Looking Beyond Watergate: The Role of Public Interest Law

Watergate is to many the symbol of a sickness characterized by big money's corrupting influence on government, the ethical infirmities of persons entrusted with enforcing the law, and the susceptibility of a large, complex bureaucracy to manipulation by special interests and unprincipled officials. To cure this sickness obviously will call for manifold reforms that will be neither simple to prescribe nor easy to carry out. One reform that surely will be needed, however, is to discourage favoritism and under-the-table dealing by encouraging better, more forceful representation of what, for want of a less elusive term, may be called the public interest.

It happens that, over the past 4 or 5 years, a highly significant new kind of legal practice has emerged—the practice of public interest law. Public interest lawyers, when pressing for proper interpretation and observance of existing law, have been formally acknowledged by the courts to be "private attorneys general." Despite its still quite modest scale, this development can be perceived as clearly helpful and salutory, especially now when one former U.S. attorney general is standing trial for an alleged obstruction of justice, another faces possible prosecution for perjury, and a third has been fired for refusing to carry out an improper presidential order.

Public interest law, which has antecedents in the more specialized fields of civil rights law and poverty law, is no more readily defined than is the concept of the public interest itself. By any definition, however, it is concerned with issues whose outcome will not, in a given case, affect the interests of the plaintiffs who brought it any more than the interests of a wide public. Examples can be found in suits or administrative actions brought on behalf of citizens seeking to stop air pollution, prevent the marketing of potentially harmful drugs or pesticides, ensure more balanced television programing, avoid unjustifiable utility rate increases, or remove unwarranted restrictions on voting rights.

Some strictly private litigation can be both highly rewarding to the plaintiff's attorneys and beneficial to the public, as in the successful antitrust action brought by one wealthy corporation against another for treble damages. But a salient characteristic of public interest law is that its practitioners represent parties whose financial ability is generally either limited or nil and who do not seek damages but merely injunctive relief or a regulatory decision favorable to their cause.

A Hothouse Product

It is, in fact, the lack of a secure financial footing that has kept public interest law from emerging yet as a self-sustaining part of the legal profession. A pioneer in this field, Charles Halpern, staff attorney at the Center for Law and Social Policy in Washington, summed up the problem this way in an article last fall for the American Bar Association's *ProBono Report:*

> The public interest bar is still a hothouse product. There are probably no more than 100 [full time] public interest lawyers in the country and they are concentrated in a few cities [New York, Washington, San Francisco, Los Angeles, and Chicago]. Most are subsidized by foundation grants, by the willingness of able lawyers and their familes to make very great financial sacrifices, or by ad hoc financing mechanisms such as contributions by college students. . . . A career in public interest law has yet to be fashioned, and the mechanisms which will permit broad expansion of the public interest bar have not yet been devised.

The opportunities and the need for broadly expanding activity in this field are evident. Some important laws of the past 5 years probably would not have been enforced at all if it had not been for public interest lawyers' going to court. A striking case in point is the National Environmental Policy Act (NEPA) and its requirement for thorough analysis of the environmental impact of proposed federal actions. Without doubt, the Council on Environmental Quality would not have been politically strong enough to have demanded compliance with this statute, and the Office of Management and Budget would not have cared enough.

A little-noticed aspect of the practice of public interest law has been the efforts made by attorneys in this field to bring about strict and timely enforcement of other laws without going to court. For instance, attorneys of the Natural Resources Defense Council have—through informal contacts with officials of the Environmental Protection Agency and through formal administrative proceedings—provided at least a partial counterweight to industry influences in matters such as scheduling compliance with the Clean Air and Water Quality acts and establishing precise standards. Similarly, attorneys for the Center for Law and Social Policy, which does not confine its interests to the environmental field, have been active in such administrative proceedings as those conducted by the Food and Drug Administration on the marketing or experimental use of possibly unsafe birth control drugs.

The need for an expanding public interest practice is enormous just in Washington alone. Indeed, in this city with an estimated 10,000 nongovernment lawyers, nearly all are representing private interests, with a number of specialized fields of law (such as the "communications bar" or the "patent bar") having hundreds of practitioners. The fact is, however, that a need for much more public interest practice exists throughout the nation. Every state capital has a burgeoning bureaucracy in which the public interest is likely to be given short shrift unless represented better in the future than it has been in the past. The same is certainly true of the bureaucracies that run the larger cities and urban counties.

The growth of public interest law will not be retarded by any lack of young attorneys looking for gainful and interesting work. In recent years law schools have had a surfeit of applicants, and these institutions are now graduating more than 25,000 students a year—an enormous output in light of the fact that the total number of lawyers in the nation is not more than about 350,000.

Competition for grades and for places in prestigious law firms is more fierce than ever. Those firms remain highly attractive to the young lawyer despite the drudgery of the work to which he is likely to be assigned—he is willing to look some years ahead to the

time when, as a partner, he will be managing cases and earning a large income.

Public interest law would no doubt exert a strong appeal for many new law graduates if the opportunities in this field were more numerous and if the ultimate promise of financial reward were greater. Indeed, the young public interest lawyer may have the heady experience of handling big cases almost before he has had time to learn where the rest room is at the courthouse. Appealing as this promise of early professional challenges may be, the law graduate who weighs the possibility of entering public interest practice may nevertheless be deterred. For unless circumstances change, even at middle age the public interest lawyer may not earn an income exceeding that of, say, a journeyman carpenter or plumber.

Groping for a Solution

Thus, if public interest law is to expand and flourish now at a time of clear need, the problem of putting this kind of practice on a strong self-sustaining basis must be squarely addressed. Currently, there is much groping for a solution to this problem. Last fall, for instance, Senator John V. Tunney (D–Calif.), chairman of a new subcommittee on representation of citizens interests, conducted 6 days of hearings in which the problem was approached inversely—that is, from the standpoint of citizens who go without counsel because they can't pay the legal fees.

The staff of the Tunney committee is currently preparing draft legislation, but what form it will take is not yet clear. For its part, the American Bar Association (ABA) has established a special committee on public interest practice. This committee wants the courts and the organized bar to adopt a "clear statement of the duty of each lawyer to provide public interest advice and representation." It will propose specific programs to that end.

The Ford Foundation, a mainstay of public interest practice, recently held a 2-day conference at San Diego with its grantees, representatives of the ABA, and others interested in this field's development. Ford's initial 5-year commitment to support public interest law will have run its course by mid-1975. Although the foundation does not intend to withdraw all support after that time, it does hope to see these groups soon weaned. Accordingly, a major concern of the San Diego meeting was to consider where public interest law might find alternative sources of support.

From the exploratory initiatives on the part of Ford, the ABA, the Tunney committee, and the public interest law groups themselves, it now seems clear that, if public interest practice is to achieve financial security, support will have to come from a mix of sources. These would include the membership fees and donations received by groups that maintain a staff of public interest lawyers; court-awarded attorneys fees and witness fees; contributions of both time and money by members of the bar; and direct public subsidy. Consider each of these further.

- *Support by groups with large membership or lists of contributors.* For some time there has been a tendency for groups such as the Sierra Club, the National Wildlife Federation, the League of Women Voters, Common Cause, Consumers Union, and Ralph Nader's Public Citizen, Inc., to maintain litigation units, either as integral parts of their organizations or as offshoots. Some groups have impressive fund-raising abilities. For example, Public Citizen, Inc., raises about $1 million a year from its 115,000 supporters. Common Cause, with 325,000 supporters, will operate this year on a budget of $6.3 million.

Even if no more than a small percentage of such budgets is devoted to public interest law, a significant amount of activity can be supported. Furthermore, innovative techniques for supporting public interest advocacy can sometimes be developed. Note, for instance, the Public Interest Research Groups formed on university campuses with Nader's encouragement. These groups, which have brought lawsuits on environmental, consumer, and other issues in a number of states, are supported by a checkoff of student activity fees.

Some groups organized expressly for the practice of public interest law have covered a substantial part of their costs from membership fees or public solicitation. For instance, the Environmental Defense Fund, which now has a list of 47,000 contributors, met about 54 percent of its 1973 budget of $1.1 million from contributions raised by direct mail solicitation.

- *Court-awarded fees.* Potentially, this is an important source of support for public interest law. It involves shifting the attorneys fees to the defendant where the court can be persuaded that, by bringing the suit, the plaintiff has functioned as a private attorney general. In *La Raza Unida v. Volpe* a federal court found that, by suing the U.S. Department of Transportation and the California highway department, a group of citizens of the San Francisco Bay area had helped enforce laws aimed at avoiding unnecessary displacement of people and encroachments on parks. Public Advocates, Inc., of San Francisco will benefit from the fees awarded in this case.

Public interest law groups will not, however, be able prudently to receive even court-awarded fees until the Internal Revenue Service has issued regulations governing their acceptance of fees as tax-exempt groups. Such regulations have been awaited now since the fall of 1970. Still more troublesome is the fact that, under existing law, attorneys fees ordinarily cannot be shifted to a federal agency, although this is not true of cases arising under a few statutes such as the Clean Air Act of 1970. Any new legislation aimed at promoting public interest practice will have to look to the modification or repeal of this policy.

- *Support by members of the bar.* Chesterfield Smith, president of the ABA, has been exhorting the organized bar to ensure all causes adequate representation. In his view, the goal is not to support public interest advocacy as such but rather to make the adversary system work better. Smith is simply invoking the lawyer's credo that justice usually is served by competent argument of opposing briefs before an impartial judge.

Attorneys could support public interest practice through bar dues and special contributions, or by devoting part of their own practice to public interest work. Hundreds of lawyers already do some "pro bono" work on either a no-fee or (more commonly) a minimum fee basis.

- *Direct public subsidy.* It can be argued that support of public interest law by the taxpayer would be no less justified than public financing of political campaigns, a matter of much current interest. There would, however, be the problem of giving such a subsidy program enough insulation from the vagaries of politics to prevent capricious funding cutbacks and avoid improper restrictions on the kind of work supported. Difficulties experi-

enced in the field of poverty law show that such dangers are very real. Safeguards would probably have to include the creation of a board prestigious and independent enough to protect the program's integrity.

In the final analysis, public interest law is not likely to flourish unless the public accepts the concept that its interests are in the main well served by vigorous representation of all reasonable viewpoints on public issues. Such an attitude requires no little tolerance and sophistication.

Consider, for instance, an opinion rendered recently in the Alaska pipeline case by the U.S. Circuit Court of Appeals for the District of Columbia. The court held, by a 4 to 3 majority, that the environmental groups that brought the suit should recover attorneys fees from the Alyeska Pipeline Service Company and the state of Alaska. The majority found that this suit had benefited the public by furthering compliance with NEPA and calling attention to the requirements and deficiencies of the Mineral Leasing Act. The minority, much to the contrary, believed that—with motorists waiting in line at the gasoline pump—the public had been ill-served and that to shift the burden of attorneys fees would be to invite reckless and ill-advised litigation on a grand scale. Yet the outcome of public interest litigation is not determined by the litigants but by the language of the law and its interpretation by the courts. And no judge need entertain frivolous suits.

In sum, now to overlook the social value of private attorneys general would seem perverse in light of the evidence that many of the officials charged with enforcing the law actually have been flouting it. The great white whale of official corruption won't be harpooned this year or next, but more public interest practice could reduce the chances of its sinking the ship.

—LUTHER J. CARTER

Food and Nutrition: Is America Due for a National Policy?

In this land of fruited plains and amber waves of grain, most people have taken plentiful food and good nutrition for granted. Recognition that many poor people weren't getting enough to eat dawned in the 1960's. But more recently nutrition professionals, consumer advocates, and policymakers have been saying that the nation as a whole needs to formulate a food and nutrition policy.

The complexity of the food picture has increased dramatically over the past dozen years. Despite new regulations on food additives, and advertising and food labeling requirements, people have less and less idea of what in fact they are eating as supermarket shelves are inundated each year with literally thousands of new, highly processed products of questionable nutritive value. The rabbit-like multiplication of fast food chains—for whom bad nutrition often equals good profits—and the decline of the family meal have contributed to a deterioration of Americans' eating habits.

These developments, deleterious as they may be to public health, are pretty much a result of voluntary choices among consumers, most of whom, as conventional wisdom has it, make choices based more on pleasure and convenience than on nutrition.

There are many things to be said for the effectiveness of distribution and quality control in the present American food supply system, but as with energy, the emerging awareness that resources are finite means that the United States will no longer be able to tolerate the frivolity and waste that inevitably are a product of uncoordinated policies on food production, consumption, and trade. The situation, as Raymond Goldberg of the Harvard Business School says, has changed over the past year and a half "like day and night." Farm surpluses have evaporated and this year is seeing record plantings. Crop failures throughout the world last year have caused international commodity prices to soar. The Food for Peace program has dwindled to a trickle as trade replaces aid, and European countries and Japan are buying up U.S. commodities, leaving little left over for poor countries.

In other words, it is impossible now to talk about national nutrition policy apart from its interrelationship with the world food situation. As Senator George D. Aiken (R–Vt.) said last year, "Every farm program from now on will be a major piece of foreign policy legislation with our own family food budget seriously involved."

People have been carping for years about the need for better public education, for the teaching of nutrition as preventive medicine in medical schools, for better epidemiological research, for improved distribution of food to vulnerable groups such as the poor, the young, the old, and the pregnant. Now it is becoming evident that the whole American diet will have to undergo a gradual change. High prices and energy shortages have already caused the corner to be turned on meat consumption, which reached an all-time high of 189 pounds per capita in 1972. Now vegetable protein substitutes, mainly in the form of soy products, are making their way into the market, and even Secretary of Agriculture Earl Butz, a great steak man, has acknowledged that more emphasis will have to be put on the production of vegetable as opposed to animal protein. The infiltration of textured soy into the hamburgers of school lunches is only a harbinger of a large and strange generation of new foods that is looming on the horizon.

All this means that some fundamental shifts are required to bring the elements of the economy concerned with food production and consumption in line with each other.

The changing scene lends a special urgency to the National Nutrition Policy Conference to be held by the Senate on 19 to 21 June under the auspices of the Select Committee on Nutrition and Human Needs, headed by Senator George McGovern (D–S.D.). Chairman of the conference is Jean Mayer of Harvard, America's nutrition superstar, who also ran the White House Conference on Food, Nutrition, and Health in