privy to all its operations and marketing procedures? If the cooperative is not abandoned, how can the firm justify its position to each of its clients?

Moreover, even if no substantive conflict of interest ever arises, procedural conflicts seem inevitable. Assume that a firm is representing a public interest client before an administrative agency, regardless of whether the firm appears before that agency on behalf of its fee-paying clients. We can

safely assume that the agency is less than cooperative if not downright recalcitrant. Several approaches are possible. The laborious administrative procedures can be endured and judicial relief eventually sought, or imaginative new procedures can be pursued with the object of shortcutting the time-consuming administrative process. For example, a public interest client such as a consumer group may wish to establish its right to intervene in an administrative proceeding of the Food and Drug Administration; once established, this right could be inimical to the best interests of the firm's pharmaceutical clients. At the least, a procedural victory will have far-reaching repercussions in the area of administrative law generally. How is the tactical decision to be made? Should the firm ignore the potential effects on agency practice and therefore on other clients? Arguably not. Should the best interests of the public interest client be in any way compromised? Certainly not. This dilemma, we suggest, is a real one although it may not as yet have been recognized. Public interest clients have a vital stake in shaking up the system; private clients often have a vested interest in the perpetuation of the labyrinth as it now exists.

There is another facet to the problem of fully representing public interest clients. Can the public interest client be effectively represented on an ad hoc basis and only in response to crisis situations? Does the automobile industry wait until automobile safety regulations are promulgated? Does the food and drug industry wait until the Department of Health, Education and Welfare revises its procedures before seeking representation and initiating a challenge? Obviously not. Effective representation, particularly at the administrative level, requires continual presence and preventive action. It is much easier to convince agency staff that a contemplated rule should be revised prior to its publication than to effect modifying action thereafter. But this requires the development of a close working relationship and constant alertness. Unless the establishment law firms are willing to provide this kind of total representation, the public interest client is not receiving equality of representation.

This is not to suggest that the establishment firms cannot perform a valuable service, for clearly they can. In terms of manpower, expertise, library materials and clerical and administrative help they have much to offer their public interest clients. Their lawyers' accumulated expertise and familiarity with individual administrative agencies is of immense importance. Their senior corporate partner may not be involved in pro bono work, but his detailed knowledge about SEC procedures will be invaluable for the young associate desiring to help a venturesome black-owned business seeking registration. Moreover, in a massive case, such as an attack against HEW procedures for processing of welfare grants, the resources of a large library and clerical staff are vital, although often overlooked.

Firms can also do significant pro bono work on civil liberties and civil rights and many have distinguished themselves in these areas over the years. Here, especially in the former area, the potential for conflict is virtually nonexistent and ad hoc involvement is not fatally prejudicial.

If bent on a more widespread involvement, the firms can truly divorce their public interest segments. They can endow separate offices and assign them personnel on a long-term basis, say a minimum of two but preferably five years. Ideally, the firms would offer new recruits the opportunity to do a public interest stint before establishing more formal ties with the firm (and therefore before they are exposed to the firm's prevailing philosophical inhibitions). This approach would certainly help to solve the recruiting problem which most of the large firms concede underlies their recent dedication to public interest law. As a variation on this theme the firm could provide the salary for an associate with freedom for a few years to work in whatever area of public interest law he chooses.

The firms also can give true meaning to the supposed time-honored tradition of assuring adequate representation to all, by scratching their own financial resources ever so slightly and contributing to the establishment of independent, viable, public interest firms. Surely the approximately ten thousand

industry attorneys practicing in the District of Columbia can shoulder the financial burden of supporting as few as one hundred public interest attorneys. To date, exactly one firm has made any such contribution.

Whatever form the pro bono program may take, there remains a nagging question: To what extent are these firms as institutions committed to the principle of legal representation for all who desire it? There is substantial evidence that many pro bono activities are motivated primarily by the firms' recruitment needs. If so, one may wonder just how long such activities will last. It must be assumed that as soon as the firms again find a plentiful supply of young lawyers willing to work for their traditional clients, the pro bono activities will be phased out. Where will that leave the public interest client who has built up a solid relationship with his lawyer and relies heavily on his advice? By taking on pro bono clients, the establishment law firms are taking some clients who could have retained public interest firms whose fees are usually substantially below the "going rate" and whose commitment will be less transitory. When the incentive for funding such legal services dies away, these clients would then be sufficiently educated about the value and necessity of adequate legal representation that they would continue, as a matter of course, to retain and insure the existence of their public interest lawyers.

Public Interest Law Firms Supported by Foundations

The second variety of public interest law firm is supported by foundations. Usually, a grant is given to the firm for the carrying out of certain broadly defined activities. As long as the firm operates within the guidelines of the grant, its members can choose their own clients and are free to handle cases in any way they see fit. Thus, a foundation grant may specify that the firm provide legal counsel only to organizations seeking to better the environment, or only to clients seeking to enforce civil rights claims. Assuming that the supporting foundation does not have any vested interest in any particular

industry, (an unlikely assumption in view of the breadth of the investment portfolios of most foundations) most of the potential conflicts of which we have spoken are avoided. But another type of conflict poses a serious problem relating to the role of the lawyer in our society; he is an advisor and a technician, but the client is responsible for setting ultimate policy.

The foundation-supported law firms represent two very different kinds of clients. On the one hand they often speak for organizations who usually have very clear broad policies and leave their lawyers substantially free to plan strategy and tactics within those policy guidelines. On the other hand they may also speak for individuals who, while part of a larger cause, are also personally involved and consequently bring to the case their own personal interests. In both cases the lawyer's function is to serve the interest of the client, and not to serve the public interest as only the attorney or the foundation perceives it. To the extent that the attorney is not financially dependent upon his client, there is the danger that counsel will formulate and pursue his own view of the public interest, even at the expense of the real, but perhaps unrealized, interests of the client.

This problem is most acute where the client is a private individual with a direct stake, whether economic or not, in the outcome. Thus, in an environmental case involving scenic intrusion by an unsightly power line, the individual may be willing to compromise on a rerouting that will affect him only minimally, whereas the attorney and/or the foundation may prefer a purist position which resists any power line encroachments whatever. Both the foundation and the attorney it sponsors may be dedicated to the establishment of certain principles and willing to accept interim defeats rather than compromise. However, the best interest of the particular individual public interest client may require settlement for half a loaf. While the lawyer must resolve this conflict in favor of the client, the very existence of the conflict may present dangers. Part of any lawyer's effectiveness is the level of commitment he makes to his work. The foundation-supported lawyer must decide whether he is committed to the

public interest client or only to the public interest generally.

An additional problem area for foundation-supported law firms is the limitation of the tax laws on influencing legislative activity, one very important forum in the public interest area. Under the Tax Reform Act of 1969, most foundation-supported law firms fall into the category of private foundations. They also receive their support from private foundations upon whom the full brunt of the new tax law has fallen. High tax penalties will compel contributing foundations to carefully scrutinize every grant and how it is spent. Such constant surveillance is not conducive to the practice of law. In fact, the vehemence of Congress in passing the law has made some foundations reluctant to fund any high-visibility and controversial public interest law. Thus as a practical if not a legal matter, activities which involve counselling use of the press or direct action for unpopular causes may also be eliminated for the foundation supported firm.

One further tax factor is that foundation-supported public interest law firms are artificially limited in their permissible courses of action by the definition of "charitable" activity. (Educational organizations are only permitted to practice law as a means of educating students and litigation is not in and of itself educational.) Most charitable activities are limited to pursuit of causes on behalf of the poor. However, certain issues, even if not pursued on behalf of the poor, are proper charitable activities. These issues include civil rights, civil liberties and apparently environmental litigation. But consumer law, draft law and many other pressing public interest issues may be litigated only on behalf of the indigent. Limiting litigation to only those who are truly indigent may rob the lower middle income individual of representation and may unduly narrow the scope of operations of the public interest law firm. In short, a foundation-funded law practice within the confines of the Internal Revenue Code is neither the easiest nor the most efficient organization.

The most fundamental problem with the foundation-funded law firms is their impermanence. Foundations make their grants from year to year or at most for three years. Rarely

if ever do they intend to fund any project on a permanent or semi-permanent basis. Thus unless a general practice foundation-funded public interest law firm can attract broad public support, it is inevitably doomed to short term existence. Although public interest law is becoming increasingly popular today, in five years other social causes undoubtedly will have captured the fancy of the foundations, as happened recently with voter registration. The limited tenure and lack of independent support of foundation-funded law firms seriously troubles those who hope to see strong and permanent institutions built to accommodate the needs of public interest clients.

The Self-Supporting Public Interest Law Firm

Finally, there is the public interest firm which endeavors to make its own way by maintaining the traditional lawyer-client relationship and accepting fees. We selected this route, convinced that it posed the fewest obstacles to the pure practice of public interest law. Our experience has confirmed our original judgment.

Nonetheless, the traditionally structured public interest law firm has certain fundamental vulnerabilities, most of which are occasioned by its precarious economic position. By its very nature, the public interest law firm of this type can only be as militant and vigorous as the resources, rather than the motives, of its clients permit. For example, a private individual may be outraged over the failure of a large retail store to honor certain manufacturer's warranties and may be more than willing to fund what would be explained to him as a ground-breaking law suit. A loss sustained in the trial court may make an appeal vital, but for a variety of reasons, ranging from personal economic losses to loss of interest to outside pressures, the client refuses to allow an appeal. An extremely damaging lower court decision relating to a matter of vital consumer law is now on the books because the client seeks no further redress.

Two serious problems are demonstrated by this example.

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First, the public interest lawyer is asking private clients to fund what are essentially public causes, and the two interests may well diverge at some point. What does the public interest lawyer do when he is convinced that the course chosen by the client will jeopardize what he sees as the overriding public interest? While it may seem expedient to withdraw, that is never fair to the client. Second, the self-supporting public interest law firm is in a very pernicious sense the worst "cop-out" of all, for it is playing by all the rules of the system and thereby perpetuating its worst evils. When you represent an individual property holder seeking to hold out against condemnation of his property by a large power company, you know full well that in the final crunch one individual's resources (whether modest or substantial) are simply no match for the virtually limitless resources which the company can expend if it is determined to prevail. That is a bitter lesson to be learned, and its teachings raise very serious questions about the long-range role of "traditional" public interest law firms.

Lawyers in such firms are also subject to some of the same pressures, different in degree though not in kind, as those in "straight" firms. Lawyers are usually forced to allocate their time in at least rough proportion to the importance and economic contribution of their clients. In the public interest field, an individual who seeks help because of discrimination in employment can rarely if ever pay for the actual time needed to win such a case. It is very tempting to assign that discrimination case a low priority and work on a major consumer fraud suit being funded by a wealthy labor union or a pollution case on behalf of a municipality against a private polluter. Nevertheless, they are, one and all, public interest matters.

In short, the "traditional" public interest lawyer is forced by the nature of economic realities to cater to big institutional clients who can afford to pay their way in the present litigation and are sources of further funds for future litigation. While this kind of "corruption" is subtle, it is there

nevertheless, and only by recognizing the temptations can they be avoided—hopefully.

These economic problems will not be solved until there is a sufficient number of paying public interest clients. As of now, the public interest clients who can afford legal services, even at minimal rates, are distinctly in the minority, and fewer still recognize the need to pay for such services. Until there is a sufficient number of clients who can ensure the survival of public interest law firms, the members of such firms must either accept some "straight" work (which of course would not conflict with their public interest work) or must be willing to tolerate the uncertainties and insecurities of a somewhat hand-to-mouth existence.

Moreover, it is incumbent on the members of a public interest law firm to assume the task of affirmatively educating their clients about the utility of legal representation. The client must be made aware of what the attorney can do for him and convinced that it is in his interest to retain counsel on an on-going basis, rather than placing reliance on ad hoc volunteer assistance. The establishment and the foundation-supported firms can contribute significantly by making it clear that their public interest efforts are meant to service those who cannot afford to go elsewhere. Little is accomplished if foundation-supported firms and pro bono programs represent those who can and should pay for legal services. Unless the foundation and pro bono programs limit their clients to those who have no less need for assistance but far less ability to secure it, they will not have served to broaden the range of available public interest representation.

Finally, it must be recognized that the interests of public interest clients are not monolithic and that there is a potential for conflict. Public interest clients may differ in long-range goals and views on substantive issues. (For instance, in the nuclear power field municipalities and cooperatives are inclined to be favorable where conservationists are skeptical). Because of the pressures on public interest clients to obtain and retain their own foundation funding, many organizations will be attracted by a project's favorable effect on promoting

their activist image, rather than the intrinsic merits or drawbacks of that project. In the final analysis the public interest lawyer must decide what best serves the public interest—providing legal services to clients who are generally concerned with public as opposed to private interests, or providing representation for public interest issues.

Suggestions

The previous discussion has explored some of the most difficult problems of public interest law practice. Present concern with the public interest law field suggests that new sources of funding for such programs may be forthcoming. We feel that these funds can flow to the public interest law firm in a manner which will help assure its permanency at no sacrifice to independence or freedom of action. In order to avoid overdependence upon such funds by law firms and overdependence by potentially paying clients upon free legal services, we suggest two types of financial assistance. First, foundations and others who want to provide funds for public interest law should contribute to the client (in most cases organizations which represent consumers, conservationists, the poor, etc.) and not to the lawyers. Thus the client will begin to develop the habit of paying for legal services just as such organizations now pay for secretaries and office space. The grantor should encourage (but not require) the recipient organization to hire lawyers who devote themselves to public interest law, not because of the benefit to the lawyer, but because of the benefit to the client organization from having lawyers who are philosophically in tune with the organization, lawyers to whom the client is extremely important and not merely a charitable duty, and lawyers who have developed skills for dealing with the problems which public interest clients present. This form of funding will also build into the organization's budget an account for legal services which may continue to receive foundation money after the foundations lose their concern for public interest law as a separately funded project. Finally, the client should be free

to hire his own attorneys rather than be forced to retain lawyers from any particular firm or legal service organization.

Second, public interest law firms could be funded through the judicious use of foundation investment funds. It has always seemed strange that foundations which spend millions of dollars each year to solve problems created by vested economic business interests contribute to those problems by investing funds in those same businesses. It is shocking that a non-profit organization devoted to providing housing to the poor had a substantial time deposit in a bank notorious for its failure to invest in housing. Foundations can and should use their investments to further their social ends within the limits of sound investment policy. Public interest law firms need library facilities and office space, but financing for these capital investments is scarce or prohibitively expensive. If the foundations would make long-term, secured loans at prime interest rates for library and office space, they could serve their investment goals as well as the needs of the public interest law firm. For instance, the public interest firm is seriously hampered by the inadequacy of facilities suitable to the efficient practice of law, such as accessible research materials particularly relating to the subject areas with which public interest clients are most interested. Foundation financing could make a significant contribution toward the acquisition and operation by public interest law firms of a building in which office space would be made available to such firms. The building would also contain centralized supporting facilities such as a complete and regularly maintained library, reproduction facilities and bookkeeping services.

These two funding techniques and similar devices would provide the funds for public interest law practice without strings and without continuing dependence upon foundation grants. They would also help to make the public interest law firm a permanent entity. With assistance through the critical early years, the firm can hopefully build a continuing clientele which is aware of the vast benefits to be obtained from public interest law firms, benefits which the client will find are worth the price paid.

We also believe that the foundation-supported public interest law organization can avoid the problem of overdependence on direct grants and can develop into a permanent self-supporting public interest law firm. Members of the foundation firms, with established expertise in public interest law, could gradually develop a separate paying public interest practice and reduce its dependence upon the foundation funds. In this way the foundation might fund 40 hours a week on non-paying legal work from each lawyer in the first year and progressively less in later years as paying clients demand more time and provide more money.

The ultimate strength of a public interest law firm of this type is its capacity to achieve true independence and permanence. Although we have focused on many of its problems, there is no question in our minds that the self-supporting public interest law firm is the only answer for the future precisely because it will be able to stand on its own two feet independent of any outside funding sources other than clients. In the long run, it is essential to develop those institutions which can provide legal services to public interest clients. The public interest law firm has the potential to attain economic self sufficiency and thus acquire a permanent place on the legal landscape.

Conclusion

We have presented a number of criticisms of certain approaches to the practice of public interest law. While there are also problems with our own type of public interest practice, it is our conclusion that our approach is preferable. To temper these criticisms and our self-serving conclusion, we want to disclaim any pretense of knowing all the answers. We merely asked the questions in the hope of stimulating a dialogue in which all those concerned with public interest law will participate. There are some aspects of public interest law which we have chosen not to discuss here but which also merit examination, for example, the estrangement of public interest lawyers from the organized bar. And although

our discussion has been limited to three types of public interest law service, there are still unexplored possibilities for establishing other organizational forms, such as corporations or cooperatives of specialists in consumer affairs, housing or employment. But our objective has been to pierce the facade of glamour which has settled over public interest law. There are too many lawyers and law students who examine the subject with preconceived and often untested hypotheses. Before the current public interest law fad subsides, those who are involved must make every effort to capitalize on its current popularity in order to build a public interest law practice strong enough and independent enough to survive. To do this we must analyze the practice of public interest law as it is now developing. Only by dealing with its real problems, rather than idealizing its virtues, will we succeed in making the practice of public interest law a more viable possibility for more lawyers in the future.

APPENDIX XIV

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The Challenge of the New Lawyers: Public Interest and Private Clients*

DAVID P. RILEY

While law is supposed to be a device to serve society, a civilized way of helping the wheels go round without too much friction, it is pretty hard to find a group less concerned with serving society and more concerned with serving themselves than the lawyers.[1]

Introduction

As the seat of Government where the wheels of society need constant oiling, Washington is preeminently a lawyer's town, and such disparaging remarks about lawyers are seldom heard here. Not so in the hinterlands, where American society has long carried on a strange love-hate relationship with lawyers. Beginning with the Constitutional Convention in 1787, two-thirds of our Congressmen and Senators have been lawyers.[2] Yet it is not hard to find anti-lawyer senti-

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* A shorter version of this article appeared in The Washington Post, Potomac Magazine, March 15, 1970.

1. Rodell, *Goodbye to Law Reviews—Revisited*, 48 U. VA. L. REV. 279, 283 (1962).

2. ERNST & SCHWARTZ, LAWYERS AND WHAT THEY DO 107 (1964).

ment, such as Carl Sandburg's refrain, "tell me why a hearse horse snickers hauling a lawyer's bones," or Shakespeare's lines in *Henry VI*: "First thing we do, let's kill all the lawyers."

In Washington, we see mostly the love side of it. Lawyers play leading roles in the executive, legislative and, of course, judicial branches of government.[3] The most prominent private lawyers are as legendary, as revered, and as socially sought after as the political stars of this political capital. Washington lawyers in the leading firms live and work in a plush world of their own, far from the dirty streets of black Washington, the barren halls of government, or the cramped quarters of academia. They conduct their search for the law along thick carpets and paneled walls. Their visitors, the famous and the wealthy, wait in antique-furnished rooms and gaze out over the city from the calm of a top-floor window.

Like just about everything else in our society, this world of Washington lawyers is being challenged now by a new generation. This challenge can be viewed as the second stage of the modern legal revolution. The first stage saw a series of major Supreme Court decisions secure far more procedural fairness for defendants, particularly the indigent, in criminal trials. The second stage is aimed mainly at civil practice, particularly administrative law. Dealing with the administrative agencies and departments of Government is of course the bailiwick of Washington lawyers. In fact, the term "Washington lawyer," as coined by Covington & Burling's Charles Horsky, refers not simply to any lawyer in Washington, but rather to that particular individual whose law practice consists largely of representing private clients in their dealings with the Federal Government. Many lawyers in Washington who draft wills, file divorces, bring negligence suits, and so forth, are *not* Washington lawyers; and some lawyers in other cities

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3. Forty percent of all American diplomats and fifty percent of "federal politicians" have been lawyers. KELLER, BEYOND THE RULING CLASS 325 (1963), *quoted in* DOMHOFF, WHO RULES AMERICA? 60 (1967).

are Washington lawyers.[4]

The second stage of the legal revolution is being conducted by young lawyers and law students. It is more complicated and more subtle than the first, but potentially much more devastating to lawyers' concepts of who they are and thus to the plush and prestigious world many of them inhabit.

Everyone agrees that lawyers have a special duty to serve society because of their special knowledge about it, and lawyers do contribute a great deal of public service work. But Michael Schneiderman, former associate at Arnold & Porter and now a public interest lawyer in his own firm, points out that much of that non-paying public service or pro bono publico work is "white shoe law," that is, separate from the regular corporate practice, and thus presents no risk of sullying profits or prestige. Some of what the big law firms list as pro bono work, such as representing indigent clients, is required by the court; some of it, like serving on commissions and study groups, may bring more prestige and fame (and therefore business) than hardship; and most of it brings about no substantial, institutional social change. Increasingly, leading Washington firms are taking on more substantial public interest projects, such as the current campaign for more construction jobs for blacks on the Washington Metro project. But even for those who go over the mark of spending fifteen percent of their time on pro bono work, as a number do, it still remains a sidelight to the main business of pursuing a profitable corporate practice. Jacques Feuillan, a young lawyer who has worked for the Lawyers' Committee for Civil Rights Under Law persuading the private bar to undertake pro bono projects, says that in our profit-oriented society pro bono work is like adultery: A lawyer is careful to find out exactly what he is getting into, and he doesn't want it to interfere with regular business.

The new lawyers are seeking something very different from that kind of public service legal work. They want the Washington lawyer to take more seriously his obligation to

4. HORSKY, THE WASHINGTON LAWYER 6, 8 (1952).

the public interest *in the course of his private practice.* As stated by John Esposito, an associate of Ralph Nader, the lawyer has a "duty to balance the private interest of his client against the public interest of society," and if the two interests do not coincide, he should then urge his client to take a broader view of his best interest.

Most Washington lawyers and many civil libertarians object that such a view assumes that the public interest can be easily determined. Worse yet, it sets up the lawyer as the moral arbiter of his client's cause before he ever gets into court, thus violating the sanctity of the adversary system through which the lawyer serves society by vigorous advocacy of his client's rights, regardless of the moral or public interest merits of the case.

Public interest lawyers agree that the adversary system is important and must be preserved. But they see a great difference between criminal trials, where vigorous advocacy preserves the adversary system, and private Washington law practice, where the most vigorous advocacy can prevent the system from operating. They see Washington law as characterized by an extreme imbalance of legal resources, the peculiar position of government lawyers, the political nature of Washington law practice, and powerful corporate clients who are relatively impervious to legal sanctions, although capable of causing far more social harm than individual criminals.

The new lawyers do not want clients who pollute the air and water, serve up ineffectual drugs to the public, produce dangerous cars, or preserve apartheid in South Africa and discrimination here. They feel that Washington lawyers are part of that system by virtue of their choice of clients and the nature of their practice. Such lawyers, they contend, cannot hide behind the image of the lawyer as guardian of our liberties while at the same time collecting handsome fees for protecting the profitable, yet socially harmful, operations of their corporate clients. Legal representation does not operate in a vacuum, and moral judgments can and must be made in the choice of clients. The new lawyers say that the Washington

lawyer wants it both ways: he wants the prestige of the profession and the profits of business.

This challenge to the role of lawyers in our society is not a new one. In the nineteenth century, Greenleaf raised the issue at Harvard Law School:

> While our aid should never be withheld from the injured or the accused, let it be remembered . . . that we are not only lawyers, but citizens and men; that our clients are not always the best judges of their own interests at our hands. It is for us to advise to what course, which will best conduct to their permanent benefit, not merely as solitary individuals, but as men connected with society by enduring ties.[5]

In another speech at Harvard, in 1905, Louis Brandeis concluded that the leading lawyers of the United States "have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people."[6] Chief Justice Harlan Stone made these remarks at the 1934 University of Michigan commencement:

> Steadily the best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance. At its best, the changed system has brought to the command of the business world a superb proficiency and technical skill. At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations.[7]

Even a leading private lawyer, the late Robert T. Swaine of Wall Street's prominent firm, Cravath, Swaine & Moore, remarked in 1949: "Probably too frequently our advice has been too limited to the technical validity of proposed action without regard to its social or economic implications."[8]

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5. THE GOLDEN AGE OF AMERICAN LAW 11 (Haar ed. 1965).

6. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 559 (1905).

7. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 6-7 (1934). Adolf Berle made the same point in stronger language in an encyclopedia article which came out at the same time, *quoted in* LEVY, CORPORATION LAWYER: SAINT OR SINNER? 171 n.6 (1961).

8. Swaine, *Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A.J. 89, 170-71 (1949). *See also*

But today's challenge goes further than the verbal admissions and scoldings of the past. At venerable Harvard Law School last fall forty law students picketed recruiters from Cravath, Swaine & Moore (and another New York firm the year before) to protest representation of clients with interests in South Africa. "Both firms," said the student leaflet, "through their clients and through the activities of their own lawyers, are extensively involved in supporting the South African economy and thus maintaining that country's racist Afrikaner government."[9] Harvard students have also picketed the University's legal counsel, Ropes & Gray, a well-established Boston firm that represents West Virginia coal mining interests. And in Washington, D.C., last October 9th about fifteen law students associated with Ralph Nader picketed the Farragut Square offices of the leading firm of Wilmer, Cutler & Pickering. They were protesting the way the prominent Washington lawyer Lloyd Cutler was handling an auto pollution case on behalf of the Automobile Manufacturers' Association.

It was a quiet picket line, no policemen were present, no songs were sung, and no slogans were shouted. After an hour or so of walking in the warm midday sun, most students went back to their classes and the uneventful demonstration appeared to have left the calm fall day undisturbed. But the picketing was the first time activist law students had brought their views so dramatically to the heart of Washington lawyer country. The incident shook the city's legal establishment like an earth tremor and set off a spirited, sometimes stormy debate about the lawyer's role in society.

This debate touches some sensitive nerves. The students' initial deference was not returned in kind by several members of the firm. Observers noted that usually poised Lloyd Cutler was "visibly shaken" during a conference room discussion

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LEVY, CORPORATION LAWYER: SAINT OR SINNER? 105 (1961), for comments by Swaine and Judge Wyzanski concerning the importance of the lawyer's social, economic and political, as well as legal, advice to his client.

9. Harvard Law Record, Dec. 11, 1969, at 1-2.

with several of the picketing students; the *New York Times* reported that Cutler's "hands trembled" as he accused the students of "trying to drive lawyers away."[10] Richard Wilmer, returning from lunch, scolded the picketers in an emotional encounter with two students on his way back to the office.[11]

The incident demonstrates that the force of the new lawyers' movement is disproportionate to its numbers. The vast majority of law students and lawyers in America today are probably as conventional and cautious as ever. But a new movement is afoot, both in the schools, where student activism is up and applications for conventional law practice positions are down, and among young lawyers just out of school. An increasing number are searching for some new definition of the lawyer's role within which they can live and work. Some are finding it in OEO-funded Neighborhood Legal Services Projects, which now involve about 1800 lawyers nationally in poverty law programs; others find it in VISTA legal projects, for which one out of every seventeen law school graduates applied in 1969.[12]

In Washington, a growing group of public interest lawyers work out of about a dozen public interest centers. Most of these centers opened within the past two years and many are manned by dropouts from the big firms. Some are foundation-funded, such as Ralph Nader's Center for Responsive Law, Edgar Cahn's Citizen Advocate Center, the Center for Law and Social Policy, or the Washington Research Project. Others are fee-charging law firms which do exclusively, or primarily, public interest work, such as Berlin, Roisman & Kessler, Dowdey, Levy & Cohen and Asher & Schneiderman, or individuals like William Dobrivir and Benny L. Kass. Although there is significant public interest activity,

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10. N.Y. Times, Oct. 10, 1969, at 30, col. 3.
11. The Advocate, Oct. 20, 1969, at 6 [The Advocate is the student newspaper of the National Law Center, The George Washington University.]
12. These figures were obtained from NLSP and VISTA officials in the national OEO office in Washington.

many of these centers are not yet on financially solid ground. In addition to poverty law and public interest work, there are the politically radical "movement lawyers" who defend the Black Panthers, the SDS and other movement groups. They work out of lawyers' communes in New York, Detroit and Chicago, or law schools, or political case defense centers, some supported by the resurgent National Lawyers Guild.[13]

Washington lawyers have long been criticized as simply "influence peddlers" and "fixers" who sit back and cash in on past political friendships. But that kind of criticism is superficial. Most Washington lawyers (including many of those with helpful past friendships) are highly skilled, knowledgeable, intelligent, and hard working people. The criticism of the new lawyers, admitting all that, is directed at them, the upstanding majority, and the system within which they operate. The new criticism is more serious than past criticism because it rides the wave of a new generation and because it goes much deeper.

The Lawyer's Role as Defender of Our Liberties

The issue was joined when Wilmer, Cutler & Pickering responded to the student picketers with a press release that said in part:

> Today's picket line is a prime example of McCarthyism—1950 style. The late senator from Wisconsin also believed he had a divine monopoly on knowing where the public interest lies. His zeal led him, as it now leads Mr. Nader, to assail his fellow lawyers for defending the targets of his attacks. . . .
>
> . . . The public interest is best served when all sides of such a controversy have the benefit of skillful advocacy. . . .
>
> . . . It is a basic premise of our constitutional system . . . that where the public interest truly lies can best be determined by the presentation of opposing views in the proper forum.[14]

While it may strike some as an over-reaction to equate Ralph Nader with Joseph McCarthy, in fact the firm's statement hit

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13. Materials from the National Lawyers Guild National Conference, held in Washington, D.C., Feb. 20-22, 1970.
14. Press Release issued by Wilmer, Cutler & Pickering, Oct. 9, 1969.

on the heart of the debate: The lawyer's role in the adversary system which is basic to the preservation of our liberties. Because of this issue, the American Civil Liberties Union finds itself on the side of the big firms. The Washington ACLU chapter publicly criticized the picketing students, reminding them of the McCarthyite attempts to smear lawyers who defended Communists.[15] Many civil libertarians have vivid memories of those painful days when the spectre of guilt by association put a paralytic scare into many fine people.

For lawyers, it was, and still is, a case of what Edward Bennett Williams calls "guilt by client," and he has defended enough unpopular people to know. One of the country's most celebrated defense attorneys, Williams believes fervently in Justice Frankfurter's view that it is often the "cases involving not very nice people"[16] which protect the civil liberties for the rest of us.

To assure fair trials, the Bill of Rights provides for, among other things, the right to counsel in criminal cases. Williams believes all lawyers have a "correlative duty" to implement that right by defending unpopular people. It is a basic premise of our adversary system that the lawyer's role is to defend the *client*, not his deeds.[17] In fact the criminal attorney is twice removed from the deeds of his client, because his major allegiance is to the all-important *principle* of a fair trial, which is almost incidentally personified in the client, who may or may not have done certain deeds; if he did, the government must prove it beyond a reasonable doubt.

There is truth (and perhaps also a little lawyerly self-inflation) in the statement of Eugene Rostow, former Yale Law School Dean and former Undersecretary of State, that "the quality of a civilization is largely determined by the fairness of its criminal trials."[18] That fairness is protected by an adver-

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15. Letter to the Editor, Wash. Evening Star, Nov. 22, 1969, at 22, col. 6, by Allison W. Brown, Jr., Chairman, National Capital Area Civil Liberties Union.
16. WILLIAMS, ONE MAN'S FREEDOM 19 (1962).
17. *Id.* at 26.
18. *Id.* at ix (introduction by Eugene V. Rostow).

sary system which requires every attorney to be as vigorous and skillful an advocate as he can; in the ensuing clash of arguments, truth is supposed to emerge. (If that proposition appears somewhat dubious in practice, it helps to view it with the same jaundiced eye that Churchill had for democracy when he called it the worst system of government except all the others ever tried.)

The Importance of Image

The lawyer's role and image as guardian of our liberties is thus appropriate in criminal trials, and is therefore a true image to a degree. It is also a profitable and well-guarded one. Lawyers, like other professionals, try to keep their prestigious image as untarnished as possible.[19]

In February, 1966 Leonard Downie, Jr., an investigative reporter from the *Washington Post,* wrote a series of articles detailing the serious problems of Washington's Court of General Sessions. His articles criticized the lack of concern for this lower court shown by the District of Columbia Bar Association and "uptown" lawyers in general, who seldom practice there. Rather than investigate the substance of the problems uncovered by the articles, a Bar Association Committee inquired about Downie's motives in writing the series, to see if someone had put him up to it. Eventually the matter was dropped.[20]

When judges of the court complained to the *Post,* they disputed none of the factual allegations in the articles, nor did they even mention the existence of problems within the court system. Rather, they complained that the *image* of the court and its judges had been damaged severely. Three Gen-

19. "The chief asset of a large firm in the United States is becoming the good-will value of its name, rather than the personal reputation of its individual lawyers." ARNOLD, FAIR FIGHTS AND FOUL: A DISSENTING LAWYER'S LIFE 192 (1965).

20. Interviews with Leonard Downie, March 15, 1970 and Stephen Isaacs, then city editor of the Washington Post, Feb. 5, 1970. The incident is also cited in BLOOM, THE TROUBLE WITH LAWYERS 319 (1968).

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eral Sessions' judges then wrote letters critical of the series to the Pulitzer Prize Committee, to whom the series had been submitted for consideration.[21] Only later was a committee of lawyers separate from the Bar Association appointed to look into the court's problems.

Last spring the District of Columbia Bar Association did it again. When a number of lawyers and legal groups at a congressional hearing criticized the conduct and quality of General Sessions judges, the Board of Directors of the Bar Association responded not to the issues of selection, conduct and tenure of judges but rather to the propriety of the criticism. The Board issued a resolution objecting to "open criticism" of judges, stating that such criticism, "when necessary," should be made only by a special commission created for that purpose (which it made no apparent effort to create), and concluding that "[p]ublic attack of the bench gives a distorted picture of the work of the courts."[22] Obviously, the picture is distorted only if the attack is distorted, but the Bar Association resolution did not bother to comment on whether it considered the facts in the criticism to be distorted. It only commented that, in general, the Bar had found the judges to be "competent, diligent, devoted public servants." Thus the resolution dealt with the criticism as it affects image, not with its substantive merits.

The fact that the legal profession carefully polishes its image of impartial judges and liberty-guarding lawyers does not mean that it lives up to its image. Such civil libertarians as Morris Ernst and Edward Bennett Williams have complained that the overemphasis on property and business law in the law schools have contributed to the bar's failure to take its responsibilities for defending liberties seriously enough.[23] The American bar has had its shining moments when distinguished lawyers risked their reputations to represent unpopu-

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21. Interview with Downie and Isaacs, *supra* note 20.

22. The Board of Directors Bar Association District of Columbia Resolution, Press Release, May 26, 1969.

23. *See* ERNST & SCHWARTZ, LAWYERS AND WHAT THEY DO 114, 119 (1964); WILLIAMS, ONE MAN'S FREEDOM 23 (1962).

lar defendants. In 1770, for example, John Adams put aside his political sympathies for the American patriots to defend a British captain accused of murder during the Boston Massacre. And during World War II, Harold Medina of New York defended a man accused of treason and received a spit in the face from a spectator for his efforts. William Kunstler has written a book about such moments in the history of the American bar, but he well understands that they have happened too infrequently: "I have long realized that lawyers, despite their addiction to conflict, share in common with the rest of mankind a natural resistance to involving themselves in situations fraught with grave consequences to their pocketbooks, their reputations and their peace of mind."[24]

The Precariousness of the Adversary System

There is also substance to the civil libertarian's concern over the new lawyers' criticism. It is not merely a question of wanting to preserve the respected image of lawyers as guardians of our liberties. Many civil libertarians have a genuine concern that the new lawyers' criticism will chip away at the sanctity of the adversary system. While Washington lawyers may find it harder to protect polluting companies, they argue that criminal lawyers may also find it harder to protect the rights of defendants—which by extension means the rights of all of us.

George Washington University law professor Monroe H. Freedman, one of the city's hardest hitting civil libertarians, is troubled by the new lawyers' criticism because he says he has "heard it all before—from conservative judges." Prosecution-oriented judges often admonish vigorous, civil libertarian defense counsel that in the interests of public safety there are some lengths to which lawyers should not go in trying to get their clients acquitted. That is basically the same thing the new lawyers are saying to corporate counsel.

Freedman knows first hand about the precariousness of the

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24. KUNSTLER, THE CASE FOR COURAGE 9 (1962).

adversary system in the hands of conservative judges. In 1966 he gave a speech[25] discussing the defense lawyer's ethical dilemmas, caught as he is between his primary obligation to his client under the adversary system and his other obligations as an officer of the court to avoid "fraud or chicane" and to conduct himself with "candor and fairness." The Canons of Professional Ethics are impossibly self-contradictory on this and other points, as they slide over the hard questions of how a lawyer should resolve his conflicting obligations in specific circumstances. In his speech, Freedman faced these questions honestly and carefully, and concluded that under certain circumstances the lawyer's primary obligation to his client under the adversary system might lead him to knowingly mislead the court (the alternative being to betray his client).

Three conservative federal judges—the late Judge Holtzoff, Judge Hart, and Judge (now Chief Justice) Burger—contacted the Dean of the law school about the speech. Judge Burger, by his own later account, told the Dean he could not believe that anyone who was "law-trained, mature, and responsible" could have made the remarks attributed to Freedman;[26] others expressed similar dismay that a law professor would hold such views. That was only the beginning of Freedman's troubles. He was soon brought to the attention of the United States District Court's Grievance Committee by "several federal judges" who complained about the speech. Freedman could have been censured, suspended or disbarred by Grievance Committee and subsequent court proceedings, had the proceedings not been dropped several months later. Although the Bill of Rights guarantees the right in criminal cases to be confronted with one's accusers, to this day Freedman does not know with certainty which federal judges complained about him. He does know that on two subsequent occasions Judge Burger insisted that Freedman not appear

25. Speech to the Criminal Trial Institute, Washington, D.C., Jan. 10, 1966.

26. Letter from Judge Warren E. Burger to Prof. Monroe H. Freedman, May 13, 1966.

with him on panels to discuss legal ethics questions. Last May, three years after the incident, the American Bar Association Journal ran an editorial critical of Freedman's views,[27] which he had repeated more recently at an ABA-sponsored discussion.[28] The most ringing—or hand-wringing—part of the editorial reads: "And how long after the public gets the idea that a substantial segment of the Bar tolerates perjury will the legal profession hold its present influence and prestige? Not long, we think."[29] A few months later the Journal ran a partial retraction,[30] commending Freedman for raising these difficult questions, as he has done in two scholarly review articles since the original speech.[31]

Everyone from the distinguished Chief Justice to the iconoclastic professor agrees that, as the Canons of Ethics point out, the lawyer has a dual obligation: one to his client and one to "the law" (or "justice" or "the public") and his own conscience. And everyone also agrees that although the right to counsel and vigorous legal defense must be guaranteed for all, there are certain limits to that vigor; it does not include, for example, bribing the judge or the jury, or other violations of the law. The question is whether those limits should vary in different circumstances. The question Ralph Nader and the new lawyers raise is this: if you cannot bribe a corrupt judge, can you take advantage of a corrupt system stacked in your favor? And if you do, can you do it in the name of preserving the adversary system?

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27. 55 A.B.A.J. 455 (1969). This editorial states that lawyers holding such views "will surely lose the respect of most lawyers and judges." Judge Burger used virtually identical language at a Federal Bar Association discussion on legal ethics in early September, 1966, according to Ralph J. Temple, Legal Director of the NCACLU, who attended the discussion. Interview, May 1, 1970.

28. Panel discussion on legal ethics, held at Harvard Law School, reported in Harvard Law Record, Oct. 10, 1968, at .

29. 55 A.B.A.J. 445 (1969).

30. 55 A.B.A.J. 746 (1969).

31. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

Nader and the new lawyers agree with the civil libertarian view of the importance of the adversary system—as far as it goes. But they see another world beyond it. They see the Washington lawyer as inhabiting a distinctly different world than that of the criminal defense attorney. The distinction, like all distinctions which settle hard legal questions, is admittedly not always easy to draw, but the new lawyers insist that it is still a valid one.

Nader's distinction is basically the one that Louis Brandeis made in his 1905 Harvard speech. Brandeis said that in litigation between private parties, a lawyer's vigorous advocacy is balanced by that of an opposing attorney, and the adversary system is served. But "a very different condition is presented . . . a condition of great unfairness to the public," when highly capable lawyers representing private interests deal with the legislature "while the public is often inadequately represented or wholly unrepresented."[32] Brandeis added that the ethical rule for lawyers should not be the same in the two situations.

The Auto Pollution Case

The case which Lloyd Cutler was handling and which the students were protesting is a prototype of what the new lawyers are talking about and dramatizes the distinctions they are trying to make.

In the early 1950's, Los Angeles County Supervisor Kenneth Hahn began writing to auto manufacturers, asking them to help lessen smog and pollution in the Los Angeles area. Finally in 1965, he wrote to President Johnson: "Now, after 12 years of correspondence . . . I have found out that you cannot 'cooperate' or urge them 'voluntarily' to do the job."[33]

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32. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 561 (1905).

33. Cited in a letter from Congressman Brown (D - Calif.) to Attorney General John Mitchell, Aug. 29, 1969, *reprinted in* 115 CONG. REC. H7442 (Sept. 3, 1969).

In mid-1966, the antitrust division of the Justice Department began a grand jury investigation, in Los Angeles, into the car companies' actions to determine whether they had violated the antitrust laws by conspiring to restrain the development and marketing of antipollution devices. After an 18-month investigation, Sam Flatow, the Justice Department attorney conducting the probe, requested permission to ask the grand jury to return indictments. Donald Turner, then head of the antitrust division, refused and dropped the criminal case, with no public explanation for his decision.[34]

Soon after that, Flatow retired from the Justice Department after serving 25 years. Later he told John Esposito, Nader's associate, that the grand jury foreman was so upset by the Justice Department's failure to act in the face of the evidence uncovered that he told Flatow the grand jury would come back with indictments anyway if Flatow so wished. In other words, the Justice Department almost had a so-called "runaway" grand jury on its hands. But Flatow said no, they should follow orders, and the grand jury was dismissed. Esposito talked to Flatow in Washington last summer. "He was not bitter," Esposito says, just "a jaded man reconciled to the facts of life" as a government lawyer.[35] In September, a few weeks after their talk, Flatow died. He had spent the last eight years of his life working on two cases for the Justice Department, six years on a banking case and two years on the pollution case. Both were cut off at the last minute and his work bore no immediate results. Those who attended Flatow's retirement party from the Department detected an underlying irony in his remarks about his rewarding quarter century of government service.

Last January, just ten days before the Johnson Administration left office, the Justice Department filed a civil antitrust suit against the Automobile Manufacturers' Association and

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34. This information was contained in a letter from Ralph Nader to Richard McLaren, Ass't Attorney General, Antitrust Division, Sept. 15, 1969, *reprinted in* 115 CONG. REC. E7512 (daily ed. Sept. 16, 1969).

35. Interview with John Esposito, Feb. 2, 1970.

the four major car companies. The complaint asked for an injunction to prohibit the defendants from further conspiring to cover up, delay and prevent the development of antipollution devices. The complaint outlined some rather damning evidence of a conspiracy begun "at least as early as 1953" to engage in "product fixing," or the elimination of competition among the companies to develop antipollution devices for cars.[36] On three separate occasions, the complaint alleged, the defendants agreed to delay the installation of such devices. Bringing such a strong case against the giants of industry, Esposito commented, was "LBJ's last bad joke on Nixon."

Late last summer, rumors flew around Washington that the Justice Department, under new Attorney General John Mitchell, was about to agree to an out-of-court settlement of the suit. In early September, 19 Congressmen, most representing badly-polluted city districts, wrote to Mitchell urging him not to settle the case in private negotiations, but rather to go to trial for a public airing of these serious charges. They pointed out that automobiles account for about 50 percent of the air pollution nationally (85 percent in Los Angeles), and that if the allegations in the complaint were true, the car companies have frustrated the efforts of local governments across the country to reduce pollution, having "deliberately and cynically wasted 15 precious years."[37]

On September 11, however, the Justice Department issued a press release announcing a consent decree, saying that the settlement accomplished the injunctive relief sought by the suit and avoided a long, expensive trial.[38] Under the consent decree, the industry in effect refused to admit it had done anything wrong, and promised never to do it again.

Immediate objections were voiced. Nader wrote to Nixon's antitrust chief, Richard McLaren, pointing out that the settlement's surveillance provisions were notably weak and that

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36. The complaint is reprinted in 115 CONG. REC. H7442 (daily ed. Sept. 3, 1969).
37. *Id.*
38. United States Justice Dep't Press Release, Sept. 11, 1969, reprinted in 115 CONG. REC. E7505 (daily ed. Sept. 16, 1969).

the decree had other serious deficiencies. There were no provisions for access to the Justice Department's information by local governments and private parties (who can bring suits for damages under antitrust laws), and there was no ban on the destruction of corporate documents relevant to the alleged conspiracy begun in 1953.[39] Half a dozen cities and states and many private parties urged the judge not to sign the consent decree,[40] but in October he did. Sixty Congressmen petitioned the judge to make the information from the Justice Department's long investigation available to litigants who lacked the resources to conduct such a probe themselves. He did issue such an order, although potential litigants complain it includes a cumbersome, time-consuming process. Congressman Leonard Farbstein (D-N.Y.) plans to introduce legislation requiring easier access to such essential evidence for litigants.[41]

The Lawyer's Obligations

As counsel for the Automobile Manufacturers' Association, Cutler undoubtedly played the leading role in the negotiation of the consent decree; his signature was the first of the private attorneys on the settlement papers. Big firm lawyers and civil libertarians say that Cutler did nothing wrong at all. He got the best deal he could for his client, which is what he was paid to do.[42]

Nader and the picketing students say that, given the urgency of solving America's pollution problems, Cutler had an

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39. Nader knows something about the destruction of documents: An important tape recording in his invasion of privacy suit against General Motors was "burned when a grandchild threw it into the fireplace," according to the detective hired by GM to investigate Nader. Wash. Post, Oct. 27, 1968, at A14, col. 3.

40. *See* Von Hoffman, Smog Trial, Wash. Post, Oct. 31, 1969, at D1, col. 1.

41. Interview with Ellis Levin, Legislative Assistant to Rep. Farbstein, Jan. 28, 1970.

42. Cutler has refused to talk about the case or the ethical questions it raises. He has asked the American Bar Association for an opinion on the propriety of granting interviews in such situations.

obligation to the public to urge his client to go to trial for a public airing of the charges, and if the client would not accept that course, then to sever his relationship with the client, having determined that the client's interest and the public interest were not in sufficiently close harmony.

It is a tough demand to make of any corporate lawyer. Out-of-court settlement was of course what the car companies wanted; trials are costly and this one would have been very embarrassing for a very image-conscious industry. Wilmer, Cutler & Pickering probably would have lost a client, a rather important client, had Cutler done what the students wanted; in fact the firm might have lost more than one client.

Perhaps it is this setting of contemporary mores that leads many Washington lawyers to claim defensively that Nader really wants to deny legal representation to General Motors and the others. It is a straw man argument. Nader and the students have specifically insisted from the beginning that they are *not* saying that. They are raising questions about the limits of vigorous advocacy, not about the right to any advocacy at all. They are saying they disagree with Cutler's view of the public responsibilities of a lawyer in this situation, and with his view of the public interest, which he says was served by the consent decree because it avoided a long trial.

The Canons of Ethics, reflecting the lawyer's dual obligation, provide arguments for both sides. On the one hand, they say the lawyer owes "entire devotion" to the client; on the other, they say he has a high duty to justice and he "must obey his own conscience and not that of his client."[43] The force of conventional practice is much stronger on Cutler's side. The Canons themselves may be a little stronger on the other side. Canon 32 for example specifically states that "No client, corporate or individual, however powerful . . . is entitled to receive . . . any service or advice involving . . . deception or betrayal of the public."

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43. ABA Canons of Professional Ethics No. 15.

But there is much more to the controversy than simply playing around with some contradictory Canons of Ethics. Washington lawyers say that the students should really have picketed the Justice Department for not sufficiently protecting the public interest, and their response gets to the heart of the issue. The short answer is that students and the new lawyers are in effect already doing that with legal challenges urging more government protection of the consumer. But the long answer is that even if the sides were equal—even if the public interest lawyers had as much influence and political clout as the leading Washington lawyers have—lawyers still could not escape their obligation to balance public and private interests in the course of their practice. Some public interest lawyers, however, see the real answer in the development of a true adversary system in Washington law practice. One commented that he mistrusts the sense of public interest or good will of people like Washington lawyers who cannot be held accountable for their decisions, particularly when great personal profit can come from those decisions. Charles Halpern, head of the Center for Law and Social Policy, which works in the environment, consumer and health areas, emphasizes that if public interest centers do not survive (and the issue is still in doubt) then we will never know what a real adversary system would be like.

Some Washington lawyers do perform the balancing act between public and private interests. Robert Wald, who has represented tobacco interests in Washington, is one; as he puts it:

> In matters of public health and safety, a lawyer's role becomes more critical. If he sees a conflict between his client's interest (as the client views it) and the public's, he has a responsibility to broaden his client's perspective. The real long-term interests of the client and the public often coincide.[44]

An associate at Covington & Burling has pointed out that if a lawyer is sympathetic to the merits of a particular civil rights or civil libertarian point of view, then his presentation

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44. Zalaznick, *The Small World of Big Washington Lawyers*, FORTUNE, Sept. 1969, at 124.

of that view to his client may influence the client to consider it more carefully in deciding on a course of action. The lawyer's own advice to the client may be affected by his political sympathies; indeed, the attorney's own views are a factor in the advice he gives to his clients, if not always consciously so. As Judge Wyzanski has put it, "The modern lawyer almost invariably advises his client not only on what is permissible, but also what is desirable."[45]

Others observe that it is by no means always clear just what is in the best public interest. Given the pervasive power of corporations, the public interest may, in some situations, best be served by working within the corporate structure, rather than through legal sanctions applied against it. At other times, only a legal sanction will force action for the public good.

Although the real public and private interests sometimes coincide, more often they do not. If "social betterment" were profitable, General Motors would have a division devoted to it.[46] However public spirited the car companies may be, they were not sufficiently motivated to urge Lloyd Cutler to go to trial in the auto pollution case (and thereby greatly increase the risk of private treble damage suits against them).

A similar situation involves attempts by Covington & Burling lawyers to keep the drug Panalba on the market for their client, the Upjohn Company, which in 1968 grossed $1.5 million a month on the drug. Panalba is a combination of two antibiotics which the National Research Council of the National Academy of Sciences found to be no more effective, although more expensive, than one of the antibiotics alone. Further, the FDA Commissioner had testified at a congressional hearing that the additional antibiotic in the combination involved an unacceptable hazard in light of its ineffectiveness.[47] Thus the FDA ordered Panalba off the market, but removal was delayed for over a year while the company

45. LEVY, CORPORATION LAWYER: SAINT OR SINNER? 105 (1961).
46. *See* Wash. Post, Feb. 9, 1970, at D 7, col. 7. ("Nader Visits the Street, Tilts a Few Windmills").
47. Wash. Post, Feb. 28, 1970, at A4, col. 1.

offered evidence that the drug was effective and argued that it had a right to a formal hearing on the FDA ruling. A formal hearing would seem to be the company's due process right, but keeping an ineffective and dangerous drug on the market pending the outcome of a hearing would appear to be a clear case where the private interest and the public interest do not coincide.[48]

The Imbalance of Legal Resources

Nader and Esposito both emphasize what Esposito calls the "fantastic imbalance of resources" in the Washington bar. Esposito contends that the law firms have a "virtual monopoly on the best legal talent" in the city. Apparently corporate interests monopolize the best legal talent in other cities too. An appalling example was the dilemma faced by the Assistant Los Angeles County Counsel, David Mix, when he tried to get some legal help in opposing the auto pollution consent decree: he discovered that all the major antitrust specialists in town had been retained by the companies and the Automobile Manufacturers' Association.

Compared to the private corporation lawyer, the Government agency lawyer is desperately overworked, underpaid and understaffed for the job he is theoretically supposed to do. The antitrust division of Justice has about 290 practicing attorneys, 170 in Washington, not much larger than Washington's biggest private law firm (Covington & Burling, with 119). Nader has calculated that the division's entire budget approximately equals three hours' gross revenue of General Motors, figured on a year-round, 24-hour basis.[49] Although the budget has recently been increased from $8 million to nearly $9 million, this is still well short of four hours of GM's gross revenue.

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48. Wash. Post, Feb. 28, 1970, at A4, col. 2.
49. Letter from Ralph Nader to Assistant Attorney General McLaren, in 115 Cong. Rec. E7512 (daily ed. Sept. 16, 1969).

The Peculiar Position of the Government Attorney

The relationship of the government attorney to his client is much less clear or direct than that of the well-paid private attorney to his corporate client. The government attorney's client is supposedly "the public," but it is a client he seldom sees. Although numerous, the client is also nebulous, distant, and seldom has as great an individual stake in agency decisions as does a corporation in a regulated industry.[50] James M. Landis, formerly Dean of Harvard Law School, at one time member of three different regulatory agencies, and chairman of two of them, has put it this way: "[C]ontacts with the industry are frequent and generally productive of intelligent ideas. Contacts with the public, however, are rare and generally unproductive of anything except complaints."[52]

It is a strange sort of relationship for an attorney to have with his client, and very different from the private attorney's. Clifford Durr, former Federal Communications Commissioner, has described the natural result of such a situation. "In time the vision of the larger and more distant public tends to grow dim and the members of the agency and its staff come, without realizing it, to see the public interest in terms of the few members of the public they see and know and quite often come to like."[52] And the regulators often subsequently go to work for the regulated.[53] The widespread pattern is for the bright young lawyer to work for a government agency for a few years, then take a well-paying position with a Washington law firm. He is then able to lead a client through the agency labyrinth he has just mastered from the inside. He of course still has contacts at the agency. A good example of the intangible values of past agency affiliation is presented by a recent *Fortune Magazine* article's account of

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50. *See* Letter to the Editor from Clifford J. Durr, NEW REPUBLIC, June 30, 1958, at 8; DOUGLAS, ETHICS IN GOVERNMENT 34-35 (1952). Both are reprinted in GELLHORN & BYSE, ADMINISTRATIVE LAW 1015, 42 (1960).

51. MAYER, THE LAWYERS 339 (1967).

52. GELLHORN & BYSE, *supra* note 50, at 1015.

53. NEW REPUBLIC, June 30, 1958, at 8 (letter to the Editor).

what took place when an SEC lawyer received a phone call from Manuel F. Cohen, former Chairman of the SEC and now a partner of Wilmer, Cutler & Pickering. After he hung up, the SEC lawyer remarked, "You know, I still jump when he calls."[54]

The relationship between private and government attorneys can be very cozy. It is not as simple as the stereotype of the former Government official, now private "influence-peddler" and "fixer." Much of the salable experience a private attorney gets from Government service is in the form of expertise about how the system works. It is not just knowing people; it is also knowing the system.

Either way, however, the experience is very profitable and very much in demand by corporations. Influence and knowledge of the system do not insure a favorable decision, but they can help secure a hearing before the right people weeks before the novice can. And that speed is very important, "it means money," says Peter Noterman, former associate of a Washington corporate firm.[55] The Washington lawyer who can find out over lunch with an old Government friend whether or in what manner an agency is likely to make a certain ruling in the next year has some very valuable information for which corporate clients are willing to pay handsomely. Thomas C. Corcoran, the famous "Tommy the Cork" of New Deal days, has described his law practice as "fundamentally an intelligence operation". He once made this comment: "There are no secrets in Washington, but there is such a thing as three hours head start. I try to understand what's going on and give my clients those three hours."[56]

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54. Zalaznick, *supra* note 44, at 121. Both the Canons and federal statutes prohibit a lawyer from working on a case he had earlier handled as a government lawyer, but they have limited effect. *See* HORSKY, *supra* note 4, at 149-152.

55. Interview with Peter Noterman, Feb. 6, 1970. *See* Zalaznick, *supra* note 44, at 123: "In addition to knowing where to go, the lawyer with government experience often can get there faster than an outsider. That, too, is sometimes worth a great deal."

56. *They Build a Bridge to Washington*, BUSINESS WEEK, April 23, 1966, at 96, 99.

These *ex parte* contacts between private and Government attorneys disturb Nader and the public interest lawyers. They say that such non-adversary contacts, hearings, and negotiation sessions are built into the system, and the public comes out the loser. These contacts make it very difficult to establish or maintain truly arm's length, adversary negotiations between them. Although Nader and the new lawyers are building friendships with the younger Government people, public interest advocates lack the same degree of chumminess with Government attorneys. Congressman Celler's 1958 investigation of the Justice Department's consent decree program revealed that government attorneys discussed a pending antitrust suit with American Telephone & Telegraph lawyers and executives in such casual settings as the Attorney General's hotel room in White Sulpher Springs, W. Va., and at a government attorney's vacation resort in Florida.[57]

Louis F. Oberdorfer, a prominent partner at Wilmer, Cutler & Pickering, is an old law school friend of Assistant Attorney General Richard McLaren, and the two have had dinner together socially. Both were on the Editorial Board of the Yale Law Journal—Oberdorfer was Editor-in-Chief. It is undoubtedly true, as Oberdorfer says, that he has never discussed the auto pollution case with McLaren, nor has he worked on it for the firm. Still, the mere existence of the friendship troubles the public interest lawyers.[58]

No friendship exists between Nader and McLaren. In fact, when a law student researcher for Nader requested permission to interview Justice Department lawyers last fall, McLaren denied it. Soon afterwards, McLaren sent out a carefully worded memo to supervisory personnel in the antitrust division directing them to inform staff attorneys that any contacts with outsiders about Department work should be cleared with

57. ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE (1959).

58. Friendship can also interfere with political contacts, as Myer Feldman pointed out. Zalaznick, *supra* note 44, at 122. But undoubtedly (as has been said of money in politics) the Washington lawyer is better off with such friendships than without. The point is not to use them with too heavy a hand.

supervisors first. The memo did not threaten to fire attorneys for talking to outsiders. In the context of the bureaucratic world of Government, however, it was clear enough what one should and should not do if one wanted to get promoted; it was so clear that a number of staff attorneys with civil libertarian orientations were quite upset over the memo's chilling effect on the liberties of the staff.

The Political Nature of Washington Law Practice

Nader emphasizes that the role of the Washington lawyer is not simply that of a legal technician in the traditional case-by-case manner. Rather, the Washington lawyer is a political-legal advisor who deals with all three branches of Government. Thus, he is in a position to influence social policy. As *Business Week* has written, he is a "policy lawyer," the man "business, particularly big business, seeks when mapping strategy for dealing with big government."[59] Cutler himself has distinguished Washington law practice from Wall Street (where he used to work for Cravath, Swaine & Moore), observing that in Washington practice the problems "deal with facts in the making, with the development of government policy."[60]

To deal with big government, General Motors has its political Washington lawyers, above and beyond the battery of house counsel who are its legal technicians. Cutler is retained by the Automobile Manufacturers' Association for his particular political expertise; it is this very "independent status" which, Nader argues, gives him a greater obligation to the public interest. If Washington lawyers are to be considered more than "technical minions," Nader has written, "they [must] bear the responsibility attendant upon their status as independent professionals."[61]

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59. *They Build a Bridge to Washington*, BUSINESS WEEK, April 23, 1966, at 90.
60. *Id.* at 96.
61. Nader, *Law Schools and Law Firms*, NEW REPUBLIC, Oct. 11, 1969, at 23.

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Clark Clifford, confidant of several Democratic Presidents and LBJ's Secretary of Defense, set out from the beginning to set up a law office that would be, in his words, "a counseling firm—one that could advise business on legal developments in Washington and trends in government attitudes toward business."[62] In handling a major tax matter for Du Pont, Clifford described the firm's role as "the command center" for Du Pont's lobbying efforts where advice was given as to who to see and when to see them.[63]

Sometimes Washington lawyers sign up as lobbyists and buttonhole around the Hill themselves. Lloyd Cutler did that for the Automobile Manufacturers' Association when the auto safety bills were pending. He and Thomas Corcoran lobbied for the Pharmaceutical Manufacturers' Association when Senator Kefauver introduced legislation in 1962 to require drugs to be not only safe but also effective.

It is wholly understandable that Washington lawyers should practice a particularly political brand of law. "Regulation is a political process" says Professor Bernstein.[64] Charles Horsky wrote that despite all the American myth to the contrary, "[T]his is emphatically a government of men, not of laws."[65] Lee Loevinger, a former Federal Communications Commissioner and now at the Washington firm of Hogan & Hartson, has made the same point: "In a realistic sense there is no such thing as regulation by government, there is only regulation by government officials."[66] Thomas Corcoran rephrased it this way: "All law is power and the law changes as the power balance changes."[67] When dissenting Civil Rights Division attorneys objected that the Nixon Administration's civil rights policies contradicted Supreme Court

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62. Zalaznick, *supra* note 44, at 197.
63. *Id.*
64. Bernstein, *The Regulatory Process: A Framework for Analysis*, 26 LAW & CONTEMP. PROB. 329, 340-41 (1961). *See* Miller, *Public Law and the Obsolescence of the Lawyer*, 19 FLA. L. REV. 514, 525 (1966).
65. HORSKY, THE WASHINGTON LAWYER 68 (1952).
66. MAYER, THE LAWYERS 329 (1967).
67. *They Build a Bridge to Washington*, BUSINESS WEEK, April 23, 1966, at 99.

decisions, Assistant Attorney General Jerris Leonard put it even more bluntly: "Around here," Leonard said, "the Attorney General is the law."[68]

American Culture and Corporations

Ralph Nader becomes especially incensed over what he calls "the double standard, one for corporate behavior and the other for individual behavior outside a corporate framework."[69] Society gets very upset, he points out, when somebody empties the cash register of a grocery store. But there is no serious talk of criminal sanctions when a defense contractor overcharges the Government several million dollars or when drug companies make millions of dollars from ineffective drugs, or when the auto companies produce bumpers that cannot protect a car "in collisions exceeding 2 miles per hour," with full knowledge that such bumpers "maximize repair costs."[70] Nader cites a Michigan insurance executive's study indicating "an annual loss to motorists of $1 billion due to ornamental bumpers."[71] The original draft of the auto safety bill included provisions for designing cars with reducing property damage in mind, but in final version, such provisions were deleted. That was the bill Lloyd Cutler worked on for the Automobile Manufacturer's Association.

We have no trouble talking about "individual criminals," but somehow even the term "corporate criminal" sticks in our throats and smacks of being unjustifiably ideological. Yet the harm done by corporate criminals can be far more widespread and devastating than that of even the most ambitious individual criminals. Nor is it limited just to theft and swindling of the public. There is also the "silent violence" Nader talks about. A study by a noted public health expert

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68. Greenberg, *Revolt at Justice*, THE WASHINGTON MONTHLY, Dec. 1969, at 40.

69. Remarks by Ralph Nader before the National Press Club, Washington, D.C., Dec. 21, 1966, printed in *Hearings on S. 860 and S. 2045 Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations*, 91st Cong., 1st Sess. 483 (1969).

70. *Id.* at 370.

71. *Id.*

at Albert Einstein College of Medicine found that in New York City "badly polluted air frequently causes 10 to 20 deaths a day."[72] In Richmond, Indiana, in April, 1968, 41 people died and 100 were seriously burned by the explosion of a pipeline that had been defective for some time, according to the company's own report.[73]

This is a country populated with massive corporations. The annual gross receipts of General Motors, the world's wealthiest corporation, exceed those of any country except the United States and the Soviet Union.[74] The gross revenues of General Motors, Standard Oil of New Jersey or Ford far exceed those of any state in the Union.[75] It has always been difficult for Americans to think of such economic and social giants as criminals; many look upon them as the country's greatest and most distinctive cultural invention. And they do a lot of good too, providing jobs and transportation for millions of Americans. The men in the Justice Department grind out consent decrees to avoid expensive trials because they lack the manpower to conduct them. If that policy represents a double standard of justice, it does not mean that government attorneys are conscious, conniving political fixers. But sometimes clearly political decisions *are* made, as in the case of the National Farmers' Organization. It was generally felt around the antitrust division that a recommendation in 1964 to prosecute the National Farmers' Organization for withholding livestock from the market was a "political football" and thus never got off the ground. In 1967 a milk price fixing suit was finally brought against NFO, but apparently "the word came down" to drop it, and in December, 1967, the case was dismissed with a letter from NFO saying it would give notice if it decided to initiate a similar plan in the future.[76]

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72. Wash. Post, Nov. 12, 1969, at A2, col. 2.
73. *Hearings*, *supra* note 69, at 368.
74. Press Release by Ralph Nader, Feb. 7, 1970.
75. GALBRAITH, THE NEW INDUSTRIAL STATE 87 (1967).
76. Interview with former Antitrust Division personnel familiar with the case, March, 1970.

Nader charges that political considerations have clearly governed the case with the largely unchallenged structure of the auto industry, particularly General Motors. In his testimony before a congressional subcommittee, Nader alleged that through three Administrations the Justice Department

> conducted a detailed examination into [General Motors'] . . . anti-competitive and monopolistic behavior, both vertically and horizontally. A grand jury was convened in New York for 18 months. In May 1966 a 120-page memorandum, together with a 104-page draft complaint, was completed by staff. Succeeding inquiries to the Department of Justice have received the same reply: "The matter is still under study."[77]

Nader believes that "[T]he only obstacle is political."[78]

The problem is however, also a broader, cultural one. Many Justice Department lawyers honestly believe that criminal sanctions should not play a major role in antitrust law, particularly since the antitrust division could not begin to do the job, and would probably meet congressional resistance if it tried to. The prevailing enforcement view is rather to rely on public and private civil suits, except in the most blatant cases.

Even in the rare criminal cases, such as the electrical company price fixing cases of ten years ago, the companies show remarkable resilience in the face of punishment, which is another distinction between the worlds of corporate and individual defendants. The individual has everything to lose in a criminal trial. Even if not convicted, his trial alone can smear him to oblivion. Corporations are not so vulnerable before the criminal process: Even in those rarest cases when a few of their executives spend a few weeks in jail and the companies pay millions in damages, as in the electrical cases, they still seem to bounce back. Nader figures that between the profits gained from years of price fixing and the tax write-off of the $500 million damages (as "ordinary and necessary" business expenses), the electrical companies probably came out ahead.[79]

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77. *Hearings Before the Subcomm. of the Senate Select Comm. on Small Business*, 90th Cong., 2d Sess. 240 (1968).
78. *Id.* at 214.
79. *Hearings, supra* note 69, at 369. For a general discussion of anti-

Changing Concepts of the Lawyer's Role

As in virtually every other institution and profession in American society, the young members of the legal community are raising profound questions about their social role. They are looking at the political implications of the practice of law, which has conventionally been viewed as separate from politics.

Law Students and Young Lawyers

The big firms are still the blue chips in the bull market of Washington law practice.[80] But their dazzling prestige is showing some tarnish. More and more often, some young lawyer who was doing just fine with a big firm suddenly quits to join one of the city's burgeoning public interest law centers. Even the judges' law clerks, traditionally the "straightest" group of law school graduates, are becoming more political. Last fall, most clerks on the United States Court of Appeals for the District of Columbia and some from the District Court signed a petition supporting the Vietnam Moratorium. One of the clerks to appellate court judge Roger Robb resigned from his job to march in the Moratorium. Judge Robb had told him that to march would be too much political involvement for a law clerk.

The law schools in the area are full of ferment. Traditionally, student bar association presidents have been the smoothest, smilingest, most innocuous status seekers in their schools. This year at Georgetown, the most status-conscious of the

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trust theories and underenforcement in practice, particularly regarding sentencing of businessmen, see BAZELON, THE PAPER ECONOMY, 275 (1963).

80. In 1949, there were approximately 3700 private lawyers in Washington, according to HORSKY, THE WASHINGTON LAWYER 7 (1952). By 1967, there were about 6500. *The Washington Legal Establishment*, WASHINGTONIAN, Aug. 1967, at 34. "So far as I can see," says James Rowe of Corcoran, Foley, Youngman & Rowe, "the Washington law business stays in a bull market no matter what happens—depression, recession, inflation. As the world becomes more complicated, so does Washington." Zalaznick, *supra* note 44, at 125. *See also Why Law is a Growth Industry*, BUSINESS WEEK, Jan. 13, 1968, at 78.

area law schools, the SBA president successfully defeated an attempt to oust him from office for spending too much time and money on the Vietnam Moratorium and supporting the grape strikers.

At George Washington, where the picket line against Wilmer, Cutler & Pickering was organized, the Urban Law Institute, a VISTA poverty law training program, is urging students around the country to bargain with big law firms for more racial integration and more public interest work. In Washington, Jean and Edgar Cahn, noted poverty lawyers, have been bargaining with leading firms for the establishment of formal pro bono programs.[81]

One professor at George Washington, John Banzhaf, divided his section of the traditionally business-oriented unfair trade course into a dozen small groups of students uncovering unfair practices against consumers and then doing battle before federal and city agencies. Professor Donald Rothschild, also of George Washington, has organized a course in consumer awareness in which his law students teach in ghetto public schools, run a television program and staff a consumer complaint center. At Georgetown, Professor Alan Scheflin has similarly divided his torts class into research projects aimed at legal reform. Law school curricula have been changing for several years, but these are probably the most exciting recent developments in legal education. They are also probably just the beginning.

More law students are rejecting conventional private practice to do public interest or poverty work. For example, the Reginald Heber Smith Poverty Law Fellowship Program had 1200 applications for 250 positions. The *New York Times* reported that none of the thirty-nine graduating law review editors at Harvard this year are likely to enter private practice immediately after graduating.[82] The leading Washington

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81. Berman & Cahn, *Bargaining for Justice: The Law Students' Challenge to Law Firms*, HARV. CIV. RIGHTS-CIV. LIB. L. REV., Jan. 1970, at 16.

82. Reinhold, *New Lawyers Bypass Wall Street*, N.Y. Times, Nov. 19, 1969, at 37, col. 3.

firm of Hogan & Hartson cites figures from Harvard, Yale and Virginia law schools showing a decline of graduates entering private practice over the past few years; only Virginia has more than half its class going into private practice. The Hogan & Hartson memorandum finds it "increasingly evident" that "there is a tendency among young lawyers, particularly those with the highest academic qualifications, to seek out public service oriented legal careers as an alternative to practice in the larger metropolitan law firms."[83]

It is possible to overestimate the strength of the movement. At Harvard the percentage of graduates going into practice actually increased slightly from 1967 to 1969. A Georgetown student commented that he felt a lot of the new interest is just the fashion: "[T]here's something wrong with you if you're not interested in helping the poor," is the feeling he detects; he believes some students get over that feeling by the third year when it comes time to choose between a $15,000 starting salary with an established law firm and a much lower paying public interest job. Still, there is no doubt that an important new movement is afoot, though it may not as yet be a majority movement.

The leading Washington law firms frankly admit that the new student ferment and recruitment problems are "a factor" in the increased pro bono work they are offering to associates and partners. Covington & Burling, Arnold & Porter, and Hogan & Hartson already have extensive pro bono programs. Arnold & Porter has one partner working full-time on pro bono work, while others can devote up to 15 percent of their regular office hours to such cases, sometimes, they devote considerably more. When the head of their new pro bono department arrives, Hogan & Hartson will have a similar arrangement. Covington & Burling has two members working full time in Neighborhood Legal Services offices and others have been doing a great deal of pro bono work for years.

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83. Memorandum to the Executive Committee of Hogan & Hartson from the firm's Community Relations Study Committee, Sept. 8, 1969, at 2.

There is no doubt that the big Washington firms are making a major commitment, as are their counterparts in other cities. Bruce Montgomery, Arnold & Porter's young partner in charge of pro bono work estimates that the program is costing the firm about $200,000 a year in lost income. Some of the new lawyers call it window-dressing. If so, it is expensive window dressing. But then obviously the firms can afford it. Window dressing or not, there is no denying that the pro bono work of the big firms does provide some extremely high quality legal help to overburdened legal services and public interest programs, and directly to community groups. Some argue that so much legal work is needed to help the poor, much of it not involving conflict of interest, that anyone who can do it well should be welcomed, regardless of their motivation.[84]

As Montgomery himself admits, however, pro bono work is not the final answer.[85] Conflict of interest with pending paying cases is often a problem. Probably none of the leading firms could take some broad, innovative suits such as the one pending against potentially all the District of Columbia banks for violating the usury laws. Any Washington firm with a District of Columbia bank, or perhaps any bank, as a client could not take such a case because of conflict of interest. The case is being handled by the public interest firms of Berlin, Roisman & Kessler, Dowdey, Levy & Cohen and Asher & Scheiderman. Similar broad consumer-oriented suits against the car companies or the airlines would probably also be beyond the reach of the leading firms' pro bono programs.

A few years ago Arnold & Porter told some young associates they could not work on a stockholders' suit on employment discrimination against a southern company, principally because it might set a bad precedent for some of their other clients.[86] More recently, in January, 1970, Hogan & Hartson

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84. Berman & Cahn, *supra* note 81, at 21.

85. Swanston, *Public Interest Law: The Citizen Gets a Break*, Wash. Sunday Star, Dec. 14, 1969, at 22.

86. Kopkind & Ridgeway, *Law and Power in Washington*, Hard Times, June 16, 1969, at 2.

withdrew its assistance from a task force trying to compel the Washington Metro to assure that 70 to 80 percent of construction workers at all levels of its operation would be black. The official reason given was that since in the previous summer the firm had done some free legal work for the Metro during its problems with Congress, to help a group threatening to sue Metro over equal employment would represent a conflict of interest. Several big firm lawyers in Washington find that reason a rather flimsy basis for a conflict of interest plea. The opinions of several sources both inside and outside the firm is that some partners felt the precedent of such an equal employment plan in Washington would be against the interests of the some of the firm's local commercial clients.[87] Whatever the real story, the incident serves to show how the conflict problem operates. Only experience with pro bono programs will determine how broadly the firms choose to interpret conflict of interest and how willing they are to take on controversial cases. It is to Hogan & Hartson's credit that soon after the Metro incident, approval was given to work on a school desegregation case brought by the local controversial civil rights figure, Julius Hobson.

Montgomery thinks that pro bono work can coexist with conventional business work, because he sees the lawyer in his traditional role as a technician who takes cases, not a politician who is involved in a movement. Under that view it is easy enough for a lawyer to work for a discriminatory savings and loan institution one day and a black jobs coalition the next, and do equally fine work for both. "We keep our souls to ourselves," says Montgomery, and his is certainly the prevailing view today. Louis Oberdorfer, for example, represented Crown-Zellerbach, which was being sued for employment discrimination under the Civil Rights Act, while at about the same time serving as national co-chairman of the Lawyers' Committee for Civil Rights Under Law. Similarly, the young Cravath lawyer told the protesting Harvard stu-

87. Interview with several Hogan & Hartson lawyers and others associated with the Metro project, March, 1970.

dents that while some of his firm's clients invested in South Africa, he personally was treasurer of the American Committee on Africa which adamantly opposed South African policies.

The New Lawyers Choose Sides

The new lawyers will not accept that division of loyalties, that split life. Some are giving up an eventual six-figure income to avoid it (some estimates are as high as $300,000 for the best-paid Washington lawyers).[88] Established lawyers protest that attorneys should not make ethical or moral judgments about their clients. "We are only lawyers," a Cravath recruiter told the Harvard students. "We already have too much of a tendency to build up a priestly class. We are not the high priests of society."[89]

But the new lawyers say that even if the established lawyers have not consciously done so, they have nevertheless taken the establishment side, by the very nature of their practice—whether it's 85 or 100 percent of their practice. They say the established lawyers want it both ways: they want to be closely enough associated with their clients to collect handsome fees, but sufficiently far-removed to escape criticism for their clients' deeds, which they help protect and thus perpetuate. Andrew Kopkind and James Ridgeway, the city's resident radical journalists, don't think it is possible for a lawyer to divide his soul that way. They concluded an article on Arnold & Porter this way: "The big Cadillacs come with men's money, but they leave with men's souls."[90]

In today's conventional practice, some association with the merits of the client's case is inevitable. Eugene Rostow has pointed out that a labor law firm, for example, is not likely to represent management, nor is a corporate firm likely to handle shareholders' suits for fear of losing its reputation in

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88. Zalaznick, *supra* note 44, at 201-202.
89. Harvard Law Record, Dec. 11, 1969, at 15.
90. Kopkind & Ridgeway, *supra* note 86, at 4.

its particular specialty.[91] Larger firms are sufficiently diversified in several specialty areas so that they can afford to represent either side of an issue withut fear of losing a significant part of their clientele. But they also frequently list major clients in *Martindale-Hubbell*, both for their "prestige" value and, presumably, to indicate which areas of the law they specialize in, or rather, as the new lawyers point out, which *side* they choose to specialize *on*.

Lawyers do choose clients—it is not only the other way around—and therefore, say the new lawyers, they should not be immune from being judged for their choices, especially when such choices can produce great profit for them and harm to the public. The new lawyers are raising two questions: (1) How far can you go in protecting your client, and (2) which side are you on.

Charles Rhyne, old law school friend of Richard Nixon and long-time Washington lawyer, claims that the lawyer must not be associated with his client's substantive positions. Yet, on his outer office wall is a Herblock cartoon identifying the victory in the *Baker v. Carr* reapportionment case, which he argued, with the great cause of universal justice. Rhyne is also defending the city of Richmond, Virginia, in its annexation case, which some view as a racist attempt by the city to frustrate the possibility of a black voting majority there. Would Rhyne also put on his wall a Herblock cartoon presenting that view of his Richmond case? Most likely not. But lawyers cannot have it both ways: Either they are to be associated with the merits of their client's case, or they are not. Rhyne is not the only lawyer who appears not to mind the association when it is favorable.

Traditionally, a profession has been presumed distinguishable from a business because of its established ethical standards and dedication to "a spirit of public service."[92] But

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91. WILLIAMS, ONE MAN'S FREEDOM viii (1962).

92. Wade, *Public Responsibilities of the Learned Professions*, 21 LA. L. REV. 130 (1960) *quoting from* POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).

today we seem to have a strange inversion of that view. Everyone freely criticizes the corporation for shirking its public duty by polluting the air, but no one is supposed to criticize the lawyer who is paid handsomely to further the corporation's interests, because the lawyer, we are told, works within the adversary system which preserves our system of liberties.

Such a view assumes that property rights are still as much the basis of liberty as personal rights, that GM's right to property is as basic to liberty as the individual's right to clean air. It assumes therefore that the conspiracy theory applied to the auto companies is as much a threat to our liberties as the conspiracy theory applied to the Chicago war protesters, and that Lloyd Cutler is as much a guardian of our liberties as William Kunstler.

There may be merit in that view, but the new lawyers say present circumstances have twisted it into meaningless abstraction. As one civil libertarian converted to the Nader view has concluded, society needs to tolerate bad political views to preserve political liberty, but it does not need to tolerate bad air to preserve property rights.

Such a view also assumes that the lawyer is above all the controversies of his clients, and that he must always remain so to preserve civil liberty. Judge Julius Hoffman said that the behavior of lawyers like William Kunstler in the Chicago conspiracy case encourages crime by their clients.[93] Professor Freedman cites this statement as an example of the dangers of the new lawyers' view. He argues that lawyers must not be associated with the people they represent, that such people should be defended or attacked directly, not through their lawyers.[94]

The new lawyers argue, however, that the law is not neutral, that the adversary system does not exist in a social vacuum,[95] and that the legal system is very much part of the

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93. Wash. Post, Feb. 16, 1970, A1, col. 8.

94. Debate between Prof. Freedman and Michael F. Tigar, George Washington University, Feb. 20, 1970.

95. A criminal lawyer has emphasized the importance of the equal-

political and economic system which they say needs to be changed drastically. The law is not neutral, they contend, because it has been used more as a force to prevent change than to bring it about. It is because they want the legal system and lawyers within it to become more of a force for social change that the new lawyers take an apparently inconsistent position: At the same time that they associate Washington lawyers with their corporate clients and urge them to consider the broader public interest, they also criticize bar associations and public officials who harass or hinder poverty lawyers and "movement" lawyers because of their association with their clients.[96]

Thus the new public interest lawyers and the "movement" lawyers have a more political view of the law than civil libertarians or big firm lawyers. Nader complains that the civil libertarians do not see society for the "seamless web" that it really is. He says that those who agonize over the details of a church-state issue, for example, while our pipelines explode and our cars maim thousands, are wearing "blinders" and have "not even a rough sense of parity" when it comes to judging human suffering and need. Others to the left of Nader argue that he and the public interest lawyers do not make enough political connections, that they do not see how inclusive the "seamless web" is, and that they should not be working to make the system better, but rather to change it altogether. Some argue that the law has become totally irrelevant to social change, and the important action is in the streets, not in the courts. James Ridgeway contends that

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ity of the two sides in order for the adversary system to function: Obviously, if one side is much stronger than the other, a correct determination will not come out of the conflict, but only the answer that power can impose. . . . Anything that tends to build up one side as opposed to the other, or anything that tends to weaken one side, is detrimental to the adversary system.

Steinberg & Paulsen, *A Conversation With Defense Counsel on Problems of Criminal Defense*, 7 PROC. LAW. 25, 26 (1961).

96. Wall St. Journal, April 28, 1969, at 1, col. 1. Wieck, *Justice For All on the Defensive*, NEW REPUBLIC, Feb. 21, 1970, at 12, cites numerous instances following the successful fight in 1969 to defeat the Murphy Amendment, which would have subjected state legal services programs to the Governor's veto.

for all his work, Nader is perpetuating the idea of a "legal elite" solving society's problems, rather than involving the people more directly in solving their own problems.[97]

None of this is altogether new. There have always been a few radical lawyers around, ever since Patrick Henry who once conducted his own political trial against the British system and won.[98] And administrative law experts have long criticized Government agencies as having become the "captives" of the industry they are supposed to regulate. What is new is the scale of the growing groups of bright young public interest lawyers around the country.

Ralph Nader's incisive mind, unheard-of devotion, and charisma, coming at a time when a new generation is most receptive, have inspired much of the new ferment. He is igniting two movements at once, a consumer movement and a legal movement. Whatever one's opinion of Nader, he is an extraordinary man; he is the kind of man who can change people's lives with an hour's talk, and does. He may even succeed in building a public interest bar to equal the private interest Washington bar, though that would probably require nothing less than a new American ethos.

Meanwhile, the challenges to the private bar are serious enough. Nader wants to develop administrative law negotiations into adversary proceedings, to give public interest advocates an equal voice from the beginning, not after the consent decree has been announced and judicial approval of it all but certain. He has even proposed that citizens be allowed to sue government officials for not protecting their safety and welfare.[99] It sounds like a far-out idea now, but such far-out ideas have a way of becoming law in a few years when they ride the wave of a movement as large as the environment movement that seems to be building.

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97. Hard Times, Dec. 1, 1969, at 4.

98. In the Parson's Cause (1760), Henry urged the jury to ignore the British Parliament's legislation, and in effect it did. CURRENT, WILLIAMS & FREIDEL, AMERICAN HISTORY: A SURVEY 69 (1961).

99. *Hearings on the Federal Railway Safety Act of 1969 Before the Subcomm. on Surface Transportation of the Senate Commerce Comm.*, 91st Cong., 1st Sess. 414 (1969).

A lot of people do not understand Ralph Nader; it is not easy in America to understand a 35-year-old folk hero who does not want to make money. And a lot of people whose positions he threatens do not trust him either. They say he already has the power of a leading Washington lawyer, and they fear he wants more. It is true that Nader has become a very powerful individual (he gets more attention and far more mail than most Senators), and he too has built up some influence with people in Government. But he has no powerful institution and no cultural mores behind him. In fact, he is fighting them all, with the help of a few bright associates, an expanding network of contacts, and a growing band of student researchers. "My job," he says, "is to bring issues out in the open where they cannot be ignored . . . . We have got to know what we are doing to ourselves."[100]

The current legal revolt of the new generation has two main sources: the civil rights and peace movements, and the growing consumer and environment movements. The result may well be not only a very different legal profession, but also a very different and healthier country. Responding to the charge that he is a "fanatic," Nader caught the spirit of the new movement not only of lawyers, but of the new reforming generation generally. "I don't consider myself abnormal," he said: "I consider the auto industry abnormal—people who, for great profit, sell cars with built-in defects that they know will kill people. That, to me is real abnormality."[101]

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100. TIME, Dec. 12, 1969, at 90.

101. Anderson, *Ralph Nader, Crusader; Or, the Rise of a Self-Appointed Lobbyist,* N.Y. Times, Oct. 29, 1967, Magazine, at 111.

Appendix XV

The Small World of Big Washington Lawyers

(Fortune Magazine, September 1969)

EVERYBODY SUSPECTS THEM OF INFLUENCE, AND SUSPICIONS FLOURISH BECAUSE SO MUCH GOVERNMENT DECISION MAKING IS SECRET. BUT WHAT THEY REALLY OFFER IS KNOW-HOW PLUS KNOW-WHO

(By Sheldon Zalaznick)

When a lawyer leaves government service in Washington—and a great many lawyers do every year—he doesn't necessarily leave town. Quite a few men who lately served Lyndon Johnson have found their way to private law firms within walking distance, or a 65-cent cab ride, of their old government offices. Manuel F. Cohen, Chairman of the Securities and Exchange Commission under Johnson, is now a partner in the Washington law firm of Wilmer, Cutler & Pickering, Sheldon Cohen, Johnson's Commissioner of Internal Revenue, has set up a law firm of his own, in partnership with Lester Uretz, his chief counsel at I.R.S. Joe Califano, special assistant and utility infielder in the Johnson White House, is now a partner in the Washington law firm of Arnold & Porter. Myer Feldman, a White House counsel in both the Kennedy and Johnson Administrations, now practices law in partnership with David Ginsburg, a key adviser to Johnson. Harry McPherson, a Johnson speechwriter and former Assistant Secretary of State, is now a partner in Verner, Liipfert, Bernhard & McPherson. Alive and well in Washington, too, is Clark Clifford, Johnson's last Secretary of Defense, now thriving as senior partner in the firm of of Clifford, Warnke, Glass, McIlwain & Finney.

These men followed a well-beaten path. The major law firms in Washington today are loaded with former bureau chiefs, department heads, agency chairmen and commissioners, and members of the Cabinets, sub-Cabinets, and kitchen Cabinets of six previous Administrations. If Manny Cohen is now in private practice in Washington, so is another former chairman of the SEC, Edward Gadsby. So are two former chairmen of the Federal Trade Commission, two former chairmen of the Civil Aeronautics Board, two former chairmen of the Federal Power Commission, a former chairman of the Federal Communications Commission, two former commissioners of Internal Revenue, uncounted former general counsels and deputy counsels at various agencies, and a sizable number of former White House staffers.

In private practice these men frequently represent clients before the very agencies they once served. When they do, some discreetly minimize face-to-face contact; they send junior lawyers over to their old offices whenever possible on minor matters. But others blithely stride through the corridors as if they had never left. All are virtuosos on the telephone. One way or another, most make a lot of money at their specialties. While many Washington lawyers know their way around town, those who have acquired their expertise working in government at a high level are in a class by themselves. They know the law and and the procedures that make the law work; indeed, they may have helped to write the law. They also know the men who interpret and apply the law, and may even have hired them or, at least, had some hand in their careers. Not long ago a reporter was in the office of an SEC lawyer when the phone rang. The caller turned out to be Manny Cohen, seeking information on a matter he was handling at Wilmer, Cutler & Pickering. Afterward, the SEC lawyer could not help remarking, "You know, I still jump when he calls."

This intimacy between regulators and lawyers for the regulated is unsettling on its face. It contributes greatly to the image Washington lawyers conjure in many minds as "fixers" and "handlers." Businessmen in particular, when they are looking for a fair shake at a government agency, have additional reason

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to wonder whether the decision-making process might be manipulated, at least occasionally, by well-connected lawyers. The boons Washington lawyers seek are often very large, measured by potential dollar value—oil import quotas, tariff protection, a TV license, an airline route, a merger approval, a tax ruling—and the guidelines that determine who shall get what are often imprecise.

The most powerful factor of all in undermining confidence in the decision-making process in Washington is the secrecy that surrounds so much of it. There are over a hundred administrative agencies in Washington. Their responsibilities are fixed by statute, but they have enormous latitude in carrying them out. Decisions of consequence are often made beyond the scrutiny of the courts, Congress, or the press. At the Federal Trade Commission, for example, which shares responsibility for antitrust-law enforcement with the Justice Department, a company can ask for an advance indication of how the FTC might look upon a merger it may be contemplating. Unlike a formal hearing, for which there are clear rules and a public record, pre-merger discussions at the FTC (or at the Justice Department) are secret. No record need be kept. In *ex parte* approaches, where only one side is being heard, lawyers representing private interests can descend on FTC lawyers and commissioners to their hearts' content, without leaving any discernible tracks. The FTC can find in favor of a company that wants to merge, or in favor of a company that doesn't, without leaving a single accessible clue as to how it reached its decision.

Operating under a broad mandate to guard against unfair competition and deceptive advertising and labeling, among other things, the FTC is a conspicuous example of an agency wielding great discretionary power. Because it has limited funds and manpower, it must pick and choose its cases. Once it formally takes action against a company, a public record begins to build. But the decision *whether* to take action—a crucial part of the regulatory process—is usually made in total secrecy. "That," says FTC Commissioner Philip Elman, "is where the action is."

Similar areas of discretionary power in important matters pervade the regulatory mazes in Washington. Businessmen are to be forgiven, then, for wondering just what, besides arguing the law, Washington lawyers with good political connections and good friends in governments can do for them. Mortimer Caplin, a former Commissioner of Internal Revenue now in private practice in Washington, well understands their doubts. "Some of them suspect this whole town is wired up," he remarked recently. "The businessman wants to know what the rules of the road are. He says to himself, 'Am I a fool? *Should* I be trying to do something?' "

Should anyone simply ask a Washington lawyer what the rules of the road *are*, he is certain to be told that his suspicions are groundless. "Most of the time," one typically hears from lawyers, a fair shake must be sought through established channels—channels, to be sure, that are often intricate, and sometimes obscure.

A SERVICE WORTH QUITE A LARGE FEE

Washington lawyers make no bones about their willingness to use old friendships to get their clients a *hearing* before the right people at the right level. To a client confronting a faceless U.S. Government agency in a matter of great importance to him, that alone can be a service worth quite a large fee. In theory, any outsider can call up and find out who is in charge of what. But in practice it helps a lot to have worked inside the agency, preferably at a high level. Indeed, some Washington lawyers consider inside knowledge so essential in the art of getting a hearing that prior government experience begins to sound like a prerequisite for admission to the Washington bar. "If he has been in government," says Myer Feldman, now a partner in Ginsburg, Feldman & Bress, "a lawyer learns which channels are important, who in the chain of supervisors, department heads, and so forth, really count. He knows where the decisions are made in a big agency, and so he know who should be exposed to argument."

The "right level," experienced Washington lawyers agree, is not necessarily the top. For one thing, people at the top come and go faster than those below them. For another thing, going straight to the top can be counterproductive. "The thing to remember is that policy flows up from the staff rather than down from the top," says Clark Clifford. "The overwhelming majority of decisions is made at the staff level. If you go over their heads, that's bad. It gets back to them fast."

In addition to knowing where to go, the lawyer with government experience often can get there faster than an outsider. That, too, is sometimes worth a

great deal. "Say a government executive comes back to his office and looks at the list of phone calls he received while he was out," Mortimer Caplin says. "There may be ten or twenty names on the list. He probably won't be able to return them all immediately, but he might notice a name on the list and, because he recognizes the name, call that person. Sometimes even thirty seconds can be terribly important."

Washington lawyers see nothing shady about using their influence to gain timely access to the right people. They are clearly using something besides their knowledge of the law when they do this, but nothing in the code of ethics suggests that it is improper, As they see it, getting a hearing is one thing, and improperly influencing a decision is another. They insist, moreover, that anyone who tries to win his case on the basis of political clout or personal friendship alone runs heavy risks. "You're circumscribed greatly by what you have to work with, namely the facts in the case," says Edward Bennett Williams, whose firm of Williams & Connolly has a substantial civil practice in addition to its well-known criminal practice. "Nothing of any substance is handled by just one man in a government agency. A lawyer would have to corrupt a lot of people to get something he wasn't entitled to. The woods here are full of kids who are willing to quit and call a press conference over something like that."

A TERM UNDERGOING A CHANGE

It is certainly true that the image of the Washington lawyer as a "rainmaker," a man who brings a shower of unmerited blessings on his clients by uttering incantations in the freight cars, bears little relation to the work that many of the men in top law firms actually do. A lot of man-hours go into tunneling through statutes, searching out precedents, writing briefs, and arguing points of law. Much of this work is very ably done. In fact, among lawyers, and not only those in Washington, the very term "Washington lawyer" appears to be undergoing a change. "Philadelphia lawyer," a term coined in Colonial days as a compliment, has long been something of a slur. "Washington lawyer," in contrast, may never lose entirely whatever suggestion of fixer and handler it carries, but it is also acquiring such flattering connotations as craftsmanship, thoroughness, and sophistication. As a result, Washington firms no longer find themselves at a disadvantage competing against Wall Street firms for the ablest graduates of the top law schools.

Some members of congressional-committee staffs, however, as well as some officials at such sensitive agencies as the Food and Drug Administration and the Federal Trade Commission, are not always totally admiring of the Washington lawyers they deal with. Much of their discontent comes down to the feeling that the Washington bar is expert beyond question, but smug, hypocritical, and indifferent to the public interest as well. The point of their dissent is not that Washingon lawyers are any worse than counterparts elsewhere, but that because of the seriousness and consequences of the issues they handle, they should be a great deal better, and aren't. Says the legislative aide of a Senate subcommittee chairman: "Lawyers feel free to say and do things up here on the Hill which, if they happened in a courtroom, would bring the judge or a disciplinary committee down on their necks."

Ralph Nader, a lawyer in Washington but one with an unconventional clientele, thinks it significant that few Washington lawyers are ever heard urging that the regulatory machinery in Washington—unnecessarily secretive procedures at the FTC, for example—be made more visible and hence more worthy of confidence. "There's a big difference between a lawyer and a public-relations man," Nader says. "Lawyers derive their influence from their status in society. They are accorded status because they are alleged to have certain responsibilities that transcend their responsibilities to their clients. A lawyer's *first* client is the public. It says so in the code of ethics. How often do Washington lawyers act that way?"

Washington swarms with lawyers. Their number has grown by about 25 percent in the past ten years. With less than half of 1 percent of the nation's population, Washington now has nearly 5 percent of the lawyers—roughly 15,000. Of this total, more than half work for the U.S. Government. Of those in private practice, a great many do what lawyers do elsewhere—as in other places, people in Washington regularly get hit by cars, buy houses, sell on credit, write wills, sue doctors, and get caught smoking pot. The world of *the* Washington law firms, those that draw clients from all over the U.S. and even from abroad, is relatively small. Perhaps 2,000 lawyers are partners and associates in such firms.

The largest of these firms, and one of the oldest in town, is Covington & Burling, with forty-six partners and sixty-three associates. Arnold & Porter, the second-largest firm, has thirty-two partners and thirty-eight associates. Ranked behind them in size are: Arent, Fox, Kintner, Plotkin & Kahn (nineteen partners and forty-nine associates), Hogan & Hartson (thirty-two partners and thirty-four associates), and Wilmer, Cutler & Pickering (twenty-three partners and seventeen associates).

The world of the big Washington firms is physically compact. A large bomb dropped in the middle of Farragut Square, just a few blocks north of the White House, would wreck a good many of the most prestigious firms in Washington and rattle windows at some of the federal agencies they deal with. Washington lawyers not only run into one another in the streets but meet at the same restaurants, drink at the same parties, attend the same law-school alumni affairs. (Graduates of Harvard, Yale, Michigan, Virginia, Columbia, and Cornell are especially well represented in the major firms.) "The mix is always going on," says Thomas Corcoran of Corcoran, Foley, Youngman & Rowe, dubbed "Tommy the Cork" by F.D.R. for his buoyant moods and his incessantly charming ways. "It's an unconscious circulatory process. I'm always having dinner at someone's house. For instance, last night I was talking with a Cabinet member and he was saying. . ."

There is nothing unusual about a Washington lawyer who is an old New Dealer mixing with stalwart Republicans. In the practice of law in Washington, party affiliations as such are less important than many outsiders suppose. Now that a Republican sits in the White House, to be sure, there is a lively interest in lawyers with good Republican connections, but lawyers with good Democratic connections do not seem anxious about their prospects. "So far as I can see," says Jim Rowe, "the Washington law business stays in a bull market no matter what happens—depression, recession, inflation. As the world becomes more complicated, so does Washington."

As Washington becomes more complicated, Washington lawyers tend to become more specialized. Even the biggest firms have become to a great extent collections of specialists, experts in a particular kind of complexity. Most major firms have experts in key fields—antitrust work and tax law, to name two obviously important ones. What else they do depends on who else works there. H. Thomas Austern of Covington & Burling, for example, has a substantial practice at the Food and Drug Administration. Abe Krash of Arnold & Porter does a lot of work at the FCC. Earl Kintner of Arent, Fox, Kintner, etc., a former chairman of the FTC, does a good deal of work at the FTC.

IN A BULL MARKET ALL THEIR OWN

Smaller Washington firms tend to carve out certain specialities and stay with them. Mortimer Caplin's firm, Caplin & Drysdale, hung out its shingle just five years ago with three lawyers, all tax experts. Today the firm has seventeen lawyers, including five men recruited from the prestigious tax-legislation counsel's office of the Treasury Department. Much of the firm's practice is still in tax work. Within that field, Caplin estimates that about 50 percent of the case load is devoted to tax planning, including efforts to get advance rulings for clients. Another 40 percent involves representing clients in disputes with the Internal Revenue Service. Caplin candidly calls the remainder of his tax work "lobbying," but it is lobbying of a highly visible kind—preparing legal arguments and memoranda for such clients as the Council on Foundations when they are called to testify at congressional hearings.

Lawyers who specialize in FCC work are in an especially lively bull market all their own these days. The commission's concern about concentration of station ownership has shaken up the holders of TV licenses. For some, the once-routine process of renewing the license every three years has become a nerve-frazzling workout.

One prime beneficiary of the anxiety is Benito Gaguine, a short, chunky, beamish New Yorker who has been practicing communications law in Washington for seventeen years. A partner in Fly, Shuebruk, Blume & Gaguine, he represented the successful applicant for Channel 5 in Boston, the station taken away earlier this year from the Boston *Herald-Traveler*. Currently, he represents William Buckley, the conservative political writer, who recently purchased three Negro radio stations. He is also counsel for the WCCO radio and TV stations in Minneapolis, whose licenses are under attack on the concentration issue. Gaguine,

a former FCC examiner, is far from diffident about visiting his old agency. "If you don't shepherd some matters through," he says, "they can get lost." But his greatest asset, he feels, is his credibility. "Our word is good at the FCC," he says. "If I say it's raining, people don't look out the window."

AT THE TOP OF EVERY LIST

Within the small world of Washington lawyers, a select few stand out for their brains, experience, and connections, for the economic power of their clients, and for the money they can command in representing them. Everyone in Washington has his own nominees for a list of the "most influential" lawyers in town. Ralph Nader's list, which looks very much like everyone else's, includes: Clark Clifford, Thomas Corcoran and his partner James Rowe, Thomas Austern, Lloyd Cutler, and, coming up fast, Myer Feldman.

Invariably at the top of every list—some insist on putting him in a class by himself—is Clark Clifford. Now sixty-two, Clifford has been in private practice in Washington for twenty years. Prior to that, he had spent sixteen years practicing in St. Louis and five years in Washington as counsel to another Missourian, Harry Truman. Clifford left the Truman White House in 1950 determined to practice a distinctive kind of law. "What I felt was needed," he recently recalled, in a voice that might be described as understated oracular, or early Dirksen, "was a counseling firm—one that could advise business on legal developments in Washington and trends in government attitudes toward business." Clifford surely has had little cause to regret his initial inspiration. As constituted at present, the firm of Clifford, Warnke, Glass, McIlwain & Finney does a lot of counseling, considerably less brief writing, and almost no litigating. It is modest in size (six partners and eight associates), beautifully furnished (paneled walls and Oriental rugs), and handsomely paid.

Clifford has played a direct and decisive role in some of the most accomplished pieces of lawyer work performed in Washington in recent years. One of his greatest triumphs was a special act of Congress on behalf of E. I. Du Pont de Nemours & Co. In 1961 the U.S. Supreme Court ordered Du Pont, within a period of ten years, to get rid of its 22 percent interest in General Motors—some 63 million shares worth, at the time, more than $3 billion. If Du Pont distributed its G.M. shares to its own shareholders, the distribution would be treated as ordinary income, taxable as such under existing I.R.S. rules. If, on the other hand, Du Pont sold the G.M. stock on the open market, even over ten years, the overhang might seriously depress the price. Among the stockholders concerned was the Christiana Securities Co., the Du Pont family holding company, which owned 29 percent of Du Pont.

When Du Pont came to Clifford for help, he saw no remedy but special legislation. What was required was a law that would permit a company in Du Pont's situation—ordered by the government to divest itself of stock in another company—to distribute the shares to its own stockholders as a return of capital. The strategy Clifford recommended was simplicity itself. He urged Crawford Greenewalt, then president of Du Pont, to do his own lobbying. "Greenewalt spent weeks calling on members of Congress explaining the problem," Clifford remembers. "For the most part they were pleased to see him and in some cases, perhaps, even a little flattered. He's an intelligent man and makes a good impression. For our part, we were the command center for the whole effort. He'd report to us after each visit and we'd advise him on whom he ought to see next. In the end we had no particular problem in the House and, after a lengthy debate in the Senate, the legislation passed."

THE USES OF SILENCE

No great knowledge of the law, clearly, went into Clifford's victorious work for Du Pont. He searched out no precedents, wrote no briefs, held no one spellbound as he argued his client's case. Rather, out of his deep knowledge of how things work in Washington, Clifford saw what was needed and figured out how to get it. A good deal of high-level Washington law practice amounts to just that.

A notable instance of Washington lawyers practicing their profession without using words at all, much less writing briefs, occurred last year. The lawyers were Tom Corcoran and Jim Rowe, both of whom appear on anyone's "most influential" list. Rowe, counsel to Burlington Industries for many years, had learned that the FTC was considering action to force Burlington to sell off some of the many acquisitions it had made in the textile business. Rowe brought in Herbert Bergson, an able antitrust specialist and a partner in the Washington firm of Bergson,

Borkland, Margolis & Adler, to seek a private hearing before the commission to arrange an informal settlement. Bergson, who served the Truman Administration as head of the Justice Department's Antitrust Division, represented Burlington at the hearing. Corcoran and Rowe also appeared in person. Bergson expressed Burlington's willingness to refrain from further acquisitions in the textile field in return for the FTC's agreement not to seek to force divestiture of companies already acquired. By four to one, the commission voted to accept a settlement on this basis. "Bergson made his argument for more than an hour," one FTC official recently recalled. "Neither Corcoran nor Rowe said a single word throughout the hearing. But there they were! L.B.J. was still President. Rowe was one of his closest advisers. One of the commissioners was up for reappointment. You had to feel their *presence* was a signal of some kind."

THE MODEL OF A MODERN CONDUIT

Myer Feldman, another of the "most influential," recently mused about the styles of Washington lawyers. "Some lawyers," he said, "are conduits. These men are all business. They separate themselves from their cases. Others are all personality. When they walk into a room, it's the guy as well as the case that people are reacting to." Tom Corcoran is often pointed to as the prototypical personality lawyer. Feldman, who represents clients as various as the Ford Foundation (on tax problems) and Occidental Petroleum (oil import quotas), places himself in a stylistic category somewhere between the personalities and the conduits.

In recent years Lloyd Cutler of Wilmer, Cutler & Pickering has come to be regarded as the very model of modern legal conduit. He has represented clients whom many find it difficult to love—the Pharmaceutical Manufacturers Association, the Automobile Manufacturers Association—with a degree of detachment, calculation, and effectiveness that inspires admiration, sometimes grudging, even among those he tangles with. His effort in behalf of the auto manufacturers in the Senate Commerce Committee hearings that led to the National Traffic and Motor Vehicle Safety Act of 1966 is widely considered to be one of the smoothest and most effective feats of advocacy on the Hill in recent years.

At the point Cutler came into the hearings, the atmosphere had been poisoned by client blundering. The Automobile Manufacturers had so miscalculated the strength of the industry's critics that it thought it could pacify Congress with bland proposals to encourage "voluntary" action by auto makers to get safer cars and let state officials deal with safety standards. Also, it was revealed at the time that private detectives retained by General Motors had shadowed and had tried to entrap Ralph Nader, the man most responsible for the hearings in the first place.

When the committee staff got down to writing the hearing report, Cutler succeeded in softening the language critical of the automobile industry. "American cars—whatever their shortcomings—are among the world's safest," the report finally read, thanks to Cutler's ministrations. He also succeeded in getting the report to acknowledge the relevance of *cost* in determining what the auto makers might reasonably be expected to provide in the way of safety features. No Senator could deny the point, but no Senator wanted to be heard in public balancing people's lives against corporations' dollars. Cutler solved this problem by getting into the report a quotation from a Commerce Department document recognizing cost constraints as a factor in building safe cars.

His most important achievement, however, was to keep out of the auto safety bill any provision for *criminal* penalties. "I fought for criminal penalties all the way," Ralph Nader recalls. "We lost because Congress felt that the bill had really hit the industry hard already. Cutler had won with these arguments: The automobile manufacturers are at last coming under regulation and they're behaving like statesmen about it. Shouldn't they be given the benefit of the doubt? Is it *necessary* to make criminal provisions part of the act since the bill already provides civil penalties? It certainly doesn't further the cause of safety."

Afterward, Nader made no effort to pose as a good loser. As he saw it, Cutler, representing just four private companies, had greatly weakened a bill that would regulate hundreds of other companies in the auto market—makers of spare parts and accessories, for example—not all of which were models of good corporate citizenship. A reporter asked him what he thought of Cutler's performance. Nader replied: "Mr. Cutler succeeded as a lobbyist but failed as a lawyer." Later, Nader recalls, "Cutler sent me a copy of the canon that says one lawyer shouldn't criticize another."

A VERY REWARDING SPECIALTY

Most Washington lawyers put in long hours. One Saturday not long ago, Walter Surrey looked around and counted thirty-two out of thirty-six partners and associates of Surrey, Karasik, Greene & Hill on the job. But the money is good. As in New York, graduates of the top law schools can reasonably hope to start work in a Washington firm at about $15,000 a year. Unlike many of their New York counterparts, they may start sharing in the profits as junior partners in as little as five years. This has happened, for example, at Walter Surrey's firm. The major firms get a pretty hefty mark-up on their younger men's time. The rate of $40 per hour at which a junior lawyer's time is commonly billed may be covering no more than $16 to $20 in total costs. Senior partners of the most prestigious firms are often said to get anywhere from $100 to $150 per hour. In fact, though, their time often is billed at substantially lower rates, $75 or so.

One of Washington's most rewarding law-practice specialties is CAB work. And since the CAB, unlike most other federal agencies, requires reporting of lawyers' fees, it is possible to find out just how rewarding it has been for what particular firms. Last year, for example, Prather, Levenberg & Seeger got $206,402 from American Airlines, Hydeman & Mason $266,577 from Continental Air Lines, Arnold & Porter $368,237 from Braniff, Reavis, Pogue, Neal & Rose $688,856 from Eastern, and Chadbourne, Parke, Whiteside & Wolff $813,219 from T.W.A. A sizable portion of those fees arose out of the scramble for new transpacific routes. The transpacific route cases, indeed, may well have been the biggest piece of business in the CAB bar's history. It is worth noting that the results had little correlation with the size of the fees the various airlines paid their lawyers.

Only the grossest sort of triangulation technique is available to reckon the fees generated by the Washington bar as a whole. "You have to figure," one experienced practitioner said, "that Covington & Burling grosses in the high seven figures—let's say $8 million. Further, let's say they account for about 5 percent of all the business available in this town. That would make the total amount of fees generated by the major Washington law firms some $160 million." The precise size of the "take," as they say, is known only to the partners at a particular law firm. A few partners at Arnold & Porter are said to come away with as much as $300,000 or more in a good year. But that's exceptional. At Covington & Burling, the senior partners probably earn half that.

The Washington bar is not altogether immune from some strong winds blowing through law firms everywhere in the U.S. these days. Until fairly recently a top Washington law firm's commitment to *pro bono* work typically consisted of a partner's taking time out to serve on a highly publicized presidential commission, perhaps, or accepting an occasional assignment to defend some indigent on a criminal or civil-rights matter before the U.S. Supreme Court. Such assignments offer prestige and visibility in a profession where the code of ethics forbids advertising. But things are changing. Like their counterparts in New York and elsewhere, many of the younger men joining law firms in Washington today demand at the outset—and get—regular time off from tending the private affairs of well-paying clients to help poor clients who don't pay at all. Walter Surrey recently told a friend at Covington & Burling of a young associate's client who showed up at the offices of Surrey, Karasik, Greene & Hill wearing levis, beads, long hair, and sandals. The Covington & Burling man topped him by replying: "Have you seen your first barefoot client?"

Departures from traditional attitudes are beginning to be discernible even at the senior-partner level. In Washington, as elsewhere, lawyers have seldom questioned the principle that everyone is entitled to vigorous and able counsel. Now, small but apparently growing numbers of lawyers are beginning to doubt this principle as it applies to corporate clients in certain civil matters, especially issues involving public health and safety. For example, several Washington firms have voted not to accept cigarette makers as clients. "Everyone accused of a *crime* has the right to counsel," says Edward Bennett Williams, "and the duty falls on lawyers to provide it without regard how powerful the evidence against the client may appear to be, and without regard for public opinion. But I don't have any obligation to take a civil case apart from my own predilections of what is right and just. I can just say, 'To hell with them.' "

THE BANE, NOT THE LIFEBLOOD

Rejecting clients on principle, of course, or even showing detectable qualms about the clients they accept, is not yet the fashion among Washington lawyers. Indeed, one has to look hard to observe qualms of any kind amid the prevailing complacency of the Washington bar. Washington lawyers remain disinclined to use their status even to urge the elimination of needless secrecy in government procedures.

Washington lawyers are surely entitled to feel that the ethical climate prevailing there is no worse than elsewhere. But given the importance of so many of the cases they handle, there is good reason to wish the Washington bar were clearly superior. It would not be hard to dispel at least some of the doubts about how Washington lawyers go about their business. Over at the FTC, for example, Commissioner Philip Elman offers a simple suggestion for greatly increasing public confidence in what goes on there. He proposes that a record start to build the moment a matter has been docketed as a possible cause for action. Says Elman: "Secrecy is the bane, not the lifeblood, of the administrative process."

Such a change might not greatly alter the actual outcomes of many FTC cases, but it would reduce the possibilities of covert and questionable influence. It would surely give the public greater confidence in the integrity of the process.

APPENDIX XVI

[From the Wall Street Journal, July 21, 1970]

FEELING THE HEAT: REGULATORY AGENCIES, IN THEORY INDEPENDENT, FACE NIXON PRESSURE

(By Wayne E. Green)

WASHINGTON.—After years of dawdling, the Federal Communications Commission was ready last summer to approve the start of a satellite system that could beam television and telephone signals all over the U.S. It planned to let Communications Satellite Corp., which manages the existing global system, initiate a pilot project to serve this country.

Then the White House called.

Delay action, the FCC was told, until the Nixon Administration could study the matter. By January, the White House had recommended that the commission change its plans and permit any financially able concern to put up a satellite, rather than just one firm. By March, the FCC had adopted a proposal similar to the White House recommendations.

This incident points up a fact of life in Washington. In theory, the regulatory agencies, created by Cogress, are independent of the White House; in fact, they aren't. And, to the irritation of some Congressmen and some regulators, the Nixon Administration is boldly trying to influence regulatory policy more than any previous Administration did. Through direct White House suggestions to the agencies, through task-force proposals and through close liaison by a handful of special White House assistants, the Administration is getting its way with the agencies.

CONTROLLING STAFF APPOINTMENTS

Currently the Federal Power Commission's Republican majority is delaying support of any legislative plan to solve the nation's electric-power supply problem because it's awaiting recommendations from a Nixon-appointed study group.

The White House is also reorganizing an office in the Executive branch into something called the Office of Telecommunications Policy, at least partly to give the FCC advice on policy matters—how the overcrowded radio airwaves can best be utilized, for instance. And it's exerting tighter-than-usual control over agencies' staff appointments, asking Nixon-named commissioners to clear their more important choices with the Administration.

The Nixon approach differs sharply from that of previous Chief Executives, who largely ignored the seven major agencies or at least kept quiet about any interest in specific regulatory policies. Lawmakers who consider the agencies as arms of the legislative branch are accusing the Administration of encroachment on the agencies' independence.

Legislative history "clearly indicates that the Executive branch was not to be a part of the policy-making process," asserts California Democrat John E. Moss, chairman of a House Commerce subcommittee that deals extensively with matters affecting the Securities and Exchange Commission.

THE NIXON REASONING

Another Democrat, Massachusetts Rep. Torbert H. Macdonald, even warns that continued attempts by the Executive branch to either "overtly or covertly" influence the agencies will prompt Congress to "look into it and discuss it loud and clear." Mr. Macdonald chairs a House Commerce subcommittee that oversees FCC and FPC matters. Some officials of the agencies also grumble, although few are willing to talk publicly.

But Nixon men retort that it's high time regulatory agencies' policies are coordinated with those of the Administration so that national problems of increasing importance, such as transportaton or communications, are given broad rather than piecemeal guidance.

"We're trying to see that the Executive branch and the regulatory agencies work together on policy matters," says Clay T. Whitehead, a former White House assistant recently named to head the new telecommunications office. "Congress clearly intended that." He adds that the Administration has no thought of infringing on Congressional prerogatives in the regulatory area.

THE POLITICAL RISKS

Nixon officials insist they're steering clear of quasi-judicial cases where individual companies are competing, say, for an airline route or a broadcast license. But they argue that the Executive branch clearly has a role to play on policy questions, where, as in the satellite case, an agency is considering regulations, guidelines, standards or procedures affecting whole industries—airlines or broadcasters or natural gas producers, for example.

Critics assert that if Mr. Nixon is able to strongly influence the agencies, he will in turn have strong influence over some big businesses that are regulated by agencies.

The political risks of any deep intrusion can be high, as the Eisenhower Administration discovered. White House intervention in regulatory matters became the major scandal of that Administration, eventually causing the resignation of President Eisenhower's chief of staff, Sherman Adams. He departed in 1958 following disclosures by House Democratic investigators that he had intervened at the SEC and Federal Trade Commission on behalf of his friend Bernard Goldfine, a New England textile manufacturer.

That case primarily involved quasi-judicial decisions which the Nixon Administration promises to avoid. But some regulatory experts believe it's tough in borderline instances to distinguish between quasi-judicial and policy matter, especially since some agencies use decisions on individual cases to establish policy.

"The river is clear on both sides," says Lee White, former staff assistant to President Kennedy and FPC chairman under President Johnson, "but it gets murky in the middle."

Nixon officials are confident there will be no trouble; one reason is simply that their involvement with the agencies is quite open and aboveboard. Moreover, they contend it was an overreaction to the Sherman Adams incident by both the Johnson and Kennedy Administrations that contributed to their general hands-off posture toward the agencies. "Since Sherman Adams, there has been a great fear of having any intercourse at all," says Mr. Whitehead of the new telecommunications office. "We're trying to bring the balance back."

It's unrealistic, Nixon men argue, for Congress or anyone else to expect the President to make his appointments to the agencies and then forget about them. The agencies are dealing with broad, complex issues, they assert, and increasingly, these questions are intertwined with policies of the Executive branch.

Both the Department of Transportation and the Department of Housing and Urban Development are involved in developing the Administration's rapid transit policy, he notes, but everything they do is "highly influenced" by the Interstate Commerce Commission, which can either make railroads keep their passenger trains running or let them be discontinued.

On almost any transportation matter, Mr. Whitehead adds, what the ICC and Civil Aeronautics Board do has to "hang together" with what the Transportation Department does. One Nixon appointee, CAB chairman Secor D. Brownie, is currently pushing a plan to combine the CAB, ICC and Federal Maritime Commission into a single transportation-regulating agency. The President's Advisory Council on Executive Organization is expected to recommend a similar plan.

The nation's electric-power pinch is another area where the Nixon Administration got involved because it felt the responsibilities of the Executive Branch and of regulatory agencies overlapped. The FPC, which regulates the power industry, is getting pressure from Congress to propose legislation for resolving the problem. FPC Chairman John Nassikas and his two GOP colleagues are resisting, however, until they get recommendations from a Nixon study group, which is considering how needed electric power facilities can be built without despoiling the environment.

"You can't just have the FPC authorizing power plants will-nilly without consideration of environmental guidelines," says Mr. Whitehead. "And you can't have environmental guidelines without considering their impact on the power industry."

On somewhat similar grounds, the President last year asked the American Bar Association to recommend possible changes in the Federal Trade Commission's activities and organization; he requested the ABA study as part of his Administration's "extensive review of the Government's activities in the field of consumer protection." The association's report called for new FTC leadership, better planning and bigger appropriations. And this year, after Nixon-appointed Caspar Weinberger became chairman, he announced a major FTC reorganization partly designed to spur consumer protection. (Mr. Weinberger has since moved to a White House post.)

A crucial consideration in gauging the implications of Executive branch involvement in regulatory matters, is the way it chooses to intervene, experts say. The power plant task force, for example, and the ABA study of the FTC have drawn slight criticism, mainly because they are detached rather than direct involvements.

But sometimes the Administration manages to avoid raising many eyebrows even when it works closely with agency officials, as it did with the SEC on proposed legislation designed to protect stock market investors against brokerage house insolvencies.

One reason the Administration got involved is that the bill calls for $1 billion in standby credit from the Treasury. But there was a larger reason too: The Administration was concerned with the impact that a financial crisis in the securities industry would have on the whole economy. "In the current economic climate, I don't see how we could not involve ourselves," says Peter Flanigan, special White House assistant.

It was a similar broad concern for society and the economy that brought the White House into the Communications Satellite matter, Mr. Flanigan insists. But the Administration drew criticism for the way it chose to express its views on domestic satellites. Instead of filing an official legal comment in the long-pending FCC inquiry, the White House submitted a publicly announced Presidential memorandum directly to Dean Burch, the FCC chairman appointed by Mr. Nixon.

Edwin B. Spievak, legal assistant to one FCC member, says that in skipping normal channels "the Nixon Administration no doubt discovered an extremely useful fact about the regulatory structure—its vulnerability to power relationships and its propensity to transfer decisional responsibility elsewhere whenever possible."

The direct approach also bothered some Congressmen, including Rep. John D. Dingell. Asks the Michigan Democrat: "Why should the White House have any privilege not possessed by anyone else?"

Mr. Whitehead, who spearheaded development of the satellite memo, retorts that "the fact that it came from the White House suggests that it shouldn't go through normal channels." But, he adds, the White House visualizes using such an approach only on "truly major" policy issues. Presidential involvement would be "out of place," he says, in relatively minor regulatory matters.

Appendix XVII

Private Law Firms Serve the Poor

[56 A.B.A.J. 565 (June 1970)]

(By Allan Ashman and Richard Woodard)

Responding to the necessity of making high-quality legal services available to all segments of society, regardless of ability to pay, several private law firms are experimenting with branch offices located in metropolitan areas accessible to disadvantaged persons. The National Legal Aid and Defender Association not only is encouraging and appraising these operations but also is sponsoring a discussion at the American Bar Association Annual Meeting in St. Louis in August on the involvement of the private law firm in poverty and public interest law.

The past decade has seen modern revolution penetrate every level of American society and demand, among other things, the elimination of poverty in this vastly rich country. The effects of this revolution are being felt in all institutions, including the legal profession, the institution involved in the structuring of society's needs and counseling society in its dealings with the rules and regulations

of the structure. A significant response within the legal profession to these developments has been the movement of the large private law firm into the practice of poverty and public interest law.

The traditional *pro bono publico* role of the private attorney and the efforts of government and privately supported legal aid have proved insufficient to meet the needs of unrepresented individuals and interests who are locked in the poverty cycle and unable to secure legal services. As the demand for equal justice for all becomes more vocal and more militant, private law firms are joining in the effort through more meaningful relationships than in the past and are experimenting with imaginative new methods for enlarging their role in providing legal services for all.

The National Legal Aid and Defender Association, an organization devoted to the cause of providing legal services for the poor since its creation at the beginning of this century, is keenly interested in and supports these activities of private firms. At the 1970 Midyear Meeting of the American Bar Association in Atlanta, the National Legal Aid and Defender Association conducted a round-table discussion on the involvement of private firms in poverty and public interest law.

The panelists at this discussion, young attorneys who have been preparing and implementing programs for the involvement of private firms were William R. Klaus, Pepper, Hamilton & Scheetz, Philadelphia; Robert H. Kapp, Hogan & Hartson, Washington, D.C.; Frances Sebastian, Patner & Karaganis, Chicago; Robert N. Sayler, Covington & Burling, Washington, D.C.; Peter S. Smith, Piper & Marbury, Baltimore; Stephen L. Kass, Community Law Offices, New York City; Allan Friedman, Munger, Tolles, Hills & Rickershauser, Los Angeles; and Bruce L. Montgomery, Arnold & Porter, Washington, D.C. A limited number of edited transcripts of this discussion are available from the National Legal Aid and Defender Association, 1155 East 60th Street, Chicago, Illinois 60637.

To help co-ordinate the efforts of private firms and to encourage others to become similarly involved, the National Legal Aid and Defender Association has arranged a morning conference and afternoon workshop on August 9, 1970, at the Chase-Park Plaza Hotel in St. Louis during the Annual Meeting of the American Bar Association. Also, the N.L.A.D.A. now is conducting an eighteen-month evaluation of the branch office opened in East Baltimore by one of Baltimore's largest private law firms, Piper & Marbury. The St. Louis conference and the Piper & Marbury study are discussed below in detail.

Young Attorneys Eschew Traditional Private Practice

The disenchantment of the young, radical attorney with the American legal institutions and systems and his desire for a more tolerant and accommodating society, one that will include all people, have resulted in more and more law graduates rejecting the traditional law practice for direct participation in changing the American way of life. These young attorneys no longer flock to the major corporate law firms, whose practice has been devoted to the wealthy client; instead, they practice law in government-funded legal services programs, "public interest" law firms, experimental law communes or law guilds, and private, public service law institutions, like Ralph Nader's Center for the Study of Responsive Law and Edgar Cahn's Citizen's Advocate Center. Some of the more energetic and independent have become "street' attorneys, living with and working for the poor and economically and politically oppressed of all races.

Responding to this loss of talent, but more important responding to the demand to be more responsible to the needs of all levels of society, the private firms are attempting to bring their talents and resources to bear on the critical problems dividing society today. The methods by which private attorneys and firms may act are numerous, and no one method assures success. The best method is one that will utilize the firm's resources to eliminate totally and as quickly as possible the oppressive conditions; one that will allow for an integration and mutual exposure to the different ways of life of the poor and the middle- and upper-class white attorney; and one that completely avoids any suggestion of missionary zeal or paternalism but recognizes the fundamental principle that all men are one in their struggle for survival and a good life. With an elimination of oppressive laws and practices and with an opportunity for communication, exchange and understanding, the legal profession may be able to avert more destruction and violence resulting from frustration with the inequities of the American legal system.

Methods of involving the private firm, in addition to commitments that an attorney makes as an individual include: financial support of legal aid and legal services programs, public law offices, law communes, guilds and clinics and scholarship programs for the legal training of members of unrepresented minorities; providing technical support by utilizing the firm's research and administrative resources and attorney manpower through released-time programs and leaves of absence to legal services programs and public interest lawyers' associations representing the poor; and committing the firm to the development of a community service or public interest practice on an equal footing with the firm's paying practice through existing procedures within the firm or by creating new procedures within the firm for this purpose. The number of firms and attorneys that have adopted an enlarged and more meaningful *pro bono publico* responsibility is small in comparison to the total number of firms and attorneys. However, included in this number are some of the largest, oldest and most powerful firms in the United States.

Attorneys, and particularly young attorneys, who are dissatisfied with traditional law practice caution against token *pro bono publico* efforts by law firms. They call for total commitment to the elimination of poverty. Barring some unseen catalytic event, the law firms are not going to abandon the clients who have made them rich. However, as the number of firms and attorneys involved increases and the methods of involvement become more refined and productive, it is possible that private firms and attorneys in every community will use their sophistication and power to influence their clients to place more importance on civil and human rights than on property rights, an important and necessary step in eliminating poverty and creating a more tolerant and accommodating society.

THE "BRANCH OFFICE" EXPERIMENT IN BALTIMORE

In 1967 Justice Brennan, in an address at the Harvard Law School sesquicentennial celebration, challenged the private Bar to take a more active role in dealing with the problems of the poor. He stated, ". . . the burden of the new quest from justice has been assumed very largely (though not exclusively) by government lawyers, law professors, and young men associated with public defender or neighborhood law offices or civil rights organizations. The practicing bar has remained largely aloof. . . ."

Indeed, many private law firms have responded to Justice Brennan's call to action. However, no law firm has responded as dramatically and as imaginatively as the Baltimore firm of Piper & Marbury. Piper & Marbury is one of the oldest and largest firms in Baltimore. Toward the end of October, 1969, the firm opened a branch office in the heart of one of the poverty areas of East Baltimore. The office is staffed by two young associates, one of whom had extensive experience as a legal services attorney in an agency funded by thhe Office of Economic Opportunity.

Piper & Marbury's decision to establish a branch office involved a basic commitment on the part of the firm to provide legal services to the poor at little or no charge, with the expenses of the office—the salaries of the two lawyers who staff the office and the overhead expenses—to be paid by the firm. This decision generated some controversy in the Baltimore legal community. However, the opening of the branch office also created interest outside Maryland. Much of the debate, both in Baltimore and in other cities, has centered on the efficacy of the branch office approach. Attorneys opposed to the "ghetto office" concept argue essentially that it does not properly utilize the power and *expertise* of a major law firm. These attorneys would have the firms confine their "public interest" efforts only to issues that would lead directly to broad scale institutional change and reform.

In order to facilitate a thorough appraisal of the Piper & Marbury branch office experiment and to make information about its operation available to the legal community, the Ford Foundation awarded the National Legal Aid and Defender Association a grant to observe and study it for eighteen months. A four-man "observation" team spent two days in Baltimore last December shortly after the branch office opened. The team recently completed a second and more intensive four-day visit to the branch office this past May.

The branch office study has two *major* objectives. First, the study seeks to provide information about the operation of the program itself—the character of services provided, the means adopted by the firm to implement its objectives, the efficiency and effectiveness with which the branch office does its job, and the

difficulties it has encountered. Second, the study hopes to appraise the actual effects of the branch office operation on its intended beneficiaries—*e.g.*, on existing legal aid programs, the firm itself and the legal profession in the community.

Specifically, the observers study various methods of helping Piper & Marbury view its performance against what other firms are doing. In addition, the team will study the reactions of clients, the attitudes of existing legal aid services and the position taken by the organized Bar toward the branch office operation. The observers will also try to determine methods of integrating existing branch office services with existing services in order to prevent confusion among clients and duplication of services. Other matters that will demand attention include the degree of participation by partners and associates in the work of the branch office, the effects, if any, that the branch office experience has had on maintaining a normal balance between public support of legal services and the contribution of private firms, and those aspects of the branch office that might prove useful to other private firms interested in developing similar programs.

PLANNING FOR ST. LOUIS AND BEYOND

The N.L.A.D.A. does not intend to limit the scope of its activity to the Piper & Marbury branch office study. While the specific concern under the Ford Foundation grant is to study and evaluate the branch office experiment in Baltimore, the institutional goal is to educate the Bar as to what is happening nationally and to provide support to private firms that request information or assistance in implementing a particular kind of public interest or poverty law program.

Toward this end, the N.L.A.D.A. will supplement the Atlanta round-table discussion with a full-day conference on Sunday, August 9, 1970, in St. Louis. This program will again focus on the techniques being employed by private laws firms to provide legal services to the poor. The morning session will include a panel discussion of which American Bar Association President Bernard G. Segal will be chairman, with each panelist representing a different approach or philosophy for private law firm involvement in poverty law—separate "public service" departments or divisions within firms, branch offices established legal services programs with firm attorneys for a period of a month or longer. Along with Messrs. Klaus, Smith, Kass and Sayler, all of whom participated in the Atlanta program, the panelists will include John Ferren of Hogan & Hartson, Washington, D.C., and David Crosland of the Lawyers Committee for Civil Rights Under Law, Atlanta, Georgia. The afternoon session will be devoted to individual workshops with the panelists from the morning session and other poverty lawyers available to discuss in depth the operation and objectives of their respective programs.

At Atlanta several themes were developed that are representative of the concerns expressed by the profession with regard to private firm involvement in poverty law, and these will be pursued thoroughly at the St. Louis conference. These include such matters as the sources of eligibility of potential clients; whether or not to charge fees and what basis to use to determine fees; problems regarding advertising the availability of services; direct conflicts of interest with paying clients and the more subtle conflicts between the broader interests of the poverty community and of the business community; co-ordination of efforts among private firms with existing agencies concerned with legal services for the poor, with the community to be served, and with local and national legal professional organizations; the benefits of direct visible exposure of members of private firms to the poverty community and vice versa; and methods to acquaint the profession with these recent developments to secure the support and the participation of as many private firms as possible.

These matters do not lend themselves to easy resolution. In many cases new rules and guidelines for the profession will have to be evolved, and the traditional attitudes for public service will have to be altered. The ultimate success of this latest venture of the legal profession will not be judged by the amount of funds expended or by the novelty of the approach selected but by the permanence of private firm participation and by the changes that are produced in conditions affecting the lives of the poor.

Appendix XVIII

Controversial Cases and the Legal Services Program

[56 A.B.A.J. 329 (Ap. 1970)]

(By John D. Robb)

Legal services programs funded by the Office of Economic Opportunity are coming under increasingly sharp attacks for handling controversial cases—claims against governmental agencies and officials and test cases smacking of "law reform". These attacks are jeopardizing the national legal services program and, if not checked, may seriously disable it.

The amendment that Senator George Murphy of California offered last fall to the authorization bill to continue the Office of Economic Opportunity has focused a national spotlight on controversial cases handled by legal services programs funded by the OEO, principally cases against government officials and test cases generally. The Murphy amendment, which finally was killed in the conference committee after having passed the Senate, would have provided the govenor of each state with an absolute veto power over all or any part of an OEO-funded legal service program.

The remarks of Senator Murphy in the *Congressional Record* and the hearings of the Subcommittee on Employment, Manpower and Poverty of the Senate Committee on Labor and Public Welfare indicate that the amendment was designed to prevent legal services programs from handling cases against Governmental agencies and officials and from engaging in test cases, both of which are integral parts of the national OEO legal services program. The amendment would have dealt the legal services program a crippling blow. It would have subjected the program to political control or interference, restricted the scope of services available to the poor and jeopardized the attorney-client relationship.

The Murphy amendment was a direct outgrowth of successful actions brought by the energetic, OEO-funded California Rural Legal Assistance program, which challenged the legality of cuts in the California medicaid program and practices of the United States Department of Labor concerning the importation of braceros into California.

An earlier Murphy amendment, which would have precluded suits against governmental agencies, was defeated in the Senate in 1967.

The 1969 amendment was a reaction at the national level that had surfaced in a number of communities. In recent months this issue has been responsible, wholly or in part, for the termination by united funds of local support for programs in St. Louis and Albuquerque. It has been a factor in serious disputes involving legal services programs in at least seven other cities—Los Angeles, Philadelphia, Chicago, Camden (New Jresey), Charleston, Dallas, and Baton Rouge—and in the three principal OEO-funded rural programs—California Rural Legal Assistence, DNA (Navajo Reservation) and the South Florida Migrant Legal Services Program. It also has been a source of numerous unfounded complaints and grievances against lawyers working in legal services programs.

The dangers of "Murphy" attacks on the national level are fairly obvious, but local attacks also are serious. Local attacks threaten to undermine the 20 percent local financial support and the community maintenance of effort that are conditions precedent to OEO federal funding.[1] Moreover, the problems will multiply in the future as legal aid programs increasingly become involved in controversial activities. The organized Bar, which has supported the OEO legal services program since its inception, must decide whether or not to respond to these threats.

The types of actions brought by legal services programs involve government agencies at the local, state and federal levels. They include as defendants police departments and police officers (usually concerning brutality complaints welfare departments (generally concerning the validity of application of regu-

[1] 42 U.S.C. § 2812 (c) and (d) require that every community must provide 20 per cent matching funds or services and also must continue to maintain the same level of community support for the legal services program after receiving the federal grant as it did before.

lations and practices relating to welfare benefits), and public housing authorities (often involving the validity or application of public housing regulations). Some of the most striking victories of programs have been achieved in the welfare field, where the United States Supreme Court has struck down such practices as the man-in-the-house rule and state residency requirements.[2] The most controversial actions have been those against police departments and officers.

Some of the suits against governmental agencies are in the nature of test cases, intended to obtain landmark decisions affecting numerous persons or groups. Often they are brought as class actions. Most, however, involve the rights of individuals in particular cases. Test cases and actions designed to effect changes in statutes, regulations and rules are called "law reform" by the OEO. This term has been widely misconstrued to mean some ill-defined form of non-legal reform rather than a vital part of the service and advocacy any good lawyer renders to his client, whether an individual, a group of individuals, an association or a corporation. "Law improvement" is perhaps a better phrase than "law reform", if any terminology is to be used at all, since these actions are designed to improve the laws affecting the poor. In any event, these cases are only a small proportion of the total handled by legal services programs.

It is argued that some of the important areas in which the poor require legal assistance are the protection of their rights vis-a-vis governmental agencies and the problems to which test cases and other aspects of "law improvement" are directed. To deny them access to justice in these areas would seriously undermine the effectiveness of the program and would deprive it of the confidence of the poverty community. Since those in poverty have gone largely unrepresented in the past, it is claimed that many statutes and administrative regulations, rules and practices have developed without adequate consideration of their interests, and as a result they operate unfairly on the poor. It is argued that "law improvement" is an efficient procedure, since the plight of many persons can be bettered by such actions; that those unable to pay a lawyer's fee should receive the same services lawyers always have rendered to those who can pay for them; that "law improvement" in a real sense is inseparable from the legal services program since nearly all actions included within the scope of that term entail service to individuals or specific groups; that the resulting benefits to the poor are mainly byproducts of this service.

Those opposed to these suits contend that the government should not pay one of its branches to attack another; that these cases invlove "social reform" rather than legal services; and that the public should not have their tax dollars spent to support actions of which a majority may disapprove.

LET'S ANALYZE THE ARGUMENTS

In order to assess the merits of the respective arguments, one must consider the basic goals of the legal aid movement. The purpose of legal aid is to achieve equal justice for all regardless of the ability to pay. Legal representation is, of course, crucial to the assertion of most legal rights. Added impetus for the program has been supplied by the war on poverty, which recognizes that legal services can play a key role in the attempt to eliminate some of the causes of poverty. More recently, increasing crime, violence and disobedience in the streets have reflected a growing disrespect for law and its institutions. Presidential commissions on civil disorders[3] and violence[4] have underscored the need to restore the confidence of the disaffected in the ability of our courts and institutions to respond to their legitimate grievances. They have emphasized the need for the poor and minority groups to use peaceful means within our system to achieve their goals and the crucial role that legal services can play in bringing this about.

When measured against these objectives and needs, the arguments in favor of suits against governmental agencies and the practice of "law improvement" are extremely persuasive. Equal justice can never be achieved so long as the poor are denied redress against illegal or arbitrary governmental action the rich are able to challenge. The funding difficulties and the overwhelming case loads that face legal services programs make it imperative that services be extended as efficiently and to as many as possible through test cases. In no other way can

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[2] *King* v. *Smith*, 392 U.S. 309 (1968); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

[3] National Advisory Commission on Civil Disorders, Report 152 (1968).

[4] National Commission on the Cause and Prevention of Violence, statement on violence and law enforcement (1969).

the legal services program have a major impact on injustice or poverty. How can governments expect citizens to obey the laws and yet deny many of them protection against violations by their own agencies?

The arguments against government suits and "law improvement" are not compelling. Actually, the Federal Government is not funding one governmental agency to fight another. It is providing the services of lawyers to vindicate the rights of individuals and groups. But the financing of both sides of a litigated matter is not novel. For years local, state and federal governments have supplied attorneys both to prosecute and defend criminal cases. And seeking changes in laws is not foreign to the services performed by lawyers and is not properly classified as "social reform". Historically, lawyers often have sought to achieve such changes on behalf of paying clients. "Law improvement" is, therefore, not a new and far-out notion; rather it is a fundamental part of a lawyer's advocacy.

Particularly illegitimate is the objection that these actions may be controversial or unpopular with the majority of the public. Equal justice and the right to counsel do not depend on the popularity of the client's cause. Rather they are absolutes that must be protected under any circumstances.

THERE ARE REASONS FOR THE CONTROVERSY

It is not hard to see why these actions are controversial. Legal services lawyers are conscientiously representing clients in cases involving disputes with entrenched political, economic and social forces that are not keen about being challenged. It is inevitable, therefore, that any properly conducted legal services program will be somewhat controversial. For example, government agencies whose operations have been relatively immune from criticism by the unrepresented poor have come to assume that their established policies are fair. They are inconvenienced, irritated and sometimes embarrassed to have to defend their actions. Like other human beings, public officials do not like to be criticized, and they do not like to lose cases any more than do private litigants. The fact is that legal services program lawyers are winning more than 70 percent of their litigated cases.

The organized Bar generally has supported the concept of a national legal services program of broad scope. Guidelines approved by the OEO National Advisory Committee of twenty-three lawyers (including representatives of the American Bar Association, the American Trial Lawyers Association, the National Bar Association and the National Legal Aid and Defender Association) stress the need for providing a "full spectrum of services", including "law reform". Segments of the Bar, moreover, have supported specific actions against governmental agencies and impliedly "law improvement" as well. In August, 1969, the American Bar Associations' Board of Governors adopted a resolution deploring attacks by governmental officials on legal aid lawyers for handling cases against government agencies.

In the fall of 1969 the Bar rose in unison to oppose the Murphy amendment. Within less than sixty days of the adoption of the amendment by the Senate, the American Bar Association, the National Bar Association, the American Trial Lawyers Association, the National Legal Aid and Defender Association, the Judicial Conference of the United States, more than fifty state and local bar associations, eighty-five law school deans and 11,000 students and law professors joined to fight the Murphy amendment. In several cities prompt support by the city bar associations has helped to prevent local attacks from crippling their legal services programs.

These responses by the organized Bar to attempts aimed at limiting the scope of the legal services program are not only proper but vitally necessary. Bar associations and lawyers have a special obligation to protect these programs against unjustified attacks. They best understand the professional problems involved and should inform the public concerning them. The Bar has a proud tradition of representing unpopular clients and causes. Energetic legal services program lawyers are upholding this tradition, often at great personal cost and sacrifice. They deserve the unflinching support of the entire Bar. Indeed, attacks against legal services lawyers solely because of their advocacy threaten the independence of all lawyers.

Having endorsed and supported the OEO program, lawyers and bar associations have an obligation to see that it works properly. A national legal services program that does not handle such cases and does not strive to improve the laws affecting the poor cannot be truly effective. Without the support of the organized Bar, the legal services programs may not be able to survive the attacks directed against them.

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Appendix XIX

Private Lawyers and Public Interest

[56 A.B.A.J. 332 (Ap. 1970)]

(By John E. Robson)

The public's concern for individual rights, consumer and environmental protection, private life and public good has led to the development of forces that challenge and may threaten the tradition of private practice of law. What will be the role of the private lawyer in the issues with which the 1970s have evolved?

We may debate whether in the 1970s we shall know peace, see the end of human want or witness man on distant planets. But is is almost certain that we lawyers will feel the impact of forces that will profoundly affect the structure, style, ethics and values of private law practice. That these forces are already afoot is not just baseless speculation:

A distinguished Washington law firm was picketed recently by a group of young lawyers and law students. They were protesting the firm's representation of the automobile manufacturers in securing an allegedly weak consent decree in a government civil antitrust suit involving federal air pollution requirements.

Seventy-five young lawyers worked for no pay last summer as part of Ralph Nader's "Raiders", investigating how well the public interest was being served by government agencies and prominent Washington law firms.

The University of Michigan Law School reports a 67 percent drop in the number of its graduates entering Wall Street firms, and Harvard Law School reports that only about 40 percent of its current graduates enter private law practice.

A number of "public interest" law centers have been organized. Their purpose is to employ legal tools to force upon both government and private institutions a strict adherence to courses of action considered to be clearly for the public's benefit.

Lawyers in the Justice Department's Civil Rights Division revolted because they believed their senior partner, the Attorney General of the United States, was pursuing a school integration enforcement policy that was both legally and morally wrong.

Partners in a prominent Washington firm voted to refuse to represent any client whose desired objectives in certain pending legislation did not conform to what the firm viewed as sound public policy.

OUR PROFESSIONAL LIVES WILL CHANGE

These may be only isolated incidents—symptoms of a society momentarily out of joint. Perhaps. But I believe these events are harbingers of significant changes in our professional lives. We shall be confronted by root questions on the rights to and obligations of legal representation that will test long-standing precepts of our legal system. We shall be challenged to overcome what among many young people who want to become lawyers is a growing revulsion against private law practice as they believe it has been traditionally carried on.

Why? These present forces of threat and challenge have emerged from the confluence of three factors:

First, an energetic and politically broad-based effort for consumer and environment protection.

Second, a deep skepticism among the young that traditional values and institutions are responsive to the legitimate claims of either individual rights or the public interest and a concomitant activist movement to refrom those values and institutions.

Third, a widespread and zealous commitment by young people to follow a pattern of private life that permits them at the same time to serve the broader public good.

THE OLD LADY HAS PLENTY OF COMPANY

One may remember *The New Yorker* cartoon showing the old lady's tiny house sandwiched between two enormous urban skycrapers—a symbol of individual resistance to the commercial tide. Now the old lady has lots of people on her side. In the past few years there have been dozens of laws enacted and countless regulatory actions taken that are designed to protect the individual consumer and the public environment. They deal with physical protection such as safety standards for automobiles, railroads, mines, gas pipelines, meat, fish, textiles and toys. They affect credit disclosure and practice and seek to prevent deception in consumer packaging. There are programs to eliminate air and water pollution and regulate aircraft noise. Federal assistance for highway projects is prohibited unless the location least damaging to parklands and wildlife sancturies is selected. Development of the Everglades airport, a pipeline to bring oil from the rich strikes in northern Alaska and a number of electric utility power generating stations has been stopped because of conservation or environmental considerations. There is a widespread conviction that government and citizen action can be effective in meeting these problems.

BUSINESS HAT IS TAKING ON A BLACK HUE

Justified or not, the consumer and environmental protectionist movement is wagging an accusatory finger at private business. There is as well a strong suggestion of a need for rigorous legal and ethical commercial standards that go beyond the simple avoidance of negligence and misrepresentation and require affirmative (and perhaps expensive) action to protect the individual and his environment against all the hazards of commercial activity and normal product use. The hat of American business, our client, is, in the minds of many, taking on a distinctively black hue.

What relevance has this to the future of private law practice? It is beyond doubt that the consumer and environmental protectionist movement has reached and been embraced by numerous young lawyers, law students and law teachers, many of whom are deeply distrustful of the typical business client's sensitivity to moral issues. Many question the validity of the profit motive, when it may lead to conduct in conflict with their view of the public interest. And most are well aware that lawyers have been the cutting edge for business in resisting legislative and agency efforts for consumer and environmental protection.

It is perhaps premature to prophesy that pressures from the newest and future generations of young lawyers will lead to the broad application of a "public interest" test in determining the ethical appropriateness of undertaking legal representation. However, it is certainly possible that the more subjective test of the lawyer's view of public impact could come to govern our participation in causes we are asked to represent—that the lawyer's freedom to decline to represent could become an obligation to decline if there is reason to doubt that the client's cause is in the public interest. Some of today's more militant reform rhetoric at least suggests that a lawyer's service to the corporation that is resisting some forms of government regulation may come to assume the odious aspects of being house counsel for the Mafia.

HOW SHOULD "PUBLIC INTEREST" BE IDENTIFIED?

But in our diverse society can we be confident in each case that the "public interest" has been correctly identified? Is an action asserted to be in the public interest in fact so? The truth is that government is sometimes wrong and frequenly unsure in determining that a proposed action will accomplish its intended beneficial objective. Moreover, we are plagued with an incapacity to measure accurately the costs and benefits of a particular action in assessing how well it serves the total public interest. What is the over-all impact of government regulatory action that raises the cost of a consumer item in the interest of an assered safety advance? Is it enought that there are anticipated benefits in lives saved or injury avoided? Must we go on to examine whether an increased price will cause sales of the product to decline and lead to unemployment? What could the welfare costs be or the economic effects on the communities where the product or its component parts are made? What is the inflationary consequence? So it is that breaking down and weighing the ingredients of the "public interest" is a complicated business.

Can we, then, hope to operate successfully a system in which a subjective public interest test is applied in deciding whether to take a prospective client's case? We have generally shared the belief that virtually every point of view is entitled to legal representation and that society is more likely to get the "right" answers when the competing positions are vigorously advocated by skilled counsel. But these precepts may not satisfy the standards of lawyers entering practice in the 1970s.

There is also among young lawyers and law students a growing dissatisfaction with what they view as personal constraints of traditional law practice. Clerkships or service with the Peace Corps, VISTA, OEO's legal services program or elsewhere in government have left on many an indelible mark and a determination to continue public service in private life.

AN EXTRACURRICULAR PROFESSIONAL LIFE FOR LAWYERS

Apart from changing career patterns, which will show a more frequent shuttling in and out of private practice and public service, there is emerging a new concept of extracurricular professional life. Involvement in legal problems of the poor and in environmental issues is replacing participation in a bar association's corporate law section, and aspiration to lead the local legal aid program ranks with ambition to head the local bar association. The freedom given new associates to pursue these activities and a law firm's commitment in the public service area are becoming increasingly important factors in recruiting from the law schools.

The demands for added dimensions to law practice will lead to the allocation of greater human and economic resources of private law firms to public interest activities. Some firms have already announced policies permitting their attorneys to devote significant percetages of their time to public service pursiuts. Others have designated *pro bono publico* partners who are expected to spend substantial time co-ordinating public service activities of the firm. And at least one firm is establishing a ghetto branch where legal services will be offered free or on an ability-to-pay basis. All of this will have an obvious economic impact on the firm's profits.

No doubt, a deeper involvement of private lawyers in public issues will raise some very difficult problems of conflicts of interests. What do you do as counsel for a steel company when one of your associates is suing them for air or water pollution damages? What happens to the lawyer-client relationship with a real estate developer or a financial institution when your attorneys are involved in litigation fighting a highway location or an urban renewal program?

Finally, we must confront the potential impact on law office management and organization of increasing demands for broader participation in the decision-making processes of our institutions. Particularly democracy is an expanding political concept. Many of the whirlwinds swirling about our campuses today spring from student demands for a greater voice in university decision making. There is no reason to assume that these same attitudes and expectations will not be carried into the institutions of private law practice. The important decisions in most law offices have usually been made by a very few "seniors". It may no longer be practical, by the weapon of threatened or actual dismissal, to preserve inviolate that system of decision making against the determined challenge of an intelligent and sizable segment of the firm's young lawyers.

Unless private legal institutions respond sympathetically to the concerns of their younger lawyers, the attractiveness of private practice as a career will wane, and law firms will be met with increasing defections to public or quasi-public service or possibly revolt and protest within their own organizations.

We shall not serve ourselves well by playing ostrich to the various issues that will confront private lawyers in the 1970s. These issues do not admit of categorical answers. Solutions will be fashioned *ad hoc*, with different approaches adopted to suit specific circumstances. But these issues have not been frivolously raised. It is certainly not too early to begin serious thinking about some solutions.

APPENDIX XX

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Appendices*

Appendix I: Private Law Firms

Growth

Washington has often been referred to as a city of lawyers. According to American Bar Association estimates, as of January 31, 1970 there were 14,282 attorneys in the city. This figure includes lawyers both in and out of Government, and many whose practice does not qualify them as "Washington lawyers," as the term is used in this issue. Nevertheless, thousands of attorneys are in private practice in Washington "because it is the seat of the federal government."

Over the last ten years, Washington law firms have experienced enormous growth. Among the smaller firms, for example: Corcoran, Foley, Youngman & Rowe has doubled in size since it was founded in 1962; Ginsberg, Feldman & Bress, a three-man firm until Myer Feldman arrived in 1965, now has 17 attorneys; Clifford, Warnke, Glass, McIlwain & Finney (formerly Clifford & Miller) has increased from three to ten lawyers in the past ten years; Strasser, Spiegelberg, Fried, Frank & Kampelman, a nine-man firm in 1965, now has eighteen lawyers and will add two more before the end of the year; Chapman, DiSalle & Friedman has grown from four to ten in the past ten years.

The remarkable growth pattern has also occurred in the "big five" Washington law firms. Covington & Burling, the city's largest law firm, has added thirty-five lawyers since 1960 and now has about 120. Hogan & Hartson, with thirty-seven attorneys in 1960, had added seven more by 1965 and now has over

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*Robert Courtney III, a Law Review member, gathered the material from which these appendices were prepared.

sixty. Arent, Fox, Kintner, Plotkin & Kahn, a firm of only 11 attorneys in 1960, and only 27 in 1965, now has over 70. Arnold & Porter has increased from 19 to 62 in the past ten years, and Wilmer, Cutler & Pickering, with ten lawyers in 1960, now has 46. Some of these larger firms have expressed concern over growing too large too fast, but their growth continues unabated, and few if any of the firms have set absolute limits on the number of attorneys they are willing to hire in the future. As long as the demand for legal advice continues to increase, most firms seem willing to expand to meet that demand.

Lobbying Activities

As of May 21, 1969, 61 Washington law firms were registered as lobbyists. Although many organizations do their own lobbying, lobbying by Washington lawyers is unquestionably very big business. Some generalizations can be drawn from the Congressional Quarterly's listing of firms who are registered lobbyists. First, lobbying is not limited to lawyers renowned for their influence, nor is it confined to large firms—indeed, many of the registered lobbying firms have less than ten attorneys. More interesting is the composition of the clients represented on Capitol Hill. Since lobbying on a continuing basis can be a rather expensive service, generally only the largest businesses and organizations can afford such an arrangement. The mainstay of the lobbying business appears to be the trade associations, ranging from the California Olive Association to the Electronic Industries Association. Several giants of American inustry, such as Coca-Cola or AT&T, also retain Washington firms to lobby for them. In addition, some of the smaller firms with an established area of specialization lobby for a number of clients in that area; for example, Wilkinson, Cragun & Barker, a firm prominent in the field of Indian claims, is registered lobbyist for six separate Indian tribes.

Pro Bono Publico Activities

In a sense, Washington lawyers engage in pro bono work

when assigned to represent indigent criminal defendants. However, in recent years the term "pro bono" has been given a broader meaning, embracing the concept of some formalized program under which a law firm represents the poor or other previously unrepresented groups (*e.g.*, consumers), either at reduced legal fees or at the firm's own expense.

The response by private law firms to the movement for public service work has not, of course, been uniform. Many apparently have not responded at all, or more accurately, have followed tradition in allowing their attorneys to do public service work on their own time, providing that it does not conflict with the interests of firm clients. Some law firms have formulated a firm-wide approach to the issues, adopting policies in regard to pro bono work, rather than leaving the matter to the discretion of the individual attorney. Certain firms permit or even encourage their attorneys to spend a given percentage of their time (commonly 10-15%) on public interest work; the work is conducted as part of the firm's regular business, during hours that otherwise would be devoted to paying clients, and with the same level of care given paying clients.

Other private law firms have gone even further in their public interest work efforts. Some have or are planning to establish an inner-city office designed solely to aid the poor, or a department within the firm to deal with community-oriented legal matters, structured much the same as their regular departments. Private firms also participate in public interest work by accepting test litigation, working for or with such groups as the Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense Fund, or the American Civil Liberties Union, and providing legal services during special situations such as the riots in April, 1968.

The particular firms which have or are planning to adopt practices of the types described have not been identified, in a desire not to create inappropriate publicity. Suffice it to say that the activities are many and varied, and, what is more important, they seem to be on the increase.

Appendix II: Government Lawyers

Approximately half of the attorneys in Washington are in government service. Although many in this capacity are not "Washington lawyers," those in some positions in the federal agencies or on the staffs of various congressional committees often interact with the private Washington lawyers, or leave the Government to become "Washington lawyers" themselves. The information below, gathered from telephone interviews, concerns four federal agencies: the Securities and Exchange Commission, the Federal Power Commission, the Federal Communications Commission and the Civil Aeronautics Board. A fifth, the Federal Trade Commission, refused to grant any information over the telephone, requiring instead a written request which would not have been completed in time for publication. In addition, information is contained on the Antitrust Division of the Justice Department.

Securities and Exchange Commission. The SEC has a legal staff of approximately 380; 190 are located in Washington. Law school graduates begin at the GS-11 level, with a starting salary of $11,233. (The "going rate" of the larger and some of the smaller firms is somewhere in the neighborhood of $14,000 - 15,000 per year for 1970.) Pay raises come after the first year, after which there are "in-grade" increases (usually $500) made according to ability and length of service. Turnover appears to be a fairly significant problem. The average length of an attorney's service with the SEC is approximately three years. The SEC loses about 75 lawyers per year; roughly ten percent of the total go into private Washington practice. Seventy-five to a hundred new attorneys are hired annually.

Federal Power Commission. The FPC employs 70 attorneys, with the same salary structure as the SEC. Approximately ten lawyers leave the FPC each year and about the same number are hired each year. Of the ten who depart, normally half go into private Washington practice.

Federal Communications Commission. The FCC has a legal staff of 190-200 lawyers, with starting grades and levels the

same as at the SEC and FPC. About 30-35 lawyers leave annually; information is lacking on how many go into private practice in Washington. Hiring each year is at least enough to counteract losses.

Civil Aeronautics Board. The CAB has a legal staff numbering around 80. Salary and grade levels are the standard, *i.e.*, starting at GS-11. The CAB loses about one quarter of its lawyers per year and hires an equal number. Of the 20 who leave each year, approximately half go into private Washington practice.

Antitrust Division, Justice Department. The Antitrust Division has 288 attorneys. Annual turnover is about 40, with a few more than 40 new attorneys being hired each year. Of the 40 who leave, about half enter private practice in Washington.

*Appendix III: Public Interest Law**

Firms and Centers

In response to the recognized need for full legal representation for all, a number of organizations devoted to the public interest have been established throughout the country. In Washington, as elsewhere, the public interest law center is a relatively recent phenomenon, but a growing one. Any list that could be compiled would soon be out of date; however, some of the more well-established include: Berlin, Roisman & Kessler (a self-supporting public interest firm), Center for the Study of Law and Social Policy, Center for the Study of Responsive Law (established by Ralph Nader), Citizens' Advocate Center (established by Edgar Cahn), Citizens' Communication Center, and the Washington Research Project.

In addition, there are several single practitioners in the public interest area, including John Banzhaf III (Action on Smoking and Health), Benny L. Kass (consumer matters) and William A. Dobrivir (litigation). There are also some firms which practice primarily in the public interest area. These include Asher & Schneiderman and Dowdey, Levy & Cohen.

Law School Activities

The law schools have also joined in the public interest movement. Professors and students, working through traditional or specially structured courses, have begun to tackle such problems as pollution, unfair trade practices and consumer problems. A group of students in Professor Arthur S. Miller's Administrative Law class at George Washington formed GASP (Greater Washington Alliance to Stop Pollution) to challenge D.C. Transit's air pollution. Although the students in the original group will soon be graduating, their successors will carry on the action. Professor Miller also heads the Committee for Ecological Responsibility. Professor John Banzhaf, while still

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carrying on his movement against cigarette advertising (ASH), has converted part of his Unfair Trade Practices course into more than a dozen small groups to carry public interest causes before administrative agencies. Going under such acronyms as SOUP (Students Opposed to Unfair Practices) and TUBE (Termination of Unfair Broadcast Excesses), the groups have been dubbed "Banzhaf's Bandits." Professor Donald P. Rothschild, also at George Washington, now heads a multi-faceted consumer protection course. Divided into three primary action groups, the class runs a television complaint center for consumers, produces a television spot on consumer problems, and teaches in the District of Columbia public schools in an effort to make the city's future consumers more aware of the types of practices and problems they will face. Similar activities are occurring at other area law schools and at law schools throughout the country. All factors indicate an increase both in courses structured around student awareness of modern social problems and in student participation in the legal process on matters in the public interest.

Traditional Public Interest Groups

For many years, even before public interest law became popular, a number of Washington groups have been active in the legal aspects of social change. For example, the American Civil Liberties Union has about 200 attorneys in the Washington area. Such groups as VISTA and the NAACP Legal Defense Fund also have lawyers in Washington. The Office of Economic Opportunity, with national headquarters in Washington, has funded public interest organizations and has legal services backup units. Although many are located in other cities, (*e.g.*, the California Indian Legal Services or the Migrant Research Project), some apparently have jurisdiction to bring law suits in Washington against the Federal Government.

