What is the Public Interest? Who Represents It?

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DEAN CRAMTON: What is the public interest? Who represents it?
When lawyers talk about such subjects, there is a danger that we may take ourselves too seriously. I am told on good authority that the Arkansas Supreme Court recently devoted its attention to a subject that I last considered in law school—the rule against perpetuities. One of the judges, carried away by the intricacy and beauty of the problem before the court, inquired of counsel whether a particular variation of the rule was well-known in his part of the State. “Your honor,” the lawyer replied, “in Booneville we talk of little else.”

There is also the danger of hypocrisy. When lawyers who represent special interest speak of the “public” interest, they may be viewed by members of the public as falling within Mark Twain’s definition of a lawyer: “A person who has his hand in someone else’s pocket.”

A few introductory comments may help to put the Panel in perspective. Our topic is: “What is the Public Interest? Who Represents it?”

Many of you will recall the celebrated confrontation a few years ago between Ralph Nader and Lloyd Cutler. Cutler’s firm had represented automobile companies in settlement negotiations with the Justice Department. These negotiations had resulted in a consent decree which terminated an antitrust suit which charged the automobile companies with a conspiracy to impede the development of emission control systems.
Through Nader's promptings a group of law students picketed Cutler's firm to call attention to the settlement, which they characterized as a "sell out" out of the public interest. Cutler was visibly upset and accused the law students of violating legal ethics by picketing. He asked the sixty-four-dollar question: "Why do you think you have a monopoly on deciding what is in the public interest?"

The traditional view of the bar—which is implicit in what Lloyd Cutler said, and in Chesterfield Smith's opening remarks, is that the political process and the adversary system are fair and open ones, which provide orderly methods of participation and change. The duty of a lawyer, by and large, is to represent vigorously the interests of his client in the political system and in the courts. Whatever you and I may think of the result of the process in a given case or situation, if the process itself is fair, open and rational, the theory goes, the outcome is the current expression of the public interest. At the very least, the outcome is legitimate in the basic sense—conforming with basic procedures.

Given fair and open procedures for resolving disputes or urging social change, Learned Hand concluded some years ago, "Right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is and always will be folly, but we have staked upon it our all."

The objections to the adversary system—some of which will be discussed by members of the panel—rest upon disagreement either with its factual or its normative premises. First, there is the assertion by some that the procedures are not really fair and open either because of procedural defects or because of the existence of widespread bias, favoritism or corruption on the part of government officials. For example, Nader and his followers charge that deficiencies in public participation in the informal administrative process, such as the consent decree settlement case, or the alleged "sell out" of regulators to the interests that they regulate, so distort the whole system that it can't be viewed as being fair and open.

How pervasive are these warts on our system? To what extent does it fail in practice to live up to its pretensions? How can these imperfections—if they exist—be eliminated? These are questions which I hope the panelists will address.

A second objection to the adversary process in our pluralist system is that the cards are stacked against interests that are not economic in character or that lack resources. I believe that this problem is a far more serious one than that merely of representation of the improver-
ished. Interests other than those of the poor may be unable to obtain full and adequate representation.

In the first place, organizations do not fully represent the interests of their members. Does Chesterfield Smith speak in all respects for all of the lawyers in this room?

In the second place, there are diffused and unorganized interests which are either unrepresented entirely, or which are represented only by self-appointed or governmental spokesmen which they do not choose and cannot control.

Is the clash of private interests sufficiently even-handed so that the outcomes routinely may be said to be in the public interest? If there are deficiencies in this regard, how can we improve the system so that it is more even-handed?

Thus far my comments have been fully consistent with the basic premises of the adversary system in a pluralistic society. They have merely emphasized alleged imperfections of that system.

In the pluralist view, all competing claims are merely subjective value premises. We agree only on an orderly process of resolving individual disputes or of making social changes by means of legislation. And in this ball park, Lloyd Cutler can play the public interest game with as much moral authority as Ralph Nader, although he may have greater difficulty in attracting the attention of the media.

There is another view, however, which should not remain unmentioned; and I hope our panelists will deal with it. This is that of the radical critique of American society, and particularly of the pluralistic and adversary system. The radicals do not accept the premise that decisions made in accordance with the procedures of the system will produce the best results for the whole society.

Herbert Marcuse, for example, argues that the pluralist system produces irrational and undesirable results. The competing institutions of modern industrial society, Marcuse claims, concur in a common interest to defend and extend their established positions, to solidify what he calls the power of the whole over the individual. The irrationality of the whole, Marcuse and his followers argue, goes unnoticed and unprotested—growing productivity for little or no purpose, technological advances used to produce either instruments of death or the plastic products of a consumer society, increasing affluence resulting in either moral emptiness or environmental devastation or both.

The radical critique, in short, does not accept the assumption that ultimate values can be determined by the conflict of private interests. The radicals, it seems, have discovered truths, not self-evident to the
rest of us, that do not depend upon the votes of the political process or the advocacy and rationality of the legal process. While the value choices that they assert are subjective, it is also true, ultimately, that the preference of the rest of us for a procedural definition of basic social values is also subjective. The difference for the moment is that the vast majority of our society—and nearly the entire universe of lawyers—accept today the premises and values of the adversary, pluralist system.

We have four highly-qualified panelists, and now is the time to turn to them. Each will make a short presentation. There will be opportunity for audience participation. In the back of your books are green slips on which you may address questions to the panelists. At the coffee break and during the latter part of the panel presentations, bring them down. I will sort them out and address them to one or more of the panelists.

The initial presentation will be by William D. Ruckelshaus.

Now Bill, as you know, abruptly became a private citizen last October!

Now engaged in private practice in Washington, he was serving at that time as Deputy Attorney General of the United States. Previously he performed distinguished service as Administrator of the Environmental Protection Administration, and also in the Department of Justice.

MR. WILLIAM D. RUCKELSHAUS: Thank you very much for that warm introduction, Roger, and your kind attention.

Roger Cramton did not mention that for eighty days I was also the Director of the FBI. I am certain there is nothing in his background that would lead him not to mention that!

I am delighted to be here this morning to get a chance to share with you for a few short minutes my views on this issue, vital to our society, and to the public interest. But I have a confession to make to you about delight in being here, and that is that—as Roger mentioned—over the last five years I have been incapable of holding a job for any considerable length of time.

Having started in the Justice Department, where, among other responsibilities, I was in charge of the Civil Disturbance Unit, which went around the country and observed riots; from there, I became the Administrator of the Environmental Protection Agency, where I was once introduced to the Detroit Economic Club as “the greatest friend of American industry since Karl Marx!”

Having left there to become the Director of the FBI for some eighty days, where among other duties, I had the responsibility of overseeing
the investigation into the Watergate; from there to the position of Deputy Attorney General, where among other duties, I had particular responsibility for the investigation of a Vice President of the United States; and from there to one of the most rapid departures from government in our history—with this background, my confession is that, not only am I delighted to be here, frankly, I am delighted to be anywhere!

Roger admonished the panelists that we were to follow the old adage of George Bernard Shaw, that in order for a speech to be immortal it need not be eternal. So I will do my best to keep what I have to say as short as possible.

I stated a minute ago that I think the subject to which this conference is addressed is of overriding importance to our society, and I believe that very strongly. It is certainly true that the definition of "public interest" is almost impossible to divine, but nevertheless, the effort to do so must always be a prime goal of any public official.

In my view, the overriding, and in the last analysis only responsibility of any public official in government is to serve the public interest. He simply has no higher loyalty than to serve the public interest. And while that may seem to be a statement upon which everyone could agree, it is—and continues to be—incredible to me that so many people move into government at various levels who have no perception whatsoever not only of what the public interest is, but that the public interest is what they are there to serve.

I was talking to Dean Cramton just before coming up here this morning, and I asked him to what extent the question of the serving of the public interest is being taught in our law schools. He indicated that there were several courses in which the question of what was in the public interest was interwoven. But I believe that not only in our law schools, but in our schools in general, we need to pay more attention as a society to the obligations of a public servant to serve the public interest, and the obligations of a public servant to do his best to define what public ethics is all about.

What often happens is that people come abruptly out of private life into public service without ever having given 10 minutes' thought to what their obligations as a public servant might be. And while we produce in our law schools individuals who will often be called upon during their lives to serve the public and the government at one level or another, the fact that we have not given them adequate schooling as to what their obligations are, I think, has led us to a great deal of the present difficulties we are experiencing. This is true
not only at very high levels of the federal government, but at other levels of government as well.

In whatever capacity I have served as a public servant or in whatever agency, I have always attempted to lift myself above the parochial interest of that particular body—and I must confess that I have universally failed to achieve that degree of objectivity that I think is necessary.

Casper Weinberger, whose travels through the federal bureaucracy have rivaled mine, has said that “where you stand depends on where you sit.” And what we are addressing ourselves to today is how it can be possible for the public interest to be served when it is so difficult for a given administrative official to be as objective in serving that public interest as he ought to be.

When I was serving in the state legislature in my home state of Indiana, I remember hearing an insurance man, who also happened to be a state legislator, announce to the assembled legislators, that he was there as an insurance man to represent the interests of the insurance industry in that legislature. That was the platform on which he ran, and he thought that other interests that were represented by other people there would be able to compose good policy. There was no mention of a broader constituency or responsibility.

It struck me as very unusual that he would be willing to admit that in a public statement, but it shows the gap between what his real obligations were and what he perceived them to be. This statement passed without much public comment or shock because I think that is how many people in the state legislature viewed their responsibility.

Suppose that a public official does perceive that his primary obligation is to serve the public, what does he then do? From the perspective of an agency or a department head, how is he to discharge that responsibility to the public interest?

In the first place, I think that as long as he is asking himself the question constantly, every day, “What is the public interest?” we will have gone a long way toward solving many of the problems that we have. The unfortunate problem is that too often that question is not asked.

But if he perceives this as his obligation, he first of all must deal with the statutory basis on which his particular agency or department is formed, or his responsibilities are defined. There he may find that the definition of his responsibility or of what the public interest is—as defined by the statute—may be very limited, or in some instances even misleading.
Some experiences that I had as Administrator of the Environmental Protection Agency concerning two very significant pieces of legislation, passed at the height of public concern about the environment, will serve as examples: the Clean Air Act of 1970; and the Water Act that was passed in October of 1972.

Both of these pieces of legislation are giant steps forward in the effort to clean up the environment. On the other hand, there are portions of both of them that very poorly define precisely what is in the public interest, and that failure hampers the ability of anyone who is supposed to administer those acts in weighing all the considerations that should be weighed in concluding what best serves the public interest.

The Clean Air Act is almost a classic example of a Congress reacting against what they saw as too much emphasis given in the administrative branch of government to the vested interests as opposed to a more broadly defined public interest. The Act itself can be read as an effort by the Congress to come down very hard on the side of what they perceive to be the public interest, as opposed to the vested interest. It can also be read as an example of enormous distrust of the administrative branch by the legislative branch of the government.

The fact that EPA had the responsibility, under the Clean Air Act, to set air standards that protect the public health without giving any consideration to the economic feasibility of achieving those standards within the deadlines that are also set by the Act, is, in my mind, aimed primarily at vested interests but, in the long run, may well penalize the public interest even more.

The history, of course, of the use of the phrase "economic feasibility" in environmental statutes in states throughout the country was that the phrase was interpreted by the administrative agencies charged with regulating those industries as an excuse for doing nothing. The argument always was, "Well, yes, we can clean up air pollution in a given case, but it is unfeasible economically to try to do so."

So the Congress, in reacting against the interpretation, simply struck from the language of the statute any consideration that could be given to the economic feasibility of achieving a given health-related standard within a given time frame.

It was true that this came down very heavily in favor of clean air versus the economic ability of a given industry or a given municipality to achieve that standard within a given time. But in the long run, it could be the public itself that suffers. The public itself will achieve one social benefit—clean air—at the expense of many other social bene-
fits that could have been achieved, had those standards taken into account, both in terms of the standard itself and the time frame, the economic feasibility of doing so.

To give you just one example, we were told to set a photo-chemical oxidant standard, which is smog, for the nation. In an effort to protect the public health, we did so, and as best we could define where that number should be.

In order to achieve that standard in the city of Los Angeles within the time period that was also set by the statute, you would have to remove ninety-five percent of all of the automobiles from the highways. This would undoubtedly achieve clean air in Los Angeles. It would be a better place to live in terms of breathing. But there would be some related health problems—just in terms of getting to the hospital, among other things, if ninety-five percent of the automobiles were removed from the highways.

Obviously, in that case the distortion of attempting by statute to define the public interest and to set it in concrete could well work against—in the long run—that same public interest. Similar examples, I think, could be given in the Water Law that was passed just a little over a year ago.

I do not mean to imply, by what I am saying, that there is no merit in either one of these statutes. In fact, I think that they are, by and large, very meritorious pieces of legislation and ought to be preserved.

One of the hazards of passing legislature like this that restricts and inhibits very greatly the administrative ability to weigh the competing interests of our society is that we could generate a backlash to the purpose of the statute itself which would then cause a wild swing of the pendulum in the other direction. When something like the present energy crisis occurs, the result would not be sustained solid progress in achieving cleaner air and water, but just wild fits and starts at the problem in which no real progress is made. In addition it is enormously expensive in the process.

The adversary system has been mentioned by Dean Cramton. From the perspective of an agency head in the federal government, we must recognize that the adversary system will only work if there are roughly equal arguments on various sides of a given question. The problem in achieving an effective adversary system is insuring that there will be equal arguments made on both sides. The most telling criticism against the adversary system has to do with the impossibility of achieving this rough equality on either side of a question.

"Public interest" law firms, of course, are misnamed because no group can represent the total public. Nevertheless, they represent a
portion of the public which was otherwise largely unrepresented before many administrative and regulatory agencies. I think that the public interest law firms should be protected and encouraged, and that we should do everything in our power as well to insure that the adversary system, as we presently have it, does work and does function by providing roughly equal and sustained effort on both sides of questions that come before an agency like EPA and many others.

If we move from the question of the statutory limitations of defining what the public interest is, to the more general policy questions that an agency head has to consider, how does he make sure that the decisions that he makes have in fact taken into account all of the facets of the public interest, and that all of the various publics are represented?

The kinds of functions that the head of an agency has involve the development of statutes themselves, the issuance of regulations, and policy statements that are made by an agency head—all of these things have to be carefully staffed out. There has to be great care given that any voice in the society is given a chance to impact that policy before it is announced or certainly before it is implemented. And one of the ways that can be done is for the heads of agencies or departments in government to give much greater emphasis than has been given in the past to openness in the agency itself, in an effort to open up the processes by which these policies are formed.

In the water legislation that passed in 1972, there was a provision which, I think, was a very good one, to insure that there was maximum public participation at very early stages of the development of policy and the implementation of the Act.

We formed policy task forces to implement the Water Act within the Environmental Protection Agency itself on which were representatives of public interest groups of all kinds, so that we actually had a portion of the public, which was otherwise not represented, participating in the process of the formulation of policy itself.

This experiment, I think, has borne great fruit. It has forced members of the public who otherwise would stand and criticize what the agency was doing, to become involved in the formulation of that policy itself, thereby giving them a much greater understanding of all of the ramifications involved, and the complexities in attempting to formulate a policy and take into account the total public interest.

My own feeling is that there is a tremendous need in our society in general to provide new mechanisms in which the public can become involved more directly in impacting the decision-making process. These publics have to be informed in order for that participation to be meaningful. This is particularly true in relation to the environment.
And again I use Los Angeles as an example only because it may be the most advanced of the problem areas in the country.

Back in the nineteen-thirties a decision was made in Los Angeles—a very simple decision by the Board of County Commissioners—to give the highways the right of way over the rail system. If you look at the hearing record there was almost no public participation in that decision, and yet the implications for the city of Los Angeles were incredible.

Los Angeles in the nineteen-twenties had the most complete interurban rail system in the world. To substitute for that system a highway system in which the total dependence for transportation for the people that lived in that valley was going to be on the automobile was, by all measures, a very unwise decision.

The people who made the decision were not evil. They were simply not subject to the kinds of information and pressures that they should have been had there been not only mechanisms for the public to participate but information systems that could have been utilized to give the public knowledge that could make their participation meaningful. The public could have then spelled out in detail to the decision makers the results of a choice of any given option in Los Angeles.

Let me close by making a strong pitch that we not take a simplistic view of what the public interest is.

If we can assume that what we are all seeking to achieve—whether as private citizens or government officials—is a clear understanding of what the public interest is—we must recognize the limitations of the present systems that we have created in coming to grips with that problem.

Again, in Los Angeles, I always had mixed emotions about solving the problems of air pollution as they related to the automobile in that city because, if we did that, it would mean that all of the public pressures behind doing something about transportation in the city that were caused by their concern about air pollution would have been taken out of the equation. Instead of addressing the issue of transportation as they should do there, with a certain degree of urgency, it would simply continue to move along at its own pace, as it has in the past, with the parts of the transportation problem being dealt with incrementally—air pollution being just one of them. All of the problems of congestion and noise and fuel consumption and urban sprawl that relate to the transportation problem would simply not be addressed.
We also have to recognize that in that community, as in many others, transportation as a problem is simply a part of the larger problem of the quality of life, of how do the people in that community really want to live, what sort of life do they want to have in the future?

So what we need very desperately as a nation is to create mechanisms—particularly in local communities, in my view—to provide a wholistic approach to the problems that they face, and to be able to view the public interest in its broadest sense, instead of as we are trained as lawyers to do, looking at these problems in a much narrower context and dealing with them incrementally.

If we don't develop simultaneously ways in which the public can become more meaningfully involved in the decision-making process, and at the same time provide them with information that can give real results from a given option that is chosen by decision makers in communities around the country, we are going to continue to flounder, in my view, in determining what, precisely, is in the public interest.

Thank you.

DEAN CRAMTON: Our next speaker is Victor Kramer.

Victor has been a "public interest" lawyer in recent years, but more than that, he is a distinguished lawyer of any stripe—public interest, or private interest, or whatever.

For many years he practiced law here in Washington, first in the Department of Justice, and then in the Arnold and Porter firm, where his practice was largely in antitrust and trade regulation. He is now the Director of the Institute for Public Interest Representation at the Georgetown University Law Center.

PROFESSOR KRAMER: Mr. Moderator, men and women:

I have found it especially pleasurable to speak following two other occupants of the Department of Justice. We served, however, at different times. In my day it was the job of the Attorney General to run the Department of Justice and of the President to run the political campaigns. Now it is the job of the Attorney General to run the campaign and of the President to run the Department of Justice!

During the coffee break, a very handsome gentleman whom I don't know—I am sure he is still here—came up and asked Mr. Ruckelshaus, "Gee, how do you tell what is in the public interest?"

Well, I propose to answer that question this morning.

Writing in the January, 1974 issue of the Yale Law Journal, Professor Lee Albert has summarized what I would have hoped to have said to you today had I not seen his article. In the interest of saving
time, let me quote to you a passage that takes about a minute to read; I subscribe to it:

In a highly pluralistic society with many interest groups . . . there is no "unitary public interest." Agencies must deal with a constellation of interests which often compete with each other . . . none of the interests relevant to an administrative decision so clearly captures the common good that it can properly be regarded as public and left exclusively to an agency.

This should lead to discarding the dichotomy which classified interests as public and private, with its corollary that individuals and groups favored by statutory protections were merely incidental beneficiaries of a public right. Instead, participation by organizations of consumers or conservationists is now encouraged because they may better represent these interests than a public agency. Such representation is necessary not because these interests are identified with the public interest, but because they, like other factor interests, are among the constellation of interests entitled to consideration.

And so I accept the modification of the name of the organization for which I work to the "So-Called Institute for Public Interest Representation."

I would like to mention this morning an example of participation by consumers in agency proceedings which I think should be encouraged. The example arises out of the complaint the Federal Trade Commission filed against ITT's subsidiary, Continental Baking, on account of its alleged false and misleading advertising of Wonder Bread. The Institute for Public Interest Representation at Georgetown, representing Consumers Union, Consumers Federation and Homemakers of America, attempted to intervene in the proceedings before the Federal Trade Commission during its review of the initial decision. Failing in that attempt, the consumer group filed a petition in the D.C. Circuit to review the final order of the Commission, because the order, in the judgment of the consumer groups, was altogether too weak to vindicate their conception of the public interest.

The Federal Trade Commission Act contains no provision for review of FTC cease and desist orders other than upon the petition of the respondent: the corporation subject to the cease and desist order. The petition for review of the consumer groups relies for jurisdiction upon Section 10(b) of the Administrative Procedure Act.

ITT Continental has filed a motion to dismiss the petition on the ground that the court lacks jurisdiction and that consumers are mere intermeddlers. The FTC itself—more properly the FTC General Counsel—is far more cautious in its position. It contends that the D.C.
Circuit does have jurisdiction to hear the petition but that these consumers lack standing.

So far as I am aware, the Wonder Bread litigation represents the first opportunity for a clear test of the question whether consumers have the right to petition courts for review of those FTC orders which, in their opinion, are inadequate to protect consumers.

Since I am counsel in this case, along with others, it would be improper, not to say foolhardy, for me to comment or predict the outcome of this litigation. But because I think it is an important development in the area with which our panel is concerned, I have called it to your attention.

At the Institute we are conducting a fifteen-month study of all of the presidential appointments to the Federal Trade and Federal Communications Commissions from 1953 to 1973. Fifty-one men and women were appointed during those years. We have interviewed most of the living fifty-one as well as a score of presidential appointment advisors and we have read widely in Presidential and other libraries. This morning, in the time remaining, I would like to share with you just a few of the conclusions which we have drawn from our research.

First of all, it is clear that a majority of the Commissioners—by no means all, but a majority of the fifty-one—were appointed for partisan political reasons, and not because anybody thought that the appointees were particularly qualified to license broadcasting stations or prevent unfair methods of competition. What I am saying is that over twenty-five or thirty of the fifty-one, in our judgment, were the wrong persons appointed for the wrong reasons.

Second, we have found that the requirement of law that not more than a bare majority of the Commissioners come from the same political party has resulted in some of the worst appointments that could have been made. That provision in the law was adopted in order to assure bipartisanship. In fact, it has not accomplished its purpose. When President Nixon appoints a Democrat or Presidents Johnson or Kennedy appointed a Republican to these Commissions, we got, to be sure with a few brilliant exceptions, not vigorous members of the opposite party but men and women whom their mentors thought were safe; frequently bland mediocrities who could be trusted not to rock the boat.

Political partisanship almost never is an issue in a Federal Trade Commission or Federal Communications Commission proceeding. Party affiliation is irrelevant and, in our view, should be written out of the law.
I can report to you, however, that a relatively recent development in the agency appointment process may work some changes: whether it is for good or bad is for you to decide.

Until recently, the political appointive process to the regulatory agencies had long been the exclusive and undisturbed domain of those who govern and of those organized entities which were most directly affected—the regulated industries and the political parties. The rise of a self-appointed third force—distinct from government, party and industry—intervening on behalf of the so-called "public interest" on appointment matters was a new phenomenon, which coincided with the ascent of Richard Nixon to the Presidency in 1969. Citizen groups, with diverse, if sometimes overlapping interests and reflecting various shades of political persuasion, began to take a serious interest in the workings of the regulatory agencies.

The first and clearly most prominent consumer-oriented thrust into the presidential selection process was the Nader Report on the Federal Trade Commission. The Commission had been studied frequently in its fifty-year history with little effect. But the Nader Report had impact, in part because its timing could not have been better: a few days after it was issued Richard Nixon became President and a new party assumed power. Change was in the air. The study made many withering criticisms of the agency, but its focus centered on the Commission's Chairman—Paul Rand Dixon—and the report concluded with a call for his resignation as Chairman so that the needed reforms could begin.

The consequences of this single report were far-reaching. To begin with, the American Bar Association—at the request of President Nixon—conducted its own investigation, and—let's face it—in better temper, confirmed Nader's findings almost without exception.

On the question of a new Chairman, the ABA recommendation could not have been more specific: what was needed was a Chairman, said the report, who had "executive ability, knowledge of the tasks Congress [had] entrusted to the agency, and sufficient strength and independence to resist pressures from Congress, the Executive Branch [and the] business community. . . ." The report did not stop there. With obvious reference to Chairman Dixon, the ABA panel strongly suggested that the President appoint a Chairman who had not previously been affiliated with the agency.

Nader's efforts caused the ABA study, and the two reports together guaranteed that President Nixon's first two appointments to the FTC would be persons who would be well-fitted for their responsibilities. Competence and ability would dominate the selection decisions; parti-
san political considerations would be minimized because public attention demanded it. If there is such a thing as a "merit appointment" it occurred in the selection, first, of Caspar Weinberger, and then of Miles Kirkpatrick to head the FTC. Weinberger had a well-established reputation for hard-nosed administrative ability. When those abilities were called for elsewhere, the Administration turned to the logical person to succeed him: Miles Kirkpatrick, an antitrust lawyer and Republican who had headed the critical ABA study only a year earlier. Richard Nixon, who—in a very unusual gesture—personally offered both men the appointments, had committed his Administration to revitalization of the FTC.

But President Nixon—like other Presidents before him—also had political needs which required satisfaction, and his third appointment to the FTC was of an ex-Congressman from Ohio, who described himself as a "general practice, small town lawyer." David Dennison had no familiarity with the tasks ahead, and no discernible inclination to consumer concerns. But David Dennison did have powerful friends in the House of Representatives, and he had labored within the party for years.

On the Dennison appointment, the consumer groups were uncomfortably stymied: they had submitted lists of prospective Commissioners, which the White House barely acknowledged. All pleas for consultation before the appointment decision was made were ignored. However, largely due to Senate Commerce Committee efforts, the citizen groups did manage to secure a private, off-the-record meeting with Dennison a few days after his name was sent to the Senate. It was the first time such a meeting had occurred, although nominees to regulatory agencies regularly meet with Congressmen and other interested parties in such private sessions. Those present found Dennison somewhat less than dazzling, but he was basically competent and there was nothing in his background which could have blocked his confirmation. A sprinkling of groups did oppose Dennison's confirmation at the hearing, but it was little more than a gesture. On the Dennison selection, consumer interests had not been able to pierce the White House selection process.

A legal challenge constituted the fourth consumer group intrusion on FTC appointments in as many years. By 1973, Commissioner Everett MacIntyre had reached the age of seventy-two. Federal law required that MacIntyre retire at the age of seventy, unless there was an express waiver by the President. What would become Commissioner MacIntyre's annual rites of appointment renewal began in late 1970. On three separate occasions, and for the term of only twelve
months, President Nixon—with increasing reluctance—had exempted MacIntyre from mandatory retirement. What was once a seven-year term, due to expire in 1975, had become a one-year term. For all practical purposes, MacIntyre was serving at the pleasure of the President.

Consumer groups responded to this situation by moving to disqualify MacIntyre from participation in the Wonder Bread case to which I have already alluded. The motion was based in part on the ground that this annual exemption infringed upon the notion of independence implicit in the seven-year term established by the Congress. A few weeks after the motion had been filed, MacIntyre suddenly resigned—even though his third extension had approximately eight months remaining. The impact of the motion on that decision is not clear—the motion, by the way, was denied by the Federal Trade Commission—but there is little doubt that the MacIntyre resignation was requested by the White House and that the Commissioner did not resist the request.

Further, this legal challenge was the first instance of public interest advocates using legal channels to force a role in the appointive process—even though it was from the point of view of removal rather than selection.

Citizen group insistence on a role in the selection process has not, by any means, been limited to the Federal Trade Commission. It was only last year that a nominee to the Power Commission was rejected by the Senate, in large part because of his close ties with the industries he was about to regulate.

At this time, a nominee to the Communications Commission—who has spent his entire career in broadcasting—is facing a serious challenge on a similar basis. His nomination has been pending since September.

For fully three years, the black community—through an organization known as Black Efforts for Soul in Television—waged an intensive, unrelenting campaign to have a black member of the FCC. Those efforts, which began in 1969, did not bear fruit until Commissioner Hooks was appointed in 1972. And, that selection occurred only after Senator Pastore refused to hold hearings on a white male that Mr. Nixon had nominated to the same Commission until a black Commissioner was appointed.

In one sense, all of these efforts share a similar objective: all are attempts to open up the selection process for input from spokesmen who have no ties with government, political party or industry. To this date, the processes of White House selection—as opposed to those
of Senate confirmation—have not been opened up. Citizen groups are still not consulted on regulatory agency appointments; politics continues—as it has in the past—to dominate the majority of appointments to agency Commissions, even though the clearest instance of consumer group impact on presidential selections—the Nader Report on the FTC—directly resulted in the selection of two of the most competent Chairmen in the entire history of the Federal Trade Commission.

DEAN CRAMTON: Thank you, Mr. Kramer.

The next panelist is Mr. James T. Ramey. Jim has been a regulator and government lawyer for many, many years. He is now serving as a Consultant to the Joint Committee on Atomic Energy, but before that, for ten years, he served as a member of the Atomic Energy Commission. He has also served as a member and an active participant in the Administrative Conference of the United States, where he has been of enormous assistance to the Chairmen of that organization. He is one of the most knowledgeable lawyers around on both atomic energy problems and on administrative procedure.

MR. RAMEY: Thank you. It is a privilege to participate with such a distinguished Panel and audience on the subject of "Federal Agencies and the Public Interest."

In view of my background, I will discuss the subject of the public interest in the context of the current energy crisis and draw my examples from the field of regulation and licensing of nuclear power plants.

This is a particularly timely subject for me since I am the staff coordinator for the Joint Committee on Atomic Energy for hearings they are holding next week on means of expediting the siting and licensing of nuclear power plants. The organization and holding of these hearings should give some insights into the question of who represents the public interest, as well as what is the public interest in the energy field in general, and nuclear power in particular.

I would point out, as Bill Ruckelshaus has, that the Congress has a large role to play in promoting the public interest by conducting adequate public hearings with wide participation and availability of data, as well as by enacting laws with adequate objectives, standards, and delegations of authority. Mr. Ruckelshaus has pointed out a couple of examples of perhaps too rigid, too narrow a Congressional enactment of a law in the air and water pollution amendments.

I would call to your attention one that was too broad, namely, the National Environmental Policy Act—the famous NEPA law—which one could drive a truck through, and which was enacted in the dead
of the night, without adequate hearings, without the agencies, without the affected interests and the public having an opportunity to participate in the Congressional process. And as a result, of course, through the role of the courts primarily, we have had a rather peculiar kind of administration of that law.

Getting back to the Joint Committee hearings, one of the newer things that we are trying to do there is to set up a Planning Committee, composed of representatives from environmental groups, from labor groups, from the affected agencies, from the applicants, the utilities, and knowledgeable individuals to try to come up with adequate subject matter coverage in the hearings and some help in selecting witnesses and perhaps even to serve as a sounding board on some of the policy and public interest aspects of this rather important legislation.

The question of what is the public interest in the field of energy, of course, has been an evolving one. Historically, the public interest was thought to be served by state and federal regulation with the principal objective of providing cheap and abundant energy and electric power. Such other objectives as conservation, protecting the environment, international considerations and the avoidance of delay did not get much consideration.

This need for timely decisions and the avoidance of delay is, in my opinion, a very important part of the public interest—and again I take my example from the field of nuclear power.

In that field, AEC's licensing role until 1970 was, essentially, protecting the public from a radiological safety standpoint—that is to say, regulating low level effluents and preventing nuclear accidents. Its licensing program had been geared to uncontested hearings, and they were handled mostly on a case-by-case basis.

Suddenly the *Calvert Cliffs* decision in 1971 broadened the AEC jurisdiction under NEPA to include all environmental matters, and required decisions to be made on an overall cost-benefit basis in individual cases.

This period also marked the advent of the environmental lawyer, and the contested case almost every time. It has been my view that the public interest in licensing cases involves a balancing of the need for power and the various environmental and other aspects of the site selection and of plant design and operation.

Unfortunately, from an environmental standpoint, the benefits of electrical power would over-balance the environmental decisions in almost every individual case, if one were to look at it from a strictly cost-benefit viewpoint. This argues for dealing with these matters more on a criteria or rule-making basis rather than on an individual
case basis, and the across-the-board balancing could be taken into account in what we would call generic or rule-making hearings.

However, the individual case does give the intervenor great leverage on the utility applicant, to carry on what I have called "nuclear blackmail": to use the threat and reality of delay to obtain concessions from the applicant not otherwise obtainable through the normal, rational administrative process.

This occurred in the Palisade case and in the Point Beach case, where completed plants located on opposite sides of Lake Michigan and costing hundreds of millions of dollars, sat around for a year or so before the utility gave in. This was of course before the current energy crisis, but we have a present example at the Pilgrim plant in Massachusetts.

Again generic treatment of these matters would tend to lessen the leverage by the environmental intervenor.

That brings me to a quotation from Professor Frederick Davis's article, which I think was distributed to you all. He states as follows:

The fact remains that the "standing" requirements have been greatly liberalized in the last decade and a major problem confronting administrative lawyers in the years ahead will be the accommodation of new gladiators within the structural limits of the administrative coliseum and the fashioning of rules and procedures which will avoid unduly lengthening the intervals of strife.

I like that "gladiators and the coliseum" analogy. It reminds me of the story told about Maxie Baer staggering to his corner battered and bruised in his fight against Joe Louis: "You got him going, Maxie," said the ebullient trainer. "He ain't laid a glove on you." Baer looked at the man with one open eye and replied slowly through swollen lips, "Then keep your eye on the referee because somebody in there is killing me."

Sometimes I think that is how the utilities are viewing the AEC licensing process, which has become a kind of trial by battle.

So the AEC licensing arena is in the forefront of various proposals to improve this process and lessen delays—and, as I mentioned, there are congressional hearings to be conducted next week on such bills as the Price Bill and the McCormack Bill, which would limit the use of adjudicatory hearings, and go to a legislative type of hearing.

I would observe that another great benefit of congressional hearings, and the scheduling of them, is the forcing of the administrative agencies to come up with a legislative proposal. The Atomic Energy Commission has finally come up with a proposal just this week that
would go a little further and, I think, shows the trend in the administrative process. The new AEC Bill would provide for going to predisposed sites—the "designated site concept," as they call it—sites that are certified from an environmental standpoint after an adjudicatory hearing, but without regard to a specific nuclear plant application.

And secondly, they would go to standardized nuclear plants, approved by the AEC after generic hearings.

Thus once this system is established several years hence, one wouldn't have the normal construction permit hearings on any particular nuclear power plant, where the utility applicant would submit a standardized plan for a predesignated site.

This brings me to the trend which, I think, has been going on in administrative law generally in the technological area, and that is toward the generic rule-making approach. And also certainly in the technological area there is a tendency to put greater emphasis on technical design and the role of technical people, being sure that plants are designed, constructed and operated properly, and that they are inspected properly.

Perhaps, if this trend continues, we could finally see the situation in which the normal hearing process, as we know it—at least, in this technological field—would be dispensed with, as it has been with respect to the area of commercial airlines and airplane construction, in which the FAA and CAB do not exactly license each individual plane or even each group of planes.

In conclusion, I would point out that, unfortunately, AEC licensing—as well as many other matters in the energy field—is being carried on without any overall energy policy or organizational means of setting and adjusting objectives and priorities in the energy field in the public interest. Both the Executive Branch and Congress have been in disarray in this regard—as anyone who has observed what is going on, either in Congress or in the Executive Branch, can plainly see.

Perhaps the public interest could best be served here by the establishment of an energy policy, however imperfect, and the organization and establishment of an Energy Council of the interested energy agencies, perhaps with some public representation, to establish priorities and coordinate policy, again "in the public interest." Various legislative proposals to accomplish this objective are being considered at the present time.

But in any legislation, and in any implementation, one has to be very careful in defining the powers of such an agency; and in
particular in providing for the transition. And again I remind you of the problems of NEPA, in which a law that was established—was written, essentially, for Government-constructed public works, which did not mention and did not define licensing at all—became the single most determinative and definitive type of regulatory force in the field of electric power and nuclear power administration.

Thank you very much.

DEAN CRAMTON: It is not exactly an accident that two of our panelists have had particular background and experience in dealing with energy problems.

We now come to a panelist who is a lawyer, who has been in the position of being one of the beleaguered representatives of a utility, caught between rising costs, public criticism, environmental demands, and public participation.

Charles F. Luce is now Chairman of the Board and Chief Executive Officer of Consolidated Edison—known both kindly and unkindly in New York City as "Con Ed."

He formerly served as Under Secretary of Interior, and as Administrator of the Bonneville Power Administration.

MR. LUCE: Thank you, Dean Cramton.

Fellow members of the Panel, and ladies and gentlemen:

The subject we were assigned is, "What is the Public Interest? and Who Represents It?" I want to talk about that subject particularly with reference to energy projects and the choice of types of energy or fuels.

I think it has been agreed by all members of the panel that there is no single public interest, and that no litigant, therefore, in an administrative or a judicial proceeding can properly assert that he represents every conceivable part of the public interest. There are many publics and, therefore, many public interests.

And I think that it also is generally agreed—if I have heard correctly what has been said by the prior speakers—that we must look to the administrative agency, or to the courts, or some combination thereof, for the determination of the public interest, hopefully under statutes—as Mr. Ruckelshaus pointed out—that allow the administrative agency to take into account and properly balance all elements of the public interest.

In energy decisions—whether of siting or of choice of fuels—there are, of course, many interests. Broadly, they fall into two categories: economic interests; and environmental interests. But there are other interests which you might call "miscellaneous."

Among the economic interests, we have, first of all, the interest in
production, the interest in keeping the lights on, the interest in standard of living, the interest in keeping prices down. We have, also, narrower economic interests in siting—for example, the property owners who own property adjacent to the power facility that is going to be built, or the refinery, or the transmission line.

From the environmental standpoint, we have, of course, most basically the interest of humanity in preserving a viable biosphere. It doesn't do us much good to have cheap, abundant energy if, in the process, we destroy the Planet Earth over a period of time.

From the environmental standpoint we are also interested in health and safety—perhaps a somewhat less all-encompassing environmental interest than the biosphere, and much more oriented toward human beings than toward the complex of flora and fauna that make up this earth—but still a tremendously important part of the environment. And then we have, as another fraction of the environmental interest, that of esthetics. We hear the battle cry, “Save Storm King Mountain,” or “Don't build that plant here, because I don't want to look at it. It will mar the scenery.” Or, “It will spoil a wilderness area.”

Among the miscellaneous interests, beyond the somewhat conflicting economic and environmental interests, I would mention, because I think they are currently very important, interests of foreign policy and national defense.

How far should we allow ourselves to remain dependent upon imports of energy, which we will be unless we reverse the national energy policy, which—by drift, principally—has been rapidly leading us to a position where half of our oil comes from abroad, and much of it—most of that half—comes from the Middle Eastern countries. So, in the choice of fuels, for example, should foreign policy and national defense be taken into account?

To complicate all of this, of course, each one of us may belong to different “publics” in the same proceeding:

We have an interest in a proceeding as a consumer. We want to keep our cost of energy down.

We have an interest as a human being in breathing air that isn't going to make us sick.

We have an interest—also as a human being—in keeping a pleasant-looking landscape, and so forth.

To give you a few examples of how these interests which, collectively, are the public interest become involved in energy decisions, let me give you an example: What about the remote siting of power
plants, for example? Should we at Con Edison build our plants far away from the city, let’s say on the Great Lakes—the remote areas where not many people live? Or let’s say on the St. Lawrence River? There is a public in New York, certainly, that would much rather have the plants out of sight far away, and if we put them in an area where not many people are, well, then not many people are going to have to look at them.

But if we do that, we are going to have to bring the power down into New York. So we are going to have transmission lines all the way from the Great Lakes down to New York City, and people along the way are going to resist this. So you have got that public that gets involved in the determination of public interest.

You certainly have the consumer involved because it may cost as much to bring the power down from the Great Lakes into the New York area—considering the large amount of underground high-voltage transmission that we will have to build—as it will cost to generate the power, in the first place, on the Great Lakes. So the electric bills are going to go up. So you have a consumer interest.

Currently we have another example. All you have to do is to read today’s New York Times to see this kind of conflict of interests of various parts of the public in the choice of fuels in New York City. About three years ago the City laws were changed to try to carry into effect—earlier than the federal law required—the emission limitations on the burning of fuels which would achieve the ambient air standards established pursuant to federal statutes that Mr. Ruckelshaus has pointed out are quite inflexible. Accordingly, the City Council required that the burning of one percent sulphur fuel, which we were then burning, be discontinued and a .3 percent of sulphur fuel be substituted.

I appeared before the City Council to say, first of all, that we would cooperate, if that was the collective wisdom of the City, but that I estimated that it would cost our customers about $80 million a year more, and that I was not sure that they were going to get their money’s worth. I pointed out that London, for example, burns fuels with no sulphur limitations. They have very tough particulate limitations—getting the dust and dirt out of the smokestacks—but they don’t worry about the sulphur.

And in New York City, starting in 1967 we had, after all, reduced the sulphur in our fuel from two or three percent to one percent. I suggested that the city appoint a “Blue Ribbon Committee”—not of utility people, but of public health people and scientists and others
—to try to determine whether indeed we were going to get our money's worth out of this proposal—because it was going to cost the electric consumer and the people much money.

I advised the city that we had fuel contracts for one percent sulphur oil in quantities equal to about one-third of our oil requirements—and they would still be in effect today at about two dollars per barrel. I pointed out that by passing a law which required .3 percent oil, the city would make those contracts unenforceable, and we would have to negotiate new contracts.

Well, it passed.

The new contracts were negotiated, and the oil companies, with some foresight, insisted on escalation clauses because the source of the .3 percent sulphur oil they could obtain was in politically unstable areas, principally North Africa. And so in New York City, three years ago, we moved to a new set of fuel requirements specifying .3 of one percent sulphur oil. And the air has been great New York.

But I made a mistake in my testimony. I estimated that the tougher sulphur requirements would cost electric consumers $80 million per year. It turns out that they are going to pay three times as much, or more.

I pleaded with the Council in 1971 to tell the public, "The new sulphur requirements are going to cost more money"—not just to let Con Edison say they are going to cost more money—and to say, "It is worth it. This is a price that the public must pay for cleaning up the environment."

Well, read the paper today and see what kind of support we are getting from those who insisted that we give up these favorable oil contracts and go to this very low sulphur oil:

What is happening?

We have a consumer revolt on our hands. People are refusing to pay their bills. And is anyone standing up—other than Con Edison—and saying, "Hey, it is worth it! This is the price we pay for clean air! Don't complain about it!"

Where is the City Council? Where are the legislators?

They are demanding investigations of the companies. They are demanding that the Public Service Commission be recalled and be elected by popular vote. And those who insisted that the price of clean air was worth paying are silent.

I want to talk, finally, about the determination of public interest which, in that case, was determined by the Congress really, leaving
the administrative agency very little flexibility, and leaving our City Council not much flexibility other than the fact that it didn't have to be quite in such a hurry, as it were. I want to talk, finally, about the role of the courts in determining the public interest in energy decisions. Perhaps my views are not terribly popular with my fellow members of the bar on this subject, but I am going to express them anyway.

I believe that judicial review should not extend, as it now does, in this determination of the public interest, to a review of the adequacy of the evidence to support the administrative decision. Rather it should be limited to those matters necessary to assure the integrity of the administrative process: to assure adequate notice of hearing, reasonable opportunity of interested parties—including all segments of the public interest—to be heard in an impartial administrative agency. Also, of course, a determination of constitutionality and an interpretation of the statutes under which the administrative agencies act. All those things, I think, are very proper and necessary elements of judicial review.

I make this recommendation because of the character of the issue when economic factors are balanced against environmental factors. Such an issue is not really one upon which courts are competent to pass. It involves a choice among competing and difficult to measure social values, and this choice is, fundamentally, more a matter of social engineering than it is of the weight of the evidence. It is, therefore, more appropriate for decision by administrative bodies appointed by elected officials to implement legislative policies than for decision by courts.

Moreover, it typically involves complex scientific and engineering issues which judges are not trained to handle nor courts staffed to deal with.

There are other reasons that I believe support this recommendation that judicial review be limited so that it doesn't go to the sufficiency of the evidence. Serious delays are inherent in any judicial effort to assess the adequacy of the complicated and voluminous evidence in an economic-environmental case. The social costs of these delays can be very great.

The Storm King case has been going on now for eleven years. It goes to the courts, back to the FPC, back to the courts, back to the FPC. And in the course of ten years the cost of the project has tripled. It would have been much better for the decision of an administrative agency to be final, in the first place—and I say that even if the de-
cision had been that we couldn't build the project. It would have been much better to have had an element of certainty at that point so that we could have gone on to something else.

Furthermore, the very delays which Mr. Ramey has pointed out may force decisions which are not really in the public interest, but which energy companies make simply to get the delays behind them and to get on with taking care of the needs of their customers.

Historically administrative agencies were created to deal with certain kinds of social conflict which, it was believed, could better be resolved by specialists responsible to the executive and the legislative branches than by the courts. It was the intent that the rules of procedure and evidence of such agencies be flexible so that they could dispose of cases more quickly and economically. Further, it was felt that such agencies would be more responsive to changes in public policy as reflected in the elections of the executive and legislative officials responsible for their appointment and reappointment.

The original concept was that courts would interfere with the expert, expeditious and—presumptively—socially responsive judgments of these administrative tribunals only if such judgments were rendered in disregard of some fundamental principle of fairness—lack of due process or total disregard of the enabling statute or pursuant to an unconstitutional statute.

If the courts, through whatever verbal formula, are to second-guess the decisions of the administrative agencies on their merits, then the advantages of expertise, expeditious and flexible proceedings, economy, and social responsiveness will be lost—or certainly badly damaged. If administrative agencies are required to conduct adjudicatory administrative hearings, with all their time consuming and expensive trappings, and then have their decisions re-examined by the courts for "substantial evidence," "arbitrariness," and so forth, might it not be better—and I think it would be better—to junk the administrative proceeding to start with and start an initial proceeding in court.

The present practice of wide-ranging judicial review of economic-environmental administrative decisions has the further disadvantage that it diffuses responsibility for decision-making. In plain English, it lets the administrator off the hook. He can make his decision with confidence that a court will have the last say anyway. And presidents, governors, mayors, and other executive officers can appoint second-raters to administrative agencies—and they many times appoint first-raters, of course—with confidence that the courts will take the final responsibility for any mistakes that their appointees may make.
My recommendation that judicial review be limited is not simply an expression of belief that my company's batting average in environmental cases will be higher before administrative agencies than before the courts. In the present administrative climate the opposite might well prove to be the case. Environmental protection agencies often have constituencies they do not wish to offend, and they may make decisions that we in the energy business think are very wrong and not in the public interest as we would determine it.

In fact, our company has gone to court at least twice in the last two years to challenge environmental administrative decisions as arbitrary and unsupportable on the facts—and, incidentally, we won both of the cases, and our record in the courts, whether we have been challenging or defending administrative decisions, has been quite good. So I suggest that my argument is not one that says we can win before administrative agencies and lose before the courts.

I do not underestimate the problems that would attend a legal reform which accorded virtual finality to administrative decisions in economic-environmental cases. Lawyers would find it hard to swallow because of the long tradition of judicial review, and their strong though perhaps unarticulated conviction that the quality of decision-making is generally better in courts than it is in administrative bodies.

Some lawyers, indeed, applaud the expansive judicial review which courts today exercise in cases involving the reconciliation of conflicting socio-economic viewpoints because they feel that by today's standards judges, especially federal judges, are more "right-thinking" or "enlightened" than the administrators whose decisions they overturn. Whatever the merits of this feeling may be, to build a legal structure upon it is to build on shifting sands. One need only hark back to the nineteen-twenties and nineteen-thirties to realize that judges, even federal judges, are not always either "right-thinking" or "enlightened" by current standards.

Sometimes, indeed, administrative agencies make damn fool decisions. But if we continue to place in the courts final responsibility for society's choices between production values and environmental values, we will be asking them to perform a function for which they are uniquely ill-equipped. And the backlash from failures that may be attributed to the judicial effort could damage the high repute in which the public does hold our courts, and even injure the entire environmental movement. If our concern is that the quality of administrative agencies is not dependably high, then we should strive to improve that quality.
I believe it is peculiarly appropriate that our profession should seize the initiative in finding solutions to all of these problems before it is brought home to the public by hardship and by deprivation how terribly serious they are.

DEAN CRAMTON: Thank you, Mr. Luce.

We have been running behind, but there are a few minutes for questions.

The first question is for Mr. Ruckelshaus, and it is essentially the question of what Nader has referred to as “whistle blowing” by a government servant. The question is: “What does a career public servant do when his view of the public interest varies from that of the agency?”

MR. RUCKELSHAUS: I suppose it depends on how long he wants to be a career public servant! But, seriously it is clear that we have some competing considerations here.

Number one, the fact is that no career public servant always gets his way. If the decision-making responsibility is lodged somewhere—and it has to be—in the agency, then as long as employees have an opportunity to all of the input that they can muster, as long as they have access to the decision maker to insure that their point of view is brought forward, the mere fact that they do not succeed in achieving one hundred percent agreement with the decision maker does not, in my view, mean that they should either speak out publicly or resign.

Obviously, there are times in which the disagreement would be so fundamental that it involves a principle that you hold dear, that either speaking out or resignation may be the only recourse.

But I think that the competing consideration—and one that Mr. Luce referred to in his final remarks—has to do with the finality of decisions, with accountability and with the fact that, as a society, we cannot become so concerned with the exercise of power and with its potential abuse that we refuse to locate it anywhere. And it is true that somewhere there has to be someone who can make a final decision, that has the power to make that decision, recognizing that there may be an abuse of that power.

I think, as one who has once run several government agencies, the main thing to do, in order to insure that the civil servants don’t feel that their point of view has never been properly put before the decision maker, is to provide all kinds of avenues of access to the decision maker himself and to hold big meetings.

I always found that the smaller the meetings, the more the leaks occurred, because the people who weren’t there were always willing
to say what went on and what they would have said had they been there.

As long as they are there and feel that they have had the opportunity to express their point of view, the fact that they don't succeed doesn't usually concern the civil servant so much that they feel they have to make a public expression of opposition. And they may also come to view the final decision with more rationality than they would if they hadn't heard the reasons behind it.

DEAN CRAMTON: The second series of questions have to do with some comments made by Messrs. Ramey and Luce and are directed to Mr. Kramer. They concern the trade-off between public participation and consumer representation on the one hand, and extended procedures, lack of finality, and procedural delay on the other.

Are we getting into a situation where we have lots of voices, formal procedures, contested cases, and judicial review, but no governmental decision? Procedural veto—the inability of government to accomplish anything—may be the result. Do you have any suggestions of procedures by which you can get expedition, Mr. Kramer, while still getting active and effective participation?

PROFESSOR KRAMER: The short answer is that I do not. The longer answer will take a couple of minutes.

What Commissioner Ramey calls “nuclear blackmail” I call “compromise”—and to me, unlike some of my younger colleagues, compromise is a political ideal in a democratic society.

I am becoming increasingly impressed and depressed with the conclusion that there are many judges—administrative law judges and otherwise—who do not like to judge. A judge who does not like to judge is a very sorry situation. The indecisiveness of our administrators is appalling. You heard Chairman Luce say he would rather have lost that case eleven years ago than still have it go on—and I think he is right.

Well, what can we do to improve the vitality and decisiveness of the administrative process? Basically, I haven't got the faintest idea. I could tell you that we need desperately to attract and to hold in the government better people—but that is hardly news, and in the present atmosphere we seem to be losing good people faster than we can appoint them.

Finally, the law professors and the former learned Chief Judge of the Second Circuit have urged us to engage in more rule-making. I share that notion, but I am afraid I have little hope that more rule-making and less adjudication will get the plants built the way we
all want them built, if we want them built more quickly, so I have pulled a cipher in about two minutes.

DEAN CRAMTON: There are a very large number of questions that seem to be concerned about Mr. Ramey's views on NEPA. Some of these are really statements rather than questions, but one which I will ask along the same lines is this question: "Why should environmental attorneys be blamed for delays? Isn't the problem the AEC itself?"

MR. RAMEY: I think that the delay problem is a very large one, that part of the blame is with the administrative agencies—with the AEC in this case. I think that a part of it is inherent in the administrative process itself and that is why I was saying that perhaps for these technological matters that this type of adjudicative process quasi-adjudicative process—perhaps is not suited, and we might move to something else.

I think, on the point of what can be done on participation by the environmental people, by the intervenors, the solution that I have recommended for years is that the timing is off. The time you get to a formal licensing proceeding—and you have that voluminous cost-benefit study—is too late to achieve any kind of rational compromise. The time that this dialogue should take place is about ten years earlier, when the utility is beginning to look at alternative sites. It is at that stage where they should be consulting with environmental interests, listening to them, taking into account their proposals, and coming up with what the AEC is now recommending—designated sites that can be utilized then when there is an immediate need for a power plant, and with which, hopefully, the licensing process would not be quite so traumatic.

DEAN CRAMTON: There are about a dozen questions which fall into a common pattern and are directed to Mr. Kramer. They suggest that he believes himself a Platonic guardian who knows what is in the public interest.

One of them says:

Aren't you really opposed to political appointments because you don't want the people through the political process to express their views?

Aren't you taking the elitist view that the "Naderites" and the public interest groups and the consumer advocates know what is good for the people? Why are you so distrustful of the "silent majority," the political process, and the voters?

PROFESSOR KRAMER: Of course, I didn't think I said that I approved of Hook or that I disapproved of Quello, and if I gave you
that impression I am most unhappy, but what I said was—and I stand by it—that more than half of the appointees to the Federal Trade Commission and the Federal Communications Commission for the last twenty odd years have been the wrong person for the wrong reason.

And I do not wish to give the impression that I am not an elitist. I am. I am very proud of that appellation. I had supposed that we all strove to be elite. At least, I have, all my life. Now I was very careful not to criticize David Dennison the man. I would like to think he is a friend of mine. Perhaps he was! What I was saying is that he didn't get the job for the reason that a man ought to be selected for the Federal Trade Commission.

I believe that I have disposed of this panoply of questions, Mr. Chairman, adequately under the circumstances.

DEAN CRAMTON: There is a question for Mr. Luce that asks whether he favors the enactment of any of the consumer advocacy agency proposals before Congress, and, if so, which version of such legislation would he prefer?

MR. LUCE: Well, I will have to answer that by saying that I am not really familiar with the consumer advocate legislation before Congress. We do have proposals in New York State for this, both at the state level and at the city level.

In our rate cases, we have lots of consumer interests, or people who are officials who are there to represent the consumer: the Attorney General, the GSA, the Public Housing Authority, the City of New York, Westchester County. At least ten parties claim to be there representing the consumer.

I would say—without knowing what these bills are before Congress—I would say I don’t think that really the consumer will be aided by yet another set of attorneys in our cases. I assure you that the ones who are there already are good lawyers and working very hard.

But one other thought on the question of consumer representation. I think that in the environmental decisions that if legislation before Congress doesn't include this, it should—that there should be more representation of the consumer interest in these environmental cases because the “public interest” in these cases is now being represented mainly by environmentalists. They are fish people or Hudson River fishermen. Or in Scenic Hudson they were pretty much aesthetic matters and so forth. The consumer's voice isn't really heard.

And so, when a cooling tower that will cost the consumers twenty million or thirty million dollars a year is proposed to protect the fish, the voice for the consumer is the Consolidated Edison Company,
and our identification with the consumer in the public's mind is not complete.

DEAN CRAMTON: That perhaps is the understatement of the day!

There are a number of questions addressed to Mr. Luce about his proposals on judicial review. I think, because of the shortage of time, I am going to leave those to the panelists who are going to devote a good part of tomorrow's program to the question of judicial review, its scope and function.

Several people picked up Mr. Ramey's comments on NEPA and directed them to Mr. Ruckelshaus, and wanted to know whether he thought that NEPA had been effective in expanding public participation in decision-making by the federal administrative agencies.

Of course, I was told, when I was down there in Washington, that Mr. Ruckelshaus' public view was that he was all for NEPA, so long as it was applied to somebody else, as long as the Environmental Protection Agency didn't have to worry about it in carrying out its duties!

MR. RUCKELSHAUS: Well, your recollection isn't very good! Seriously, I did think there should be some exemption for NEPA through the regulatory responsibilities we had under the statutes that appeared to put us outside the scope of NEPA. But my own view is that the general philosophy of NEPA is one that not only should not be discarded, it should be expanded.

NEPA'S primary purpose is to insure that the federal government, in its decision-making responsibilities, takes into account, as one factor, the environmental impact of what they are doing. The underlying wisdom of doing that, and the underlying folly of not having done that prior to the passage of NEPA, I think, is very apparent.

That doesn't indicate, in my mind, that NEPA is perfect, that there could not be changes made in it that would facilitate this process, that it could not be made more clear that the environment is simply one of the factors that is taken into account in determining what is in the public interest, but it certainly ought to be a very strong consideration, and one that has not been taken into account often in the past and has led us to many of the problems which resulted in—at least, in my opinion—some over-reaction as a society to the difficulties of environmental degradation.

But I believe that not only should NEPA be a statute that applies to the federal decision-making process, at whatever stage—and I think that Mr. Ramey is probably right that it ought to apply at an earlier stage than it now does in the atomic licensing procedure, nuclear
plant licensing procedure. I think that it ought to be applied at all levels of government—and, in fact, it ought to be applied by individuals, who should ask themselves, in making decisions that have some impact beyond their own lives, "What is the environmental impact of what I am doing?"

We are not used to doing that, and if we do get used to doing that in the future, I think that we will have a better society.

THE MODERATOR: Thank you.

Unfortunately, our time has expired. I wish we had more opportunity to go through many of the questions that are here, but we don't. Many thanks to the panelists and to our audience.