PUBLIC INTEREST LAW: ITS PAST AND FUTURE*

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FIVE years ago, the term 'public interest law' had not been coined. Today a public interest bar exists and its role within the legal profession is significant enough to warrant an audit.

Public interest law is the newest addition to those fields of law in which legal services are provided to those who are disadvantaged or whose interests are so diffuse that they are outside the normal marketplace for legal services. These areas of law have in common a need for some kind of subsidy – whether from the government, private philanthropy, or the legal profession itself.

Civil rights law, civil liberties law, and poverty law are now reasonably well understood areas of practice. The constituencies they represent have grown accustomed to seeking redress through the courts and have even developed a rather sophisticated understanding of the potential and the limitations of the judicial process.

The public interest lawyers, on the other hand, define their role more broadly than the poverty lawyers. First, the public interest lawyers believe that the poor are not the only people excluded from the decision-making process on issues of vital importance to them. All people concerned with environmental degradation, with product safety, with consumer protection, whatever their class, are effectively excluded from key decisions affecting those interests.

Second, the public interest lawyers are beginning to move in an area that had only been tangentially touched by the poverty lawyers – that domain where corporate power shapes governmental power, where decisions affecting large numbers of citizens are often quietly made. The public interest lawyers began to bring citizen interests before agencies that had previously dealt only

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with the industries they regulated. For example:

•Should the license of a racist television station in Mississippi be renewed? While this decision vitally affects the interests of many black Mississippians, traditionally it would have been made by the station and the Federal Communications Commission without participation of interested listeners.[1]

•Should truck owners be warned about dangerous wheels installed on General Motors pick-up trucks? This question, which potentially affects all highway users, would have been worked out between GM and the National Highway Safety Bureau without citizen representation.[2]

•Should ineffective drugs be removed from the market and after what procedures? This issue historically had been negotiated between the Federal Food and Drug Administration and the drug industry, but what of the millions of citizens who may buy useless drugs?[3]

History

Because many public interest lawyers came out of government and large corporate law firms, they knew first hand that many courts and administrative agencies resolved important issues of public policy without benefit of adversary presentations. They knew how meticulously the corporate lawyer prepares a case and how he devotes limitless legal resources to highly polished advocacy. They knew how expert witnesses are recruited, screened, prepared, and presented for maximum impact. And they knew the kinds of political pressures which can be marshalled to complement legal arguments. As believers in the adversary process, public interest lawyers thought it important to develop legal counterweights to the corporate bar. Some public interest lawyers established tax-exempt institutes like the Center for Law and Social Policy (CLASP), and sought foundation support for their activity. Others organized conventionally structured partnerships to represent under-represented groups; suspicious of the long-term reliability of foundations, they sought to serve citizen groups, including conservation and consumer groups, who could pay modest fees.

[1] *Office of Communications of United Church of Christ* v. *F.C.C.*, 465 F. 2d 519 (D.C. Cir. 1972).
[2] *NADER* v. *Volpe*, 320 F. Supp. 266 (D.C.D.C. 1970).
[3] *American Public Health Association* v. *Veneman*, 349 F. Supp. 1311 (D.C.D.C. 1972).

The first years were lean for lawyers in both types of public interest firm. Fee-paying clients were slow coming and slow paying. The foundations were skeptical about underwriting unconventional litigation. For its first six months, for example, CLASP was housed, rent-free, in the row-house of one of its four attorneys; the Xerox machine sat on his kitchen table. At several points during this period, it seemed that the venture would have to be abandoned and the four lawyers return to traditional practice.

Slowly, however, the elements of a successful project began to come together. With the support of Arthur Goldberg, then recently returned to private life, CLASP was able to recruit highly respected and concerned trustees. Some of the smaller and more venturesome foundations gave start-up grants. A clinical training program was begun in cooperation with Stanford, UCLA, Michigan, Pennsylvania, and Yale law schools. In the spring of 1970, major litigation successes in the Alaska pipeline case and the DDT litigation helped establish the credibility and impact of the program. A year after it began operation, CLASP received a major grant from the Ford Foundation.

The development of the public interest law movement owes much to the Ford Foundation and a few other foundations. In addition to the Center for Law and Social Policy, the Natural Resources Defense Council, the Environmental Defense Fund, the Citizens Communication Center, Public Advocates, the Center for Law in the Public Interest, and the Institute for Public Interest Representation, have relied heavily on these foundations for their financial support.

Each of these law groups developed a different focus and structure. Some focused on particular subjects, like the Citizens Communication Center on the F.C.C., and the Natural Resources Defense Council on environmental issues. Some emphasized clinical education and law school ties, (Institute for Public Interest Representation and CLASP). Others focused on local issues (Stern Community Law Firm) or state matters (Center for Law in the Public Interest). Some built memberships and filed suits in their own name (Environmental Defense Fund) while others were aligned with existing membership organizations (Sierra Club Legal Defense Fund and Consumers Union Law Firm).

This brief description may give the impression of a massive build-up of powerful citizen advocacy entities – which would be a gross exaggeration. The tangle of alphabetically-abbreviated institutions resemble the New Deal agencies only in their confusing

interrelationships and bewildering acronyms, not in their size, scope, or power. In fact, the public interest bar has never exceeded more than a few dozen lawyers. The most impressive names – Centers, Funds, Councils, and Institutes – were often facades behind which two or three relatively inexperienced lawyers stood.

This limited fire power notwithstanding, the programs challenged were often massive: highway, pipeline, and dam construction; import quotas on basic commodities such as steel and oil; mergers of large banks. In addition, public interest lawyers, trying to maximize the impact of their sparse resources, sought cases involving precedent-setting issues. For example, at the outset, when standing doctrines served to bar the citizen litigant from his day in court, each successful case established an important precedent. Environmental cases had an important impact on the interpretation of the newly-passed National Environmental Policy Act and other environmental legislation.

There were easy victories in the early years. Government agencies and the industries they regulated, unaccustomed to having their actions challenged, did not take the trouble to make a record that would withstand judicial review. The highway builders, the nuclear power promoters, the offshore oil explorers, and the auto industry are now beginning to adapt to a new kind of legal system – one in which their arguments do not always go unopposed. Two examples will suggest some of the impact and problems of the public interest bar:

The Alaska Pipeline.[4] In April 1970, environmental groups obtained a preliminary injunction against the issuance of permits by the Department of the Interior for construction of a trans-Alaska pipeline. Prior to this suit, the Department of the Interior had barely gone through the motions of complying with the newly-passed National Environmental Policy Act, and had ignored the plain language of the Mineral Leasing Act which limited the width of pipeline rights-of-way over public lands.

The Department was accustomed to challenge from the oil industry and other industries with a financial interest in exploiting public lands and other natural resources. However, it was unaccustomed to opposition from environmentalists and interested citizen groups. The grant of a preliminary injunction by the district court threw it back into a re-evaluation of the pipeline's environ-

[4] *Wilderness Society* v. *Morton*, 479 F.2d 842 (D.C.Cir. 1974).

mental consequences that lasted almost two years.

After the Department of the Interior had satisfied itself that the pipeline plan was environmentally acceptable, the Court of Appeals for the District of Columbia Circuit still held that the issuance of the pipeline permit violated the Mineral Leasing Act. Throughout this litigation, environmental protection groups successfully insisted on close scrutiny of the environmental consequences of the pipeline and demanded that the Department adhere to Congressional mandates.

Ultimately the decision on whether to build the pipeline was remanded to Congress where a tie vote in the Senate was broken by Vice President Agnew's vote favoring construction. Regrettably, while the oil companies lobbied heavily for the bill, the environmentalists were handcuffed by the Internal Revenue Service prohibition on lobbying by tax-exempt organizations.

The DDT Litigation.[5] In 1969, public interest lawyers, marshalling the scientific evidence establishing the hazards of DDT, filed a petition in the Department of Agriculture to institute cancellation proceedings for DDT. At that time, the Department did not even have a procedure for entertaining citizen petitions, and this one was simply left on the desk of the Secretary's secretary. The Secretary assured the petitioning environmentalists that he had the matter under scrutiny and that their input was welcome but unnecessary.

Reviewing this decision, the court of appeals, in a series of opinions, held that the environmentalists had standing to petition the Department of Agriculture and then seek judicial review of the rejection of their petition; and that the evidence presented was sufficient, as a matter of law, to require the Department to institute the administrative procedure which could lead to cancellation. Thereafter, during the course of a seven-month administrative hearing, the Environmental Protection Agency (to which the pesticide regulation responsibility had been shifted from Agriculture) concluded that DDT registrations should be cancelled. In December 1973, four years after the initial petition had been filed by environmentalists, the court of appeals sustained this decision.

Victories out of Court

In both cases cited above, litigation was successful. But in the

[5] *Environmental Defense Fund*, v. *Hardin*, 428 F.2d 1093 (D.C.Cir. 1970): *Environmental Defense Fund* v. *Ruckelshaus*, 439 F.2d 534 (D.C.Cir. 1971).

pipeline case the judicial victory was overturned, and in the DDT matter the cost of victory was extremely high in terms of professional resources. Because litigation is often time-consuming and costly, public interest lawyers have tried to use nonlitigative advocacy methods to further the policy objectives of their clients.

For instance:

•CLASP has tried to open to citizen participation the process by which the State Department formulates positions on international matters which have domestic impact. International environmental agreements, for example, affect the quality of our beaches and the extent of our deep water oil exploration; tariff barriers increase the prices that American consumers pay for imported products. State Department officials formulate positions on such issues in close consultation with representatives of interested industries, but citizens rarely have an opportunity to participate.

CLASP's International Project has succeeded in educating some State Department officials and others in the international law community to the legitimacy of citizen involvement in such decisions. The effectiveness of International Project participation in informal State Department discussions is reinforced by occasional resort to the courts.

•The Environmental Protection Agency has broad discretion, under recent legislative guidelines, in formulating clean air standards for different parts of the country. The Natural Resources Defense Council has established a project to monitor the EPA discharge of these statutory responsibilities and to participate in the formulation of standards. NRDC lawyers have developed expertise in this matter, contacts with technical consultants, and relationships with personnel within EPA in order to help assert the environmentalists' interest in strict enforcement of the legislation.

•Another important technique of public interest law is in-depth investigation of an agency's performance and publication of comprehensive reports on its successes and failures. Ralph Nader's pioneering report on the Federal Trade Commission, for example, revealed cronyism, lethargy, and a total failure by the agency to serve the public interest. The report triggered an ABA investigation and led to the revitalization of the agency under the leadership of Chairman Miles Kirkpatrick.

•Public interest lawyers have created new forums for public policy decision and debate. The Project on Corporate Responsibility was established to develop corporate law doctrine in inno-

vative ways and to seek new ways to attack socially irresponsible corporate policies. The annual ritual of a corporate shareholder's meeting, through the efforts of the Project, became a significant forum for the debate of corporate social responsibility. The Project spotlighted General Motors' policies which adversely affected minority groups, the environment and consumers. It also helped awaken such institutional investors as universities, foundations, and church groups to their social responsibilities as investors, and led directly to the reformulation of investment policies in many such institutions.

Appraisal

An appraisal of the first five years of public interest advocacy reveals mixed results.

First, the public interest lawyers have won important litigation victories. Some, like the DDT litigation, have had important impact on policy; others, like the Alaska pipeline litigation, have proven transitory.

But winning lawsuits, as any lawyer knows, does not mean that the client's objectives are attained. Corporations can always call on more lawyers, more scientists, and more engineers than can citizen groups. They can often end-run the legal process by going to Congress and re-writing the rules. They can manipulate markets to generate scarcity and manipulate the media to create crises. These techniques, which are beyond the reach of the public interest lawyer or his clients, will always limit the value of litigation as a citizen's weapon.

Second, the public interest lawyers have begun to expand consciousness within the bar. The American Bar Association – President Chesterfield Smith has strongly endorsed public interest law and has suggested that lawyers tax themselves to support public interest efforts.

On the other hand, the influential Administrative Conference of the United States, a public body, overwhelmingly represents the corporate bar, government attorneys, and academics. There are only two public interest lawyers among its membership of 91; a recent suggestion that the membership of the conference should include additional public interest lawyers was rejected.

Third, during the past five years, public interest lawyers have helped create a new atmosphere of receptivity to citizen advocacy in many administrative agencies. The Environmental Protection Agency (which has the advantages of enjoying a fresh mandate and

vigorous leadership) is an encouraging example of an agency where dedicated service to the public interest has been the rule, not the exception.

However, success has been limited. The domination of the administrative agencies by the industries they regulate has scarcely been affected. Private law firms successfully influence administrative agency decisions because they have groups of specialists who monitor the decisions of the agency with continual representation of their clients' viewpoints. In contrast, much public interest practice has been more ad hoc than systematic, and continuity of involvement has usually been impossible. Like their clients, public interest lawyers frequently respond to crises rather than develop systematic programs.

A core group of lawyers systematically dealing with similar problems in the same agency would appear to be a minimum requirement for effective citizen representation. This does not mean that the legions of lawyers who represent corporate interests must be duplicated on the public interest side; but there must be sufficient resources to maintain an ongoing presence in the various agencies. Moreover, especially in agencies dealing with complex technological problems, public interest lawyers need access to experts. Corporate lawyers have the benefit of the expertise lodged in their corporate clients; and they have funds to retain 'independent' experts to buttress their clients' opinions. In contrast, public interest lawyers are usually compelled to seek donated services from those experts who are neither paid consultants to corporations nor people hoping to find consultant contracts.

Fourth, the citizen groups represented by public interest lawyers have been educated by their participation in litigation. They have learned that they must develop more coherent strategies and not dissipate their energies by stopping a highway here or a power line crossing there. They have been educated to the power of litigation as a tool, and some groups, such as the Natural Wildlife Federation, have been led to retain a staff of in-house attorneys.

Nevertheless, few citizen groups have the funds, expertise or stability to effectively develop coherent strategies. The environmentalists are relatively fortunate in this regard. Where interests are more diffuse and less urgently felt, or where there are inadequate financial resources, effective citizen organization is much more difficult. What group will develop a strategy to assure effective drug regulation or to promote an adequate public housing subsidy?

Tax Exemption

The efficacy of public interest practice has been limited by the fact that many public interest lawyers are associated with tax exempt programs which prohibit them from representation before legislative bodies. Many public interest cases, like the Alaska pipeline case, can be readily recast and transferred by interested corporations from administrative agencies into legislative forums.

The tax exempt status of many public interest law programs is a continuing source of concern. In the fall of 1970, the Internal Revenue Service unexpectedly issued a ruling effectively suspending the tax exemption of public interest law groups. There was much public debate over this matter, and expressions of congressional concern from all points on the political spectrum, including then-Congressman Gerald Ford. After six weeks of debate, the IRS withdrew its ruling and acknowledged that public interest law was properly viewed as a tax exempt activity.

That, however, did not signal the end of IRS interference. The Center on Corporate Responsibility, an offshoot of the Project on Corporate Responsibility, was virtually destroyed by the IRS' failure to act on their tax exemption application. By the time the district court for the District of Columbia ordered the IRS to grant an exemption, the Center was moribund.

IRS interference with public interest practice is also reflected in its failure to delineate when a public interest law firm can accept a fee. Uncertainty regarding this matter is a serious handicap to some public interest firms, which regard fee awards as an important source of income. In some cases courts have ordered large fee payments to public interest lawyers. But the IRS position has not yet allowed payment of fees to tax-exempt public interest law firms.

The Future

We are entering a new phase in the evolution of a public interest bar. The foundations which have played a major role in its early development will be reassessing their commitments. The ABA, through its new Special Committee on Public Interest Practice, will be evaluating the bar's responsibility for maintaining an adversary process in judicial and administrative proceedings.

Many public interest institutions were candidly begun as experiments, without any expectation of permanence. They must now confront difficult decisions about their futures. In the past year, several lawyers have left public interest practice and returned to

the security afforded by conventional careers.

During the first phase, the public interest lawyers were testing a hypothesis – that public interest representation could improve the quality of decision-making on important issues of public policy. The experiment was not carried out under ideal conditions. There were too few public interest lawyers; their services were often offered to groups ill-prepared to take advantage of them; they were underfinanced, had insufficient technical advice, and were unable to carry their case to the legislatures. Nonetheless, the results of the experiment to date are positive and indicate an important future role for the public interest bar.

As it enters its second phase, this fledgling legal movement must institutionalize past gains, expand opportunities for citizen involvement and abandon its commitment to the adversary process. Abandonment of public interest practice would deprive government agencies of important input which has increased their awareness of public attitudes and raised the quality of their output. It would deprive citizens of an important tool for affecting government and corporate decisions that strongly influence their lives. It would force the legal profession to turn its back on even the pretense that an adversary process is basic to justice and that the ability to pay legal fees is not the key to the courthouse door.

Finances

Continuing subsidy of public interest practice will be necessary, and new sources of funds must be located. Except in rare cases, citizen groups will not be able to draw on their own resources to support public interest litigation. For example, the later phases of the Alaska pipeline litigation involved more than 4,000 hours of lawyer time. Even environmental groups representing a relatively well-heeled constituency can ill afford the cost of such litigation. The private firms engaged in public interest practice have not identified a sufficient client pool to support a substantial number of lawyers doing public interest work and relying on fees.

The San Diego conference recently sponsored by the Ford Foundation focused on the financial future of the public interest bar. At that meeting ABA President Chesterfield Smith, and other bar leaders affirmed the importance of the public interest lawyers' contributions and committed themselves to future efforts to assure the development of public interest practice. The conference urged the establishment of a Council for the Advancement of Public

terest Law to explore alternative funding mechanisms and devel-
› longterm financial resources.

One important vehicle to be considered by the Council is a Fund r Public Interest Law, endowed primarily by contributions from ıaritable foundations and the bar. Rather than a few foundations aking grants to several public interest firms for a year or two at time, the fund could be established under the direction of lea-ers of the public interest bar and other elements of the legal ofession.

In the past, foundation grants have gone to entities with tax ıempt status. The fund would explore a more flexible approach, ıch as funding particular projects by individual lawyers or or-anizations, or making loans available to carry the substantial ıetrial costs of major litigation where there was significant pro-ise of an ultimate benefit.

Any fund proposal will face substantial problems. How should ıarce resources be allocated among competing claimants? Should ›grams serving the poor on civil matters, indigent criminal de-ıce work and programs serving conservationist interests have qual priority? Should service or test litigation be favored? Re-›lution of such issues would be particularly important because ıe fund would become the dominant source of finances in the ıblic interest law area. It is important, however, that the fund not ecome the exclusive funding source. Reliance on a single source, o matter how well-intentioned its directors might be, would under-ut the diversity of representation which public interest law is esigned to assure.

In addition to a national fund supported by the organized bar, ıdividual attorneys practicing in a very lucrative profession might e solicited, although the past history of voluntary contributions y the profession is discouraging. Better still, in jurisdictions ike the District of Columbia, in which there is a unified bar with 3,000 members, dues might be raised to support a local fund for ublic interest practice. The bars of Beverly Hills, Boston, and 'hiladelphia have already established public interest law firms upported by members' dues.

'RO BONO PROGRAMS

In recent years, some corporate law firms have developed pro ono programs. A few years ago it appeared that these programs ıight provide a significant supplement to the efforts of full-time overty lawyers and public interest lawyers. Skeptics, however,

maintained that these programs were largely a public relations device at a time when it was difficult to recruit young attorneys for conventional commercial practice. The conflict-of-interest problem inherent in the corporate lawyers' situation when he represented a citizens group against corporate interests was also thought to pose a significant barrier.

It now appears that the skeptics may have been right. The concept of the pro bono commitment of large firms has not been widely accepted. Indeed, the steam has run out of many of the pro bono programs established in the past few years, as the partners who set up their programs return to their regular corporate clients. With the job market tightening for young lawyers, law school graduates are more willing to accept full-time corporate practice as the least unpalatable career alternative, and enthusiasm for pro bono programs has waned.

Awarding Fees

An important future source of funds for public interest practice could be the award of the attorneys' fees to successful public interest litigants. The concept of awarding attorneys' fees in order to encourage public interest litigation which helps to enforce legislative policies has received explicit Congressional recognition. Title VII of the Civil Rights Act of 1964 provides for the award of fees to successful plaintiffs in employment discrimination cases. Proposed amendments to the Freedom of Information Act now pending in Congress would authorize the award of attorneys' fees to plaintiffs who were forced to undertake the expense of going to court in order to obtain information from the government to which they are entitled. Legislation has been proposed to alter the current statute, [28 U.S.C. section 241], which has been interpreted as barring fee awards against the Federal government. With few exceptions, a plaintiff who successfully sues the Federal government or an officer of the government has not been permitted to recover attorneys fees.

Even without legislative action, the courts have begun to award attorneys fees to successful public interest litigants. In a California lawsuit brought on behalf of poor people displaced by urban renewal, the court awarded a reasonable fee to Public Advocates, the public interest law firm representing the plaintiffs.[6] In the

[6] Hearings before the Subcom. On Employment, Manpower, and Poverty of the Com. on Labor and Public Welfare, U.S. Sen., 91st Cong. 2d sess., 'Tax Exemptions for Charitable Organizations Affecting Poverty Programs.'

Alaska pipeline case the Court of Appeals for the District of Columbia Circuit awarded a fee to the lawyers representing the environmental challengers, to be paid by the oil companies.[7] In a recent decision, the Supreme Court affirmed that such fee awards are within the equitable power of the courts.

The administrative agencies have been much less willing to award attorneys' fees to public interest litigants. The Federal Communications Commission has even prohibited a licensee from paying a citizen group's attorneys' fees as an element in the settlement of a licence renewal challenge.[8] The FCC has recently reaffirmed its opposition to attorney fee awards in administrative proceedings, claiming it lacked statutory authority to require the award of such fee, and that such an award would be against public policy.[9]

While the agencies complain of the courts' failure to give suitable deference to their decisions, they still refuse to build an adversary process into their proceedings to give their rulings credibility. Hopefully, the courts will begin to recognize the principle that an agency decision made without full and robust adversary proceedings is entitled to less weight than a decision reached after an adversary hearing.

The award of attorneys' fees is no panacea and it would be a mistake to rely on its evolution alone for the continued sustenance of the public interest bar. A firm depending wholly on fees would necessarily incline toward more conventional cases where the likelihood of a fee was greater and a lengthy and expensive proceeding less likely. Furthermore, past experience suggests that fee awards to public interest lawyers are likely to be inadequate.

The award of more adequate fees could create new opportunities for a variety of mixed law practices. For example, a firm dedicated to public interest practice might spend some part of its time on conventional legal work, other time on cases where court-awarded attorneys' fees were anticipated, and some part of its time of foundation-subsidized public interest work. Regrettably Internal Revenue Service, in its 1970 ruling, refused to permit tax exempt

[7] *Tenants and Owners in Opposition to Redevelopment, et al.* v. *U.S. Dept. of Housing and Urban Development, et al.*, Civ. No. C-69 324 SAW, dec. Jan. 20, 1974 (N.D.Calif.).

[8] *Wilderness Society* v. *Morton* 495 F.2d 1026 (D.C.Cir. 1974) (cert. pending).

[9] *WSMT, Inc.*, 74-85 (released Feb. 12, 1974).

public interest firms to accept fees except in accordance with IRS rules – rules the IRS has still failed to promulgate. Hence, the opportunities for mixed practice have been severely curtailed.

The public interest lawyers are off to a promising start, but it is only a start. They have shown that broader public involvement can shake the corporate hammerlock on policy decisions, but they have done little more than define the problems with greater clarity and delineate some paths which should be explored in the future. The challenge raised by the public interest bar is simply this: will the bench and bar structure their roles, responsibilities, and institutions to permit the development of public interest representation on a scale proportionate to the bar which represents corporate interest?