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CITIZEN PARTICIPATION AND ITS IMPACT UPON PROMPT AND RESPONSIBLE ADMINISTRATIVE ACTION

by

Chisman Hanes*

IN OCTOBER 1969, the Administrative Law Section of the American Bar Association sponsored a National Institute on *Federal Urban Grants: Policies and Procedures*, which was held in Washington. The participants in this Institute included legal scholars and officials in federal and local governmental agencies, as well as representatives of private agencies. A review of the proceedings of the Institute reveals that two of the most frequently recurring topics were citizen participation and involvement, and the control of administrative discretion.¹ In February 1969, Senator Edward M. Kennedy, Chairman of the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, sent to the federal departments and agencies a detailed questionnaire on citizen involvement in the administrative process and procedures for promoting more responsive agency decision-making. The responses of the members of the major regulatory agencies, which provide revealing insights, were disseminated in a committee print.² Approximately one-half of the first seventeen recommendations of the Administrative Conference of the United States related to a more effective dissemination of public information or citizen participation in administrative proceedings.³ Legal periodicals and the public press are giving increasing attention to citizen involvement in the processes of government at all levels, federal, state, and local. In substantially all of these studies and writings, it is assumed, for the most part, that more extensive citizen participation in administrative proceedings will enhance the public good.

Of course, citizen involvement in the affairs of government is not altogether new in this country. The New England town meeting has over the years been a vivid example of direct and immediate participation by the citizens, or at least the taxpayers, in the management of their local governments.⁴ The first amendment to the Constitution prohibits the Congress from making any law respecting "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁵ For this latter right, administrative agencies at the federal level are deemed to be arms of Congress to whom petitions may be addressed.

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¹ 22 AD. L. REV. 113-368 (1970) [hereinafter cited as PROCEEDINGS].

² SENATE COMM. ON THE JUDICIARY, SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, 91ST CONG., 1ST SESS., RESPONSES TO QUESTIONNAIRE ON CITIZEN INVOLVEMENT AND RESPONSIVE AGENCY DECISION-MAKING (Comm. Print 1969) [hereinafter cited as COMMITTEE PRINT].

³ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1969 ANNUAL REPORT (Jan. 1970) [hereinafter cited as ANNUAL REPORT].

⁴ For an intriguing account of the youthful training of John Adams in the "democratic politics" of the Braintree town meeting, see 1 P. SMITH, JOHN ADAMS 6-7 (1962).

⁵ U.S. CONST. amend. I.

The current extraordinary preoccupation with citizen participation has, however, been generated in part by the growing impact of government on the individual citizen, not only by regulation, but also by the dispensation of grants and aids. By statute or regulation, participation in some manner and at some level by the public or by affected citizens groups is a prerequisite to the receipt of grants under most of the programs administered by the Departments of Health, Education and Welfare, Housing and Urban Development, and Transportation.⁶ A new insistence upon citizen involvement or participation has also been stimulated by the essentially personal or emotional nature of issues which have been uppermost in the public mind in recent years, such as equal rights and protection of the environment.⁷ It is not without significance that two landmark cases, which expanded concepts of standing and opened the door wider to interested citizens groups who desire to participate in administrative proceedings, dealt with these issues.⁸

Some consideration of the methods by which citizens participate in the administrative process, the enhancement of the public interest which may result from such participation, and the strains upon prompt and responsible administrative action which may arise from extensive participation would appear to be worthwhile. It is becoming increasingly apparent that adaptations in administrative procedure will be required if the maximum benefits from citizen involvement are to be realized and the strains upon prompt and responsible action are to be minimized.

I. METHODS OF CITIZEN PARTICIPATION IN THE ADMINISTRATIVE PROCESS

American citizens participate in governmental affairs in numerous ways. They contribute time and money to political campaigns and cast their ballots. They write letters to their Congressmen and legislators. They serve on various advisory committees and commissions at all levels of government. Some citizens seek to achieve their objectives by demonstrations and even disruptive actions. However, the principal methods by which citizens ordinarily participate in the administrative process may be briefly summarized as follows:

Complaints. Citizens file complaints with administrative agencies at all

⁶ For recent legislation requiring participation of interested groups of citizens in the dispensation of federal aid to elementary and secondary education, see Pub. L. No. 91-230, 84 Stat. 121 (1970).

⁷ In describing the crisis in the electric power industry, Commissioner Carl E. Bagge of the Federal Power Commission recently said:

Obviously, one of the most significant factors has been the sudden emergence of an almost religious fervor about the quality of our environment which has provided, within the political dynamics of this industry, a substitute for the old orthodoxy—the public's relentless demand for cheap power. Few issues have so captured the public's imagination. The speed with which it was transformed from a benign environmental ethic into a zealous ecologic faith has been nothing less than meteoric. Its sudden emergence as a national religion has profound implications to our theologians—and to the electric power industry.

Address by Commissioner Bagge, American Power Conference, Apr. 21, 1970.

⁸ *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

levels of government, and the volume of complaints filed with any one agency may be tremendous. "During the fiscal year 1968, the [Federal Communications] Commission received more than 67,000 complaints, comments and inquiries regarding broadcast matters."⁹ The degree and manner of response to the complaints of citizens is, of course, variable. Administrators at the federal, state, and local levels are, however, becoming increasingly sensitive to complaints, and new mechanisms are being devised for the presentation and redress of grievances.¹⁰ An agency's responsiveness to complaints may sometimes exceed its independent initiation of action in its area of responsibility. During the fiscal year 1968, the Bureau of Restraint of Trade of the Federal Trade Commission initiated 218 investigations, and applications for complaint were the source of 108 of these. During the same year, "the Bureau of Deceptive Practices initiated 388 investigations of which 272 originated as applications for complaint and 39 as field office reports with letter of complaint. In other words, 311 of the 388 investigations, or 80.2 percent, originated from non-Commission sources."¹¹

Participation in Program Planning. Citizens groups or advisory committees are becoming increasingly involved in the planning of programs, such as Model Cities and Urban Renewal. They are also becoming involved in the planning of programs for highway construction and federal aid to education and health facilities. Indeed, without the active participation of citizens groups at the planning stage, it is sometimes virtually impossible to initiate a program. Last year, Mr. Peter F. Tufo, then Assistant to the Mayor of New York and director of the City's Washington office, described New York's recent experience as follows:

[T]he whole question of citizen involvement is one that arouses great passion. It may be that, unless the Federal government requires citizen involvement in its legislative mandate, we would not have citizen involvement in many parts of this country. It is our experience that, if you do not have citizen involvement, you are not going to have programs in the long run. There has not been a Federal highway constructed in New York City in the last six years, mainly because we cannot get the community groups to permit one to be constructed. The plans are made, but they, the community, were never consulted. Had those communities been consulted initially, we might have had more luck.

We had a terrible struggle in our Model Cities Program between the predominantly Puerto Rican group in East Harlem and a black group in Harlem, over the program for the use of the Model Cities money. It delayed our application; it made the whole process quite difficult. But I am convinced that if we had not gone through that struggle first, we would never have had a chance in the world of having the Model Cities Program in the long run.¹²

Public Hearings. Public hearings are most commonly held in connection

⁹ COMMITTEE PRINT 23.

¹⁰ See Carrow, *Mechanisms for the Redress of Grievances Against the Government*, 22 AD. L. REV. 1 (1969).

¹¹ COMMITTEE PRINT 242-43.

¹² PROCEEDINGS 167.

with land use plans or programs. Frequently a plan is developed before a hearing is held. One may question whether solid facts are developed or a representative community view is evoked at a public hearing, or the extent to which the action of the planning or other agency is based upon the results of the hearing. Nevertheless, the public hearing does serve a ritualistic and protective purpose.¹³ It is becoming more common for city councils and other local bodies to hold neighborhood hearings to answer questions and to elicit responses from those who might not otherwise participate.

Referendums. Numerous state constitutional or statutory provisions require referendums in connection with tax increases or bond issues. "Forty-seven states have constitutional or statutory provisions requiring local governments to submit certain proposed issues of general obligation bonds to a referendum. Twenty of these states require referendum approval by special majorities ranging from fifty-five to seventy-five per cent of those voting."¹⁴

Some referendum provisions have recently come under attack. On June 30, 1970, a California constitutional provision requiring two-thirds approval of local government, general obligation bond proposals was held invalid as being in conflict with the equal protection clause.¹⁵ Another recent case presents an interesting anomaly. A section of the California Constitution provides that no low-rent housing project shall be developed, constructed, or acquired by a state public body without the approval of a majority of the voters.¹⁶ Local housing authorities were unable to apply for federal assistance for public housing because they were unable to secure voter approval. Persons who were eligible for public housing brought actions requesting that the California constitutional provision be declared in conflict with the United States Constitution and that the housing authorities be enjoined from relying upon it in refusing to seek federal assistance. A federal three-judge panel held that the California provision was invalid under the equal protection clause and gave judgment for the plaintiffs.¹⁷ The Supreme Court has granted appeals.¹⁸ In this case, persons who are primarily affected by a requirement of approval by a majority of the voters are asserting that this requirement of voter participation deprives them of a constitutional protection.

¹³ See *Symposium on the Public Hearing*, 21 AD. L. REV. 119-90 (1969).

¹⁴ Note, *Judicial Activism and Municipal Bonds: Killing Two-Thirds with One Stone*, 56 VA. L. REV. 295, 296 (1970).

¹⁵ *Westbrook v. Mihaly*, 471 P.2d 487, 87 Cal. Rptr. 839 (1970). The plaintiffs in this case, who voted in favor of general obligation bond proposals that received a simple majority of the votes cast but did not receive a two-thirds majority, contended that the two-thirds requirement, by giving to each negative voter twice the voting power of each affirmative voter, substantially diminished the effect of the votes of all persons who favor passage of propositions authorizing the incurring of bonded indebtedness. They also contended that this "dilution" of their voting power deprived them of their right to the equal protection of the laws. In sustaining the position of the plaintiffs, the court held that the two-thirds requirement discriminated against voters casting affirmative ballots and that it diluted a fundamental right of such voters. In the absence of a showing that the requirement was necessary to promote a compelling state interest, it was held invalid. This invalid provision can be found in CAL. CONST. art. XI, § 18.

¹⁶ CAL. CONST. art. XXXIV.

¹⁷ *Valtierra v. Housing Authority*, 313 F. Supp. 1 (N.D. Cal. 1970).

¹⁸ 399 U.S. 925 (U.S. June 8, 1970) (No. 1557).

Direct Participation in Rulemaking or Adjudicatory Proceedings. Since the decisions in *United Church of Christ v. FCC*¹⁹ and *Scenic Hudson Preservation Conference v. FPC*,²⁰ participation by individual citizens and citizen groups in administrative proceedings has proliferated. Some participate as petitioners and others as intervenors. Among the most frequent and publicized participants are the ecologists or environmentalists. One recent case, in which seven petitioners requested the Secretary of Health, Education and Welfare to initiate a rulemaking proceeding to establish a "zero tolerance" for DDT residues in or on raw agricultural commodities, illustrates the diversity of the participants.²¹ The court identified the petitioners in this proceeding as follows:

Petitioners are six individuals and a corporation. The individual petitioners include five young mothers who presently or intend in the future to breast-feed their babies; these mothers seek elimination of DDT because mothers' milk presently contains excessive DDT residues up to twice the maximum average daily intake recommended as safe by the United Nations World Health Organization. . . . The sixth individual petitioner is an agricultural worker required to come into frequent—and allegedly dangerous—contact with DDT as a consequence of his occupation. Environmental Defense Fund, Inc., a nonprofit New York corporation, is made up of scientists and other citizens dedicated to the protection of man's environment and 'seeks to assure the preservation or restoration of environmental quality on behalf of the general public.'²²

Citizen participants represent many segments of the population. For example, taxpayers leagues, composed principally of the "silent majority," appear to be mushrooming. The confrontation tactics, which they sometimes aim at state and local tax authorities, bear some resemblance to those of the militant minorities.²³

II. THE ENHANCEMENT OF THE PUBLIC INTEREST BY CITIZEN PARTICIPATION

Citizen participation in the administrative process may have both tangible and intangible benefits. Both of these benefits are comprehended in the following comment on the requirement of the 1954 Housing Act²⁴ and its regulations for citizen participation in urban renewal:

The first possible purpose of the citizen participation requirement is that which has to do with the vitality of the democratic process. This purpose if [*sic*] founded on the premise that decision-making should be kept responsive to the needs of widely representative groups and that arbitrary action of

¹⁹ 359 F.2d 994 (D.C. Cir. 1966).

²⁰ 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

²¹ *Environmental Defense Fund v. HEW*, 428 F.2d 1083 (D.C. Cir. 1970). The Secretary rejected the petition as legally insufficient on the ground that the petitioners had not shown any "practicable method" of removing the residues. The order of the Secretary was reversed and the case was remanded with instructions to initiate the rulemaking proceeding.

²² *Id.* at 1085.

²³ *Wall Street Journal*, May 11, 1970, at 1, col. 1.

²⁴ 42 U.S.C. § 145(1)(a) (1965).

central planners in disregard of the legitimate needs and desires of the people they serve should be avoided.²⁵

Except where veto power is by constitutional or statutory provision given to the voters or groups of citizens, as in the case of referendums, in the administrative process a decision or a refusal to act must ultimately rest with the administrative agency, whether it be a major federal regulatory agency, a state body, or a city council or housing agency. Participation by representative groups of citizens, other than those who have a primarily partisan interest, can inform the agency and presumably assist it in reaching a decision which will further the public interest or accommodate the public convenience and necessity. This is the most valid reason for citizen participation.

Hopefully, those who participate will acquire a better understanding of the problems of government and of other segments of the community, a higher sense of personal responsibility, and other intangible benefits. Under Secretary Van Dusen of the Department of Housing and Urban Development has said that "effective citizen participation is an end in itself, an affirmation of democracy, and a means of eliminating alienation, withdrawal, and hostility."²⁶

Approximately eight years ago, a distinguished historian wrote:

Save in a loose and metaphorical sense, the people never really controlled 'their' government in the United States or anywhere else, despite the fact that in the days of Jefferson and Jackson, official powers and duties were restricted and the recognized political alternatives were narrowly defined by nineteenth-century liberal principles. As for the administrative Molochs of the mid-twentieth century, they can with difficulty be controlled by full-time professionals. Even in countries where governmental monopoly [*sic*] of public communication does not exist, governments more often than not can lull or wheedle the public into acquiescence or whip it into enthusiasm for official acts and plans.²⁷

In 1962 American involvement in Vietnam was limited, student activism and dissent were in low key, and very few had discovered the dangers to the environment. Citizen participation was a less familiar term. Today, millions are resolved to confront "the administrative Molochs" and to participate in their decision-making. The degree to which society will be benefitted by such massive involvement will be determined, for the most part, by the discipline, responsibility, and wisdom of the participants.

III. STRAINS UPON THE ADMINISTRATIVE PROCESS ARISING FROM EXTENSIVE CITIZEN PARTICIPATION

A few years ago courts envisioned little danger that the processes of the administrative agencies would be inundated by the expansion of standing-

²⁵ Jowell, *The Limits of the Public Hearing as a Tool of Urban Planning*, 21 AD. L. REV. 123, 125 (1969).

²⁶ PROCEEDINGS 178.

²⁷ W. McNEILL, *THE RISE OF THE WEST—A HISTORY OF THE HUMAN COMMUNITY* 800 (1963).

to-sue criteria. The expense of participation in administrative proceedings was believed to be a restraining factor which would limit the number of those who would seek to participate.²⁸ It was also assumed that representation of common interests by an organization such as the Scenic Hudson Preservation Conference would serve to limit the number of those who might otherwise apply for intervention and serve to expedite the administrative process.²⁹ These assumptions are less valid today than they were five years ago.

The number of environmental and consumer organizations has multiplied and their interests do not always coincide. Some are local and some are national in their areas of interest. Some have thousands of members and appear to be well financed. The Sierra Club is reported to have nearly 100,000 members, a budget of \$3,000,000 and a sixty-man staff. It is said that "the Club's legal committee of 20 volunteer attorneys is pressing a dozen major legal actions and studying 100 more," and that "club members are planning to form a political action group to back candidates who actively support environmental causes."³⁰ The National Welfare Rights Organization "is described as a group with more than 70,000 members in 46 states which assists its members in seeking redress of their grievances under the welfare laws, informs and educates its members of their legal rights, and generally acts as the public voice for welfare recipients." In one recent proceeding it was joined by four local welfare rights organizations.³¹ A bill pending in the Congress would provide for the establishment of an Office of Utility Consumers' Counsel,³² and the Administrative Conference of the United States has recommended the creation of an organization authorized to employ People's Counsel to represent the poor in federal agency proceedings.³³

Interestingly, anomalous divergencies in opinion as to groups or classes of citizens who may properly participate in agency proceedings are developing. Recently, the participation of thirty-two Congressmen in a Civil Aeronautics Board proceeding, as members or representatives of the public, has had judicial approval.³⁴ In contrast, a Chicago group called People Organized to Win Effective Regulation (POWER) has since requested that members of Congress and other political candidates be prohibited from participation, either directly or indirectly, in the Federal Power Commission's current nationwide investigation and rule-making proceeding to set rates for future sales of natural gas by producers. The Commission, in denying this request, noted that *ex parte* communications are prohibited by the Commission's rules, and that insofar as direct par-

²⁸ See *United Church of Christ v. FCC*, 359 F.2d 994, 1006 (D.C. Cir. 1966).

²⁹ *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 617 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

³⁰ *Sierra Club Mounts a New Crusade*, BUSINESS WEEK, May 23, 1970, at 64-65.

³¹ *National Welfare Rights Org'n v. Finch*, 429 F.2d 725, 727 n.1 (D.C. Cir. 1970).

³² S. 607, 91st Cong., 1st Sess. (1969).

³³ Recommendation No. 5B, ANNUAL REPORT 32-34.

³⁴ *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970). These Congressmen are participating in the remanded CAB proceeding (Docket No. 21322), and in certain related proceedings (Docket Nos. 22395, 22399).

ticipation is concerned, public officials have the right to express their views and the views of their constituents when their statements are made on the record and are subject to rebuttal.³⁵

Individuals, as well as representative groups and organizations, are participating in administrative proceedings more extensively than ever before. Commissioner Bagge recently said: "Today's public concern for environmental values co-exists with an unprecedented public demand for participation in nearly all facets of utility and regulatory decision-making."³⁶

It is reasonable to anticipate that this unprecedented participation by individual citizens or organizations and groups on their behalf will tax the time, energy, and ingenuity of the administrative agencies and result in major delays in the consummation of proceedings of great economic and social consequence. The "FPC's proceedings on remand in *Scenic Hudson* had, as of December 1969, consumed some seventy-four hearing days and were still far from closed. The application for the license was filed on January 29, 1963."³⁷

Senator Kennedy recently stated that "[E]fficiency and speed of decision-making by agencies are integral parts of the overall question of responsiveness of agency processes to the public."³⁸ Few persons, if any, could disagree. And yet there has been little recognition by courts, legislators, or members of the public that excessive citizen participation in administrative proceedings may preclude this very responsiveness to the public.

Aside from delay, an agency, in an effort to respond to citizen input, may allow itself to be diverted from its primary responsibilities to the public. James M. Nicholson, a former member of the Federal Trade Commission, has said:

There is no dearth at the Commission of a particular form of citizen 'input' into the Commission's decision-making process—receipt of a random individual complaint has, historically, been the reason for launching a Commission investigation. Since these investigations are the primary source material for ultimate Commission decision-making, this particular citizen 'input' has enormously influenced over-all agency performance.

A central problem is that by over-reacting to the individual complaints of private citizens, investigations have been initiated without regard for priorities. As a result, expensive projects of limited importance have been authorized, while other, more important violations, may go unchallenged. For example, network television commercials containing subtly concealed deceptions may not arouse the average viewer, may result in no complaints, and, hence,

³⁵ 35 Fed. Reg. 14001 (1970). The nationwide investigation and rulemaking proceeding was initiated last summer. 35 Fed. Reg. 10152, 11190, 11638 (1970). Public hearings have been held in major population centers, as well as in the producing areas.

³⁶ Address by Commissioner Bagge, Great Lakes Conference of Public Utilities Commissioners, July 14, 1970.

³⁷ Ramey & Murray, *Delays and Bottlenecks in the Licensing Process Affecting Utilities: The Role of Improved Procedures and Advance Planning*, 1970 DUKE L.J. 25, 28. Another chapter in *Scenic Hudson* was written on August 19, 1970 when the Federal Power Commission, by an opinion and order, again issued a license for the Cornwall or Storm King Project. Consolidated Edison Co. of New York, Project No. 2388, Opinion No. 584. It is anticipated that the Scenic Hudson Preservation Conference and others will again appeal.

³⁸ COMMITTEE PRINT at III.

there may be no investigation. Or in concentrated industries, individual businessmen may not complain about illegal practices because of general contentment with the 'easy life' or fear of larger competitors, and as a result, these abuses, too, may be undetected. On the other hand, the Commission tends to be disproportionately concerned over what is terribly pressing to one small retailer in a highly competitive industry, or the complaint of an aggrieved consumer who is the victim of a strictly local fraud which should be handled locally.

What I am suggesting is that the staff, operating without any contrary direction from the Commission, has confused a well-intentioned desire to be helpful to individual citizen complainants, with a responsibility to act only in the interests of the general public. This distinction is an essential one. The initiation of investigations ought to be made on the basis of a planned policy reflecting the broadest possible public interest consideration instead of haphazard reaction to what the mail brings. This is not to say I see no role for the unsolicited consumer or businessman complaint. By effective use of data processing techniques individual complaints could be placed in proper perspective and trends observed: these complaints would then be useful in identifying areas where Commission efforts should be focused. In sum, the complaints of individual citizens should, at most, be only part of the mix of policy planning which synthesizes the agency's own expertise, takes into account the expert opinion available from outside of the agency (especially from the universities and organizations committed to consumer protection), and makes sensible allowance for the more important individual citizen complaints.³⁹

However meritorious the objectives of citizens organizations may be, whether they be composed of environmentalists, consumers, or welfare recipients, all such organizations with large memberships and some financial support are tempted to evolve into political pressure groups. They, like other institutions in society, acquire interests to be protected and positions to be maintained. Since the rise of the administrative agencies, the organized bar has endeavored to assure that they would be engaged in the objective and unbiased pursuit of the public interest. It would be indeed detrimental to the general welfare if the agencies were now deflected from that goal by the weight of the numbers of participants in their proceedings.

Our political ethos is representative government. The administrative agencies are instruments created by the people's representatives with special responsibility for the protection of the public interest and the accommodation of the public convenience and necessity. To meet this responsibility, varying needs, including the economic, environmental, and social, must be balanced. Citizen participation can inform the agencies and contribute to wiser actions on their part, but the ultimate responsibility for the protection of the public interest rests with the administrators.⁴⁰

³⁹ *Id.* at 232-33.

⁴⁰ This ultimate responsibility was recently re-emphasized by the Federal Power Commission in its nationwide natural gas investigation. POWER moved that certain members of the Commission disqualify themselves. This they declined to do. It also requested that it be allowed \$10,000 in costs and fees payable by the FPC so that it could secure counsel and act as a public interest and consumer surrogate in lieu of the Commission. The Commission, in denying this request, said that although the participation of POWER and all other parties is encouraged, "the Commission has not and will not abdicate its mandate to represent the public interest." 35 Fed. Reg. 14001 (1970).

IV. THE CHALLENGE TO THE ADMINISTRATIVE AGENCIES, THE BENCH, AND THE BAR

In the years immediately ahead, the greatest challenge in the administrative law field will be the accommodation of efficient, prompt, and responsible action by administrative bodies to a growing participation of citizens groups in their proceedings. An effective response to this challenge will require the conscientious and creative efforts of the courts, the agencies, and the bar, and a considerable self-discipline on the part of the public.

The complexity of the impending problems and the magnitude of the challenge is illustrated by the developing energy shortage.⁴¹ A few years ago few foresaw the present rapidity in the growth of the demand for energy. Since the 1954 decision of the Supreme Court in *Phillips Petroleum Co. v. Wisconsin*,⁴² the Federal Power Commission has endeavored to regulate the production of natural gas for the protection of consumers. There is now widespread agreement that utility-type regulation has not provided the necessary incentives for the exploration and development of gas-producing properties and a serious shortage in natural gas has developed.⁴³ This in turn has contributed to a shortage in fuel oil. Labor troubles and mine safety requirements have reduced the availability of coal. Utilities have been inhibited in the location and construction of facilities for the generation and transmission of electric energy by the objections of environmental groups. These developments have coincided with a judicial insistence upon the consideration of possible alternatives in the location and operation of generation and transmission facilities,⁴⁴ and a new emphasis upon competition in the gas and electric industries.⁴⁵ Last winter industrial facilities in more than one city were closed because of a gas shortage. The East Coast has lived under the threat of blackouts and brownouts. The coming months are being approached with foreboding. The energy shortage is increasing the costs of consumers. Ironically, among those who may suffer most are the poor in the cities who have the least opportunity to enjoy the natural environment in distant places where generating plants and other facilities might be located, but for the protests of the organized environmentalists.

To meet the problems ahead, some have advocated increased use of consultative procedures in which federal, state, and local agencies, regional councils, industries, and environmental groups would be involved.⁴⁶ Commissioner Bagge recently stated:

The adversary hearing process based upon combative economic interests

⁴¹ See Wall Street Journal, July 31, 1970, at 22, col. 1; *id.*, June 2, 1970, at 1, col. 1.

⁴² 347 U.S. 672 (1954). Efforts to establish that *Phillips* did not embrace wellhead producers failed. *Cities Serv. Gas Co. v. State Corp. Comm'n*, 355 U.S. 391 (1958); *Saturn Oil & Gas Co. v. FPC*, 250 F.2d 61 (10th Cir. 1957), *cert. denied*, 355 U.S. 956 (1958).

⁴³ On July 23, 1970, the FPC published a proposed rule which would exempt small independent producers from regulation. 35 Fed. Reg. 12220 (1970).

⁴⁴ See *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

⁴⁵ See Miller, *Competition and the Public Interest in the Interstate Gas and Electric Industries*, 55 IOWA L. REV. 570 (1970).

⁴⁶ See Ramey & Murray, *supra* note 37.

which has characterized the regulatory process will become increasingly anachronistic in the decade of the Seventies. Even now, it can no longer cope with many of the vast policy issues which confront regulation today. Rational regulatory policy cannot be forged in bits and pieces, based only upon glimpses of reality as they may be chosen by the parties and the staff to be spread upon a record. New goals must be defined and implemented through the establishment of a formalized consultative process between government and business and through that, the achievement of increased joint planning and joint action, increased use of rulemaking in place of adjudication, the employment of investigatory proceedings and by joint action between government agencies both federal and state which share responsibility for the oversight and regulation of the same sectors of the economy. Regulation as we have known it in the past will be increasingly displaced by such joint efforts based upon a more mature relationship between government and industry and between federal and state governments. Evidence of this is apparent in many areas. Illustrations of this in our regulatory concerns exist in the National Power Survey, the proposed National Gas Survey, our present approach to the problem of electric power reliability and our approach to the need for a more rational construction of off-shore gas transmission facilities in South Louisiana. These illustrations of contemporary problems require regulatory oversight but do not lend themselves to traditional regulatory methodology.⁴⁷

The consultative and planning process appeals to reasonable men. As a supplement to the regulatory process and subject to regulatory oversight, it may be conducive to the public interest.

Hopefully, an increased use of rulemaking may substantially aid in the accommodation of responsible and prompt administrative action to extensive citizen participation. In a stimulative book, Professor Davis has demonstrated the utility of rulemaking in the confining and structuring of administrative discretion.⁴⁸ In his opinion, the procedure of administrative rulemaking is "one of the greatest inventions of modern government."⁴⁹ In a single rulemaking proceeding substantive questions which might otherwise be litigated extensively in adjudicatory proceedings may be resolved. By procedural rules, the participation of citizens and citizens groups in administrative proceedings may be structured. Judicial approval has been given to some reasonable rules relating to intervention.⁵⁰

It is not unfair to say that in recent years courts have shown some tendency toward a restriction of administrative discretion where citizens groups are participants in proceedings. Over-reaction on the part of agencies in order to obviate reversal may add considerable delay. An exercise of judicial self-restraint would contribute toward a resolution of the problems here considered. The reconciliation of extensive citizen participation and prompt and responsible administrative action will require the dedicated efforts of the bench, the bar, and the agencies. And much will depend upon the discipline and wisdom of the citizen participants themselves.

⁴⁷ Bagge, *Broadening the Supply Base—A Proposal To Eliminate Producer Price Regulation*, 3 NATURAL RESOURCES LAW. 430, 431-32 (1970).

⁴⁸ K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

⁴⁹ *Id.* at 65.

⁵⁰ *Palisades Citizens Ass'n v. CAB*, 420 F.2d 188 (D.C. Cir. 1969); *Telephone Users Ass'n v. FCC*, 375 F.2d 923 (D.C. Cir. 1967).