

REPRESENTATION FOR THE POOR IN FEDERAL RULEMAKING

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I. THE PROBLEM

A. *Generally*

THE sound operation of the federal administrative rulemaking system demands that all relevant interests and viewpoints be considered prior to the formulation and promulgation of its product. Only after such an examination can the responsible officials have any confidence in the soundness of the rules they create. Officials engaged in rulemaking for the federal government are usually apprised of the various interests and viewpoints deserving consideration in that process by representatives of individuals affected by their actions.

The ample personal economic resources and relatively well-financed organizations of middle and upper income Americans usually assure their particular interests adequate representation in federal administrative rulemaking. The norm is that middle and upper income individuals, or their personal or organizational representatives, directly or indirectly monitor all agency activities. These persons attempt to protect their interests through formal or informal participation in rulemaking affecting them. But federal rulemaking very frequently affects large numbers of individuals who lack the personal economic resources and organized associations of middle and upper income Americans. These economically underprivileged persons are usually unable to keep themselves adequately informed of the numerous actual or proposed exercises of rulemaking

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This Article is based upon a report prepared under the auspices of the Administrative Conference of the United States. The Conference, however, does not in any way approve it or evaluate its content, which is the sole responsibility of the author. Official recommendations made by the Conference on this subject may be found in Appendix B of this Article. Those specific recommendations are the only statements attributable to the Administrative Conference of the United States with respect to representation for the poor in federal rulemaking. The Administrative Conference of the United States [see 5 U.S.C. §§ 571-76 (1964)] was established by Congress in 1964 to study the efficiency, adequacy, and fairness of federal administrative practices and procedures. It is specifically empowered to make recommendations to the President, the Congress, the Judicial Conference of the United States, and the executive departments and administrative agencies for improvements in those procedures by which the administrative bodies of our national government determine private rights and obligations.

authority affecting their interests. Normally the poor are also unable to communicate effectively to the appropriate authority their views about proposed rules, or to petition in their own interest for new rules or for the amendment or repeal of old rules.

An agency promulgating rules affecting the poor cannot assume that it automatically knows what is best for such people. Government administrators are usually persons with middle-class backgrounds, experiences, and associations; therefore, they tend to have middle-class viewpoints, orientations, and understandings. This means that the personnel of federal agencies may be expected to reflect more accurately the interests of the affluent than those of the economically underprivileged. Consequently, there is a special reason for concern when, as is now the case, the interests of poor people are inadequately represented in the rulemaking process.

The administration of government undoubtedly suffers as a whole from the inability of the economically underprivileged segment of our society to represent adequately its group interests in the rulemaking process. The inability of the poor in this respect is injurious to the government's sound administration because it sometimes results in the formulation and promulgation of policy without consideration of all the relevant viewpoints. Recent responses of the poor to the product of such an improperly functioning process have been expensive, time-consuming, and unfortunately, too often destructive. Ill-considered rules have frequently caused litigation, civil disobedience, and on occasion, riot. Some of this might have been avoided if the views of the poor were considered in the initial formulation of agency policies affecting them.

This conclusion does not ignore the many well-intentioned and often considerable efforts of the appropriate officials to ascertain, by their own investigations, the views of the economically underprivileged concerning administrative rulemaking that affects them. But available evidence establishes that these official efforts have been insufficient to compensate for the inability of the poor affirmatively to represent their own interests in rulemaking. The fact is that government administrators are too often inadequately apprised of the poor's views respecting the desirability of existing or proposed rules.

B. General Summary of the Evidence

Substantial evidence supports the conclusion that the poor of our society have been inadequately represented in federal rulemak-

ing. Some original data on this subject was obtained from a questionnaire entitled "Survey of Participation of the Poor in Agency Rulemaking of Particular Interest to the Poor" distributed to some forty federal agencies during the summer of 1968.¹

Each federal agency surveyed was asked the following initial question:

1. What programs does your department or agency administer
 - a. that are directed primarily at the economically underprivileged segments of our society, or,
 - b. although not directed primarily at such segments, may have a very substantial impact on them?

Most agencies listed those programs under their respective jurisdictions reasonably falling within the above categories. However, the questionnaire responses indicated that a few agencies administering programs in class (1)(b) above do not recognize that they are in fact doing so. That is, even though they are administering some programs having a very substantial impact on the poor, a significant number of agencies replied to question (1)(b) by stating that they administered no programs of that type.² In addition, a few

1. The following agencies responded to the questionnaire which was distributed as a survey of the Rulemaking Committee of the Administrative Conference of the United States: Department of Justice; Civil Service Commission; Post Office Department; Department of Agriculture; Department of the Interior; Department of Health, Education, and Welfare; Tennessee Valley Authority; Department of Labor; Office of Economic Opportunity; Equal Employment Opportunity Commission; Federal Power Commission; United States Commission on Civil Rights; Small Business Administration; National Capital Planning Commission; Federal Communications Commission; Securities and Exchange Commission; Foreign Claims Settlement Commission of the United States; National Science Foundation; National Advisory Council on the Education of Disadvantaged Children; Smithsonian Institution; President's Council on Youth Opportunity; Department of State; Washington Metropolitan Area Transit Authority; Department of the Treasury; General Services Administration; Appalachian Regional Commission; Interstate Commerce Commission; Farm Credit Administration; Federal Reserve System; Veterans Administration; Federal Home Loan Bank Board; Department of Commerce; Department of Housing and Urban Development.

2. The following examples are illustrative:

"Concerning the study that your Committee on Rulemaking is making of participation of the poor in agency rulemaking . . . [the U.S. Civil Service Commission is] declining to attempt to fill out the questionnaire because we do not believe it is applicable to us." Yet that body makes the general rules for government hiring and classification of employees, and it administers nondiscrimination in government employment [under Exec. Order No. 11,246, 30 Fed. Reg. 12319 §§ 103, 104 (1965)].

"Please be advised that the General Services Administration does not appear to have programs of the nature contemplated by the Survey of Participation of the Poor in Agency Rulemaking." Yet many of the programs administered by this agency undoubtedly fit within class (1)(b) of the question in the text since the manner and conditions under which the national government purchases and sells supplies and property and cares for and constructs federal buildings undoubtedly has a substantial impact on the poor.

"This is in reply to your letter of July 18 which requested responses to a survey questionnaire dealing with programs administered by [the Post Office] Department

agencies that did list some programs having a substantial impact on the poor neglected to list all of their programs fitting into that category.³ If the agencies involved do not understand that some of their programs have a substantial impact on the poor, or cannot determine which of their programs have that effect and which do not, the interests of such persons are inadequately represented in rulemaking for those programs.

The questionnaire also asked the agencies surveyed:

5. Does your agency now attempt to ascertain the views of poor and economically underprivileged persons in respect to rules and policies proposed to be issued to implement the programs listed in response to question 1 above? If so, please describe in detail the procedures you use in each program to ascertain these views.

About one third of the agencies claiming to administer programs substantially affecting the poor indicated that they had not previously attempted to ascertain the views of economically underprivi-

which are directed at or have a very substantial impact on the poor. The Department does not administer any such programs. Our primary activity, moving the mail, and our programs to effect that end, are not directed at any economic group and do not have the impact on the poor contemplated by your questionnaire." Yet the Post Office is one of the largest actual or potential government employers of "poor" people. Its part-time hiring during Christmas, for example, has a substantial impact on the poor. In addition, whether it delivers mail on five or six days a week may have a qualitatively greater impact on the poor than on others. If the poor cannot get their welfare or social security checks on time because mail is delivered only five days a week, they have no other resources to fall back on.

3. The following examples are illustrative.

While the Department of Labor lists enforcement of Title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000 (1964)] implemented by regulations found in 29 C.F.R. pt. 31 (1968), it does not list its role as implementor of Executive Order No. 11,246, 30 Fed. Reg. 12319 (1965). The former program is to effectuate the policy of the Civil Rights Act of 1964 that no person shall, on the ground of race, color, etc. be excluded from participation in or discriminated against in any program receiving federal financial assistance from the Department of Labor, while the latter is a program administered by that Department to assure nondiscrimination in employment by government contractors and subcontractors. In addition, while the Department of Labor does list the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. § 2041 (1964), implemented by regulations found in 29 C.F.R. pt. 40 (1968), it does not list as a program substantially affecting the poor the *bracero* program partially administered by that department under 20 C.F.R. § 602.10 (1968). The former program requires certain persons to obtain certificates of registration prior to performing any activities which constitute engagement in farm labor contracting, while the latter requires that the Secretary of Labor certify certain facts as a condition for the admission of aliens to perform certain temporary agricultural or logging industry services.

While the Department of Agriculture lists many programs it administers having a substantial impact on the poor it does not list the price support and production stabilization programs administered by the Commodity Credit Corporation and the Agricultural Stabilization and Conservation Service. Also omitted from the Department's enumeration of its programs having a substantial impact on the poor are the Rural Electrification Administration programs and Federal Extension Service programs. See 1968-69 UNITED STATES GOVERNMENT ORGANIZATION MANUAL 273-77, 283, 294.

leged persons with respect to rules and policies proposed by the agencies to implement those programs. A typical response of this kind stated that "We do not now attempt to ascertain the views of the poor and economically underprivileged, as such."⁴

About two thirds of the agencies reporting that they administered programs substantially affecting the poor stated that they had made some efforts to ascertain the views of those people with respect to rulemaking for such programs. In most cases, however, the efforts described are totally inadequate for the purpose. They are frequently haphazard, unsystematic, and sporadic.⁵ The means used have sometimes been so informal and unstructured as to achieve the result only incidentally and accidentally if at all.⁶ Furthermore, agencies frequently seem to have sought information about the views of the poor from persons who are neither poor nor reliable spokesmen for the mass of the poor affected by those agencies' actions.⁷ The answers to question 5 also indicate that very few

4. Veterans Administration. Responses of a significant number of other agencies were similar. The following examples are illustrative:

The Federal Home Loan Bank Board reported that it "makes no special provision to secure the views of poor persons." The Tennessee Valley Authority simply answered question 5 "No." "The [Federal Power] Commission does not make an overt effort to solicit the advice of the poor as such" "The Department [of Transportation] does not, by regulation, specifically, attempt to ascertain the views of the poor in regulatory activities listed in paragraph 1." "The views of poor and economically underprivileged persons have not been actively solicited [by the Federal Reserve System] in respect to rules and policies regarding the program mentioned in 1b, above" "There is no regular procedure in effect whereby the views of the poor are obtained in connection with the issuance of policies and procedures" of the Department of Housing and Urban Development.

Many of the above responses do, however, go on and assert specifically that this does not mean that the interests and views of the poor are ignored with respect to that portion of the agency's policy-making which affects them.

5. The following examples are illustrative:

For three out of the five programs reported by the Small Business Administration as having a substantial impact on the poor, it answered question 5 "No." While it claimed to make an effort to ascertain the views of the poor with respect to some programs, the Department of Health, Education and Welfare reported that it did not make a specific attempt to solicit regularly the views of the poor as such with respect to rulemaking for the Old Age Survivors and Disability Insurance Programs and the Social and Rehabilitation Services Programs. The Department of Agriculture reported that it "has not heretofore, on its own initiative attempted to ascertain the views of poor and economically underprivileged persons in respect to rules and policies proposed to be issued to implement the listed [food distribution] programs," but it has attempted to do so with respect to programs administered by the Farmers Home Administration.

6. For example, the Equal Employment Opportunity Commission reported that "[o]ur agency ascertains the views of economically underprivileged persons in respect to rules and policies informally insofar as these views are elicited in the course of investigation of charges of unlawful practices."

7. For example, the Department of Agriculture reported that it ascertains the views of the poor with respect to programs administered by the Farmers Home Administration (FHA) from its Technical Action Panels, County FHA Committees, and

of those agencies stating that they attempt to ascertain the views of the poor make any consistent efforts to do so through means *specifically and specially* tailored to accomplish that result in a reliable way. For example, some agencies claimed that they attempted to ascertain the views of the poor by issuing general public invitations to all interested people, including the poor, to submit their views upon particular rules proposed by the agency.⁸

Responses to a further question are also instructive because they indicate that, in fact, the interests of the poor have rarely had any continuous and systematic affirmative representation in the federal rulemaking process. That question asked:

7. Have any particular groups or organizations intervened or otherwise participated for the purpose of representing the views of the poor in rulemaking or in proposing rules in connection with any of these programs? If so, please identify the groups or organizations and indicate the frequency of such participation and the method by which each such group or organization has participated.

About half of the responses from agencies acknowledging that they administered programs substantially affecting the poor indicated

State FHA Advisory Committees. Yet these bodies rarely if ever have members who are poor persons themselves, that is, members "of the poor"; and these bodies rarely have adequate representatives of the poor's views as such among their membership. Some Technical Action Panels may have the Directors of local Community Action Program (CAP) organizations and welfare agencies among their number. But these officials do not necessarily represent the views of the mass of the poor since their CAP or welfare agency positions are controlled by the establishment, they are not themselves poor, and frequently their outlook may be middle-class and establishment-oriented. This is especially true with respect to the Directors of CAP programs since the Green Amendment, 42 U.S.C. § 2790 (Supp. III, 1965-1967), amending 42 U.S.C. § 2790 (1964).

In addition, the Department of Health, Education, and Welfare reported that:

The Social Security Administration [with respect to Medicare] consults with the Health Insurance Benefit Advisory Counsel, a panel of 19 persons outstanding in fields related to hospital, medical and health activities, on matters of general policy and in the formulation of regulations. The panel includes representatives of public and private medicine, hospitals, nursing homes, health insurance, labor, and the general public. The poor, as such, are not represented on the panel—the public, as such, is represented on the panel.

Obviously, attempts to ascertain accurately the views of the poor from these people are not likely to be very successful.

8. For example, the Department of Labor reported:

When notice of proposed rulemaking is given, the Department of Labor invites every interested person to submit written data, views or argument, and, when an opportunity is provided for oral presentations, to participate orally. Special notice is customarily given labor unions where interest of their members is involved.

And the Federal Trade Commission reported that it attempts to ascertain the views of the poor "through building up of public records contributed by members and representatives of all sectors of the economy and through the holding of public hearings in some cases." According to the questionnaire responses, no special effort seems to be made by these two agencies to notify the poor or solicit their views as distinguished from the public generally. Certainly the unions are not adequate representatives of the poor's interests before the Department of Labor.

that no particular groups or organizations had intervened or otherwise participated in their rulemaking for this purpose.⁹ An additional number of respondents indicated that outside organizations had participated, on behalf of the poor, in agency rulemaking for some programs substantially affecting such people, but not at all in the rulemaking for other such programs.¹⁰

According to the responses received to another interrogatory contained in the questionnaire, the present situation is not likely to change very much without external stimulation. The agencies were asked:

6. Does your agency contemplate using any particular means not utilized at the present time by it to insure that the views of the poor are adequately ascertained prior to the promulgation of any rule intended to implement or affect these programs? If so, please explain in detail.

A number of very important agencies from the point of view of the poor indicated that they intended to institute new and more effective means by which to ascertain the views of the poor with respect to rulemaking substantially affecting those people.¹¹ However, most agency respondents indicated that they had no such plans, and that they were satisfied with their present efforts in this regard.¹²

In addition to the responses gleaned from the questionnaire distributed to the various federal government agencies, other evidence directly or indirectly supports the proposition that the interests of

9. For example, the Department of Transportation reported that: "No particular groups have intervened or otherwise participated for the purpose of representing the views of the poor in rulemaking in this Department"; the Equal Employment Opportunity Commission reported that "[n]o group or organization has formally intervened or participated for the specific purpose of representing the views of the poor in rulemaking"; and TVA simply answered question 7, "No."

10. For example, the Small Business Administration reported that no groups participated to represent the poor in rulemaking for any of its programs except the Economic Opportunity Loan Program, where many groups have participated for this purpose. Similarly, the Department of Agriculture reported that for food distribution programs, some groups had participated, but for Farmers Home Administration programs, "[t]he answer to this question is in the negative."

11. The Department of Health, Education, and Welfare, the Department of Agriculture (but only in regard to consumer food programs), and the Department of Labor reported such plans.

12. For example, the Veterans' Administration stated that: "[w]e have no plan at present to use any particular means other than those explained above, to insure that the needs of the poor veterans, as such, are ascertained prior to the promulgation of rules." The Equal Employment Opportunity Commission reported that: "[o]ur agency does not at present contemplate utilization of other means to insure that the views of the poor are ascertained prior to promulgation of rules." And the Small Business Administration and Tennessee Valley Authority both simply replied "No" to question 6.

the poor have had inadequate representation in federal rulemaking important to them. Officials of a number of major organizations purporting to represent some segment of the poor were questioned.¹³ They indicated that poor people's organizations had only rarely participated in federal administrative rulemaking, and then only very recently and on an ad hoc basis. The reasons most often cited for the failure of the poor to participate more extensively in that process were their lack of knowledge that rules of interest to them were being considered, their lack of money to finance such participation, their lack of knowledge of the means by which they could participate, and the relevant agencies' lack of interest in ascertaining their views.

The representatives of those poor people's organizations questioned during this study also made another significant point. They insisted that one of the most important deficiencies of the federal administrative process is the inability of economically underprivileged persons to have their views adequately represented in the formulation of policies affecting them. In this connection it should be noted that the Poor People's Campaign of 1968 specifically and repeatedly demanded that there should be greater consultation with the poor and greater consideration of their views in the formulation of administrative regulations affecting them.¹⁴ In responding to these

13. Among the people questioned, either in person or over the telephone, were Clarence Mitchell, NAACP; Cenoria Johnson, Urban League; Tim Sampson, National Welfare Rights Organization; Philip Ryan, in the offices of Marian Wright, Counsel to the Poor People's Campaign; Steven Rosenfield, Citizens Advocate Center; Norman Kurland, Citizens Crusade Against Poverty; and Larry Silver, Neighborhood Legal Services Program. All of the above are located in Washington, D.C. Also questioned were Gary Bellow of the California Rural Legal Assistance Program, McFarland, California; Junius Allison of the National Legal Aid and Defender Association, Chicago; and Leroy Clark, formerly of the NAACP Legal and Educational Defense Fund of New York.

14. For example, the Poor People's Campaign demanded of the Department of Labor "[i]nvolvement of the poor in decision making about manpower training and other employment programs"; of the Office of Economic Opportunity "that the O.E.O. reorder its priorities so that the consumers of services be involved in the policy making . . . of those programs which continue to be administered by the agency"; of the Department of Health, Education, and Welfare (1) "that the Department of Health, Education and Welfare require of grantees that poor people be included in planning bodies under the comprehensive health planning and Medicare programs which have provisions for citizen membership on their planning boards" (2) that HEW "[e]stablish a national structure and mechanism which provides for continuous input by poor black, brown, and white people in the design, development, operation and evaluation of all federally funded education programs" and (3) that HEW "requir[e] that [welfare] recipients be involved in making policy and program decisions about how the program will be carried out by the states and localities."

The quoted demands may be found in the mimeo sheets entitled "Statement of Demands for Rights of the Poor Presented to Agencies of the U.S. Government by the Southern Christian Leadership Conference and Its Committee of 100, April 29-30, May 1, 1968" presented by the Poor People's Campaign to each of the above agencies.

demands, some federal agencies tacitly admitted that the poor had been inadequately represented in the formulation of administrative policy. Those few agencies stated that they intended to adopt new means to enhance the poor's participation in that process.¹⁵ This fact correlates with the previously reported responses to question 6 of the questionnaire.

The official agency responses to some of the specific substantive demands made by the Poor People's Campaign of 1968 may also constitute some evidence that the poor have been inadequately represented in the federal rulemaking process. After examining objections raised by the poor, a number of agencies admitted that several of their substantive policies questioned by that Campaign were inadequate and should be changed.¹⁶ This indicates that these

15. For example, note that the Department of Health, Education, and Welfare replied to the Poor People's Campaign by stating that (1) "We will increase our efforts to involve persons representative of the poor in our activities and on our Advisory Committees," (2) "we will establish, and require each state to establish, some vehicle for obtaining the advice of the poor, especially recipients in program and policy development," and (3) "the Commissioner [of Education] and members of his staff will meet with a group of persons broadly representative of the poor and arrange for continued participation of such a group with respect to all federally funded education programs in the Office of Education"; the Department of Labor responded by stating that "[a]dditional efforts to reach and to communicate with the poor must be made so that their needs are understood"; and the Office of Economic Opportunity responded to the Poor People's Campaign by stating that "[t]he Community Action Program is instituting a system by which drafts of major policy instructions will be circulated for comment to all grantees and national organizations interested in community action before becoming official. Representatives of the poor on C.A.A. boards and advisory councils shall thus have a chance to discuss policy and make their views known to O.E.O. before the policy is formally adopted. . . . The O.E.O. will involve the poor as consultants in O.E.O. program development."

The above quotations may be found in the official responses from each of the above agencies to the demands of the Poor People's Campaign. Letters to the Reverend Ralph Abernathy from Wilbur Cohen, Secretary of Health, Education, and Welfare May 25, 1968, and June 18, 1968; from Willard Wirtz, Secretary of Labor, dated May 27, 1968; from Bertram Harding, Acting Director of OEO, undated and titled "Office of Economic Opportunity Response to Poor People's Campaign."

16. For example, in response to a request for more stringent enforcement of fair employment by federal government contractors, the Department of Labor stated that it "will issue new guidelines requiring firms holding government contracts to use hiring and promotion tests that are racially culturally fair." It also stated that it "will issue new regulations to tighten the Labor Department equal opportunity programs," expanding coverage from first level to all levels of subcontractors and requiring positive action programs from contractors. Letter from Willard Wirtz, Secretary of Labor, to the Reverend Ralph Abernathy May 27, 1968. Similarly, in response to a demand that health services be made available to poor through comprehensive neighborhood health centers, the Department of Health, Education, and Welfare responded that it will pool funds from different sections of HEW and other agencies to support comprehensive health services in poor urban and rural areas. And in response to a demand that only declarations of facts be required of recipients under federally financed state welfare programs the Department promised to institute such a system. For both of the above HEW replies, see letter to the Reverend Ralph Abernathy from Wilbur Cohen, Secretary of Health, Education, and Welfare May 25, 1968. Note also that of the five high-priority changes in the size, shape, and location of food distribution

agencies may not have been properly apprised of the relevant interests of poor people when the administrative decision makers first formulated the policies involved. A few officials have privately admitted that this was the case in some of those situations. (Of course, in other of those situations the decision makers may have been adequately apprised of the relevant interests of the poor and simply made unwise policy decisions. High quality representation of the poor's interests in rulemaking cannot invariably assure that administrators will make wise decisions!)

Similarly, a number of recent lawsuits may also attest to the inadequate representation accorded the poor in the federal rulemaking process. These suits indicate, in one way or another, that certain federal administrative action or inaction did not properly protect the interests of poor people.¹⁷ A possible implication may be that the interests of the poor were so inadequately represented in those agencies' policymaking processes that a lawsuit was required to induce proper protection for the economically underprivileged.

To all the above evidence may be added the fact that many scholars studying the poverty problem agree that the interests of the poor are inadequately represented in the rulemaking process. Moreover, in some situations the administrative rules or lack of administrative rules implementing a particular program affecting the poor treat the interests of those people in such a way that the poor were not likely to have been properly represented in their formulation.¹⁸ It should also be recalled, as noted previously, that administrative policy makers almost always have middle-class backgrounds and therefore are not usually personally familiar with, or natural advocates for, the interests of the poor.

programs demanded by the Poor People's Campaign of the Department of Agriculture, four were at least partially met. *Des Moines Register*, Nov. 16, 1968, at 8, col. 4, 5; *Wall St. J.*, Dec. 12, 1968, at 2, col. 3.

17. See, e.g., *King v. Smith*, 392 U.S. 309 (1968), holding that the Alabama substitute-father regulation (which requires disqualification of otherwise eligible children from federally supported aid to dependent children if their mother cohabits with a man not obligated by Alabama law to provide support) defines "parent" in a manner inconsistent with the national Social Security Act and is therefore invalid with respect to the program. 392 U.S. at 333 n.4. To the extent HEW approved any man-in-the-house provision in state plans that conflicted with the Social Security Act that approval was improper because it was inconsistent with the controlling federal act. After *King v. Smith*, HEW issued new regulations outlawing such substitute-father rules. 33 Fed. Reg. 11290. In *Thorpe v. Housing Authority*, 386 U.S. 670 (1967), a tenant in federally assisted low rent public housing was given notice of eviction without explanation after being elected president of a tenants' organization. The Supreme Court vacated the judgment below affirming eviction and remanded for a reassessment of that judgment in light of directive issued by the Department of Housing and Urban Development after grant of certiorari requiring that no tenant be given notice to vacate without reasons for eviction and a chance to explain.

18. See, e.g., Note, *Welfare's "Condition X"*, 76 *YALE L.J.* 1222 (1967).

C. *Some Definitions*

In light of the above evidence, a number of specific recommendations with respect to representation for the poor in federal rulemaking seem appropriate. To assure precision, several terms utilized in the attached recommendations (see Appendix A) and in the remainder of this Article deserve definition. The words "poor" and "economically underprivileged" are used as synonyms. They refer to that group in our society unable to represent adequately its collective interests in federal rulemaking because its members lack the individual or organizational financial resources to do so. Consistent with this definition some groups of individuals may be poor or economically underprivileged in relation to certain rulemaking and not in relation to other rulemaking. This Article and the accompanying recommendations assume that people will be treated as poor only in the rulemaking situations where they are unable to represent themselves adequately because of their financial incapacity. Depending on the circumstances it is possible, therefore, that those who are deemed poor for present purposes may vary to some extent with the particular rulemaking involved.

The "rulemaking" referred to is that defined by section 2(c) of the Federal Administrative Procedure Act (APA).¹⁹ "Rulemaking" therefore means "agency process for the formulation, amendment or repeal of a rule." The word "rule" refers to "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency"²⁰

D. *The Precise Scope of the Task*

The purpose of the appended recommendations is to assure that the interests of the poor in our society are adequately represented in all federal rulemaking having a substantial impact on them. In doing so, the primary concern is the ability of the economically underprivileged to participate in rulemaking both for those programs directly aimed at them and for those which, although not directed at the poor, substantially affect them as a separate group. However, the need for adequate poor people's representation in rulemaking extends beyond this. Rulemaking for some programs thought not to concern the poor and usually not affecting the poor may, on occasion, have a large impact on them. Consequently, an

19. 5 U.S.C. § 1001(c) (1964), as amended, 5 U.S.C. § 551(5) (Supp. III, 1965-1967).

20. 5 U.S.C. § 1001(c) (1964), as amended, 5 U.S.C. § 551(4) (Supp. III, 1965-1967).

adequate remedy must include a mechanism for monitoring, on behalf of the poor, *all* federal rulemaking; and it must assure, insofar as practicable, representation for the poor in *all* rulemaking having a substantial impact on them, even though that rulemaking occurs in a particular program not normally having that kind of effect. The need to secure representation for the poor for all rulemaking of this sort is especially critical when it is remembered that rulemaking is frequently not an on-going process. It may be a one-time affair resulting in a rule to last for the indefinite future. Failure to assure adequate representation for the poor's interests in all rulemaking having a substantial impact on them as a separable group may, therefore, have long-term rather than short-term deleterious consequences in many situations.

It would be simple to formulate a nearly perfect solution to the problem under consideration if the poor were a monolithic or homogeneous group with its own democratically elected representative structure which could be called upon to articulate the particular interests of the poor wherever they were affected. The fact is that no organization, group, or individual can rightfully assert that it speaks for all the poor of this country in any truly democratic or representative sense. The poor are too heterogeneous and diverse; their interests too disparate and fractionalized. Even the sum total of all groups or organizations purporting to represent the interests of the American poor do not do so in any really democratic sense since most poor people are not members of any such group or organization. The interests of the majority of poor may also sometimes diverge from the views of the many organized groups purporting to speak for some segment of them or for all of them. In addition, the leadership of some so-called "poor people's groups" may fall into the hands of persons who are in fact out of touch—or simply not concerned—with reflecting the views and promoting the welfare of the mass of the economically underprivileged. For these reasons, the creation of a truly representative agent to articulate and represent the heterogeneous interests of the poor is both impractical and infeasible. Consequently, the most satisfactory means of assuring adequate representation for the poor in federal rulemaking substantially affecting their interests will necessarily be imperfect. It also may have to be, in at least one sense, artificial and imposed from above.

Efforts to secure adequate representation for the economically underprivileged in all federal rulemaking having a substantial impact on them will have to move on two fronts to be successful. An attempt must be made to assure that federal agencies making rules

of this kind independently seek to ascertain from the poor their views with respect to such rules. In addition, an attempt must be made to help the poor obtain affirmative representation for their interests in the rulemaking process. That is, some means must be devised by which to assure that these people have a competent, consistent, and aggressive advocate for their interests before federal agencies. Within the limits set by this two-pronged approach, a desirable solution should also be feasible—that is, realistically achievable; should take account of the fact that the interests of the poor needing representation may often be fractionalized and diverse; should be workable in an everyday, operative sense; and should be as economical as possible. Moreover, such a solution should be practical in the sense that the positive contribution it may make to the administrative process should overbalance any negative impact it may have on that process or other societal values. A desirable resolution of the problem under consideration should also make it as obvious as possible to the poor that their views will be adequately represented in rulemaking. This particular requirement may not directly enhance the proper functioning of the administrative process as such. It may, however, help to eliminate that portion of the poor's distrust of and dissatisfaction with government which stems from their perception that officialdom does not adequately consider their views when it makes policy affecting them.

II. ASSURING AFFIRMATIVE AGENCY ACTION TO ASCERTAIN THE VIEWS OF POOR PEOPLE

A. *Generally*

Officials responsible for promulgating rules substantially affecting the economically underprivileged segment of our society should, where feasible, increase their existing efforts to ascertain independently the views of poor people. They should also devise additional effective means by which to do so. This approach stresses the ability of the several agencies involved to develop and utilize affirmative procedures for obtaining, through direct and continuing contact with the poor themselves, the specific information that they should consider when they formulate their programs affecting the poor.

There is an analogy in Budget Bureau Circular A-85, which is entitled "Consultation with Heads of State and Local Governments in Development of Federal Rules, Regulations, Procedures and Guidelines." This document orders federal agencies to follow certain procedures geared to assure that there is adequate consultation

with the heads of state and local governments prior to the promulgation of rules for the implementation of specific kinds of federal programs vitally affecting them. The Defense Production Act of 1950 also provided that "[a]ny rule, regulation, or order, or amendment thereto, issued under authority of this Act shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations"²¹ Similarly, federal agencies should follow procedures with respect to rulemaking that will assure, where feasible and practicable, independent agency efforts to ascertain directly from the poor their views with respect to proposed rules substantially affecting them.

B. *Some Specific Suggestions*

Agencies administering programs of concern to the poor should be urged to hold formal hearings—that is, oral public hearings—on proposed rules in close geographic proximity to the poor people affected. They should also be urged to obtain witnesses and solicit written views from among the affected poor and organizational representatives of the affected poor. Federal agencies should use special notice and hearing arrangements tailored to meet the peculiar problems of economically underprivileged persons in order to assure their effectiveness in accurately and successfully obtaining the views of such people. As an illustration, publication of a proposed regulation and notice of a public hearing in the Federal Register may constitute adequate notice for middle and upper income Americans whose agents or group representatives read that periodical, but it is usually inadequate by itself to apprise the poor. To facilitate affirmative agency action to ascertain the views of the poor, increased use of field surveys should also be encouraged. In addition, or as an alternative to some of the above suggestions, agencies should hold very informal conferences with the poor in their own neighborhoods in order to discuss with them contemplated rulemaking affecting such persons' interests.

Agencies should also be urged to pay certain of the personal expenses of economically underprivileged witnesses in rulemaking hearings where that would help assure adequate representation for the poor. In this way the federal agencies may facilitate the appearance of an adequate number and variety of poor people's represen-

21. Act of Sept. 8, 1950, ch. 932, § 709, 64 Stat. 819.

tatives in such proceedings. If economically underprivileged individuals must incur transportation, meal, or babysitting costs in order to testify on behalf of the poor, or if they must lose a day's wages, they should be reimbursed. Unlike the more affluent members of our society, poor people cannot afford to finance the extra costs involved in representing their own interests. At the present time most agencies are probably unable or unwilling to pay such expenses incurred by underprivileged persons seeking to represent the interests of the poor in rulemaking hearings. In order to remove any doubts as to their authority, federal agencies should be expressly empowered, in their discretion, to pay the basic personal expenses incurred by poor persons acting in such a capacity.

Each agency administering programs with a high impact on the poor should also be urged to constitute, where practicable, a formal advisory committee to apprise the agency of poor people's interests that should be weighed in the operation of its programs. These committees should be composed of persons who are themselves economically underprivileged, or the direct and close representatives of such persons. The committees should be continually kept informed of those activities of their respective agencies that specially concern them; and they should be consulted for their views before the agency makes any rules substantially affecting the interests of the economically underprivileged segment of our society. All expenses incident to the operation of such advisory bodies should be borne by the respective agencies. "Regulations for the Formation and Use of Advisory Committees" already exist.²² These might be revised, expanded, and reoriented for this purpose.

In the future, the Administrative Conference of the United States should monitor the extent to which federal agencies actually do institute specific procedures like those just discussed. Government officials must be induced to increase their own affirmative efforts to ascertain the views of the poor with respect to rulemaking which affects them substantially. If the Conference finds that the recommendations urging voluntary agency action in this regard are not adequately affecting official behavior patterns in practice, it might then recommend that agencies be required to follow certain of the above specific procedures with respect to particular programs.

Although federal agencies might, if necessary, be required to follow some of the procedures outlined above in specific programs or situations, there are a number of reasons why federal agencies

22. Exec. Order No. 11,007, 27 Fed. Reg. 1875 (1962).

should not be *required* to follow certain of those procedures *in every case* where they engage in rulemaking substantially affecting the poor. These procedures may be completely superfluous in a number of cases because the views of the poor are unmistakably clear and a matter of public record. In addition, many of the specific procedures outlined as possible means to induce affirmative agency ascertainment of the poor's interests in agency rulemaking may be very impractical. The agencies have an undisputed need to conduct their affairs inexpensively, simply, conveniently, flexibly, and expeditiously. Requirements of the sort outlined above may be unusually difficult to draft and administer because of the peculiar problems in defining precisely those whose views the agency must solicit or appoint as representatives of the poor, when or where oral hearings or conferences must be held or field surveys taken, and the like. Whether an oral hearing should be held with respect to a certain proposed rule, precisely where and when it should be held, who exactly should be invited to testify, and whether a field survey should be made are all judgment questions. Someone, probably the rule-making agency, must exercise some discretionary judgment. And to require useless hearings, conferences, or field surveys, endless lines of repetitive and inarticulate witnesses, and the like, would be to interject the worst kind of mischief into the administrative process, hamstringing rather than improving it.

However, if federal agencies will voluntarily follow the previous suggestions in all those situations where they are feasible, practicable, and necessary to assure that officials are fully informed about the relevant interests of the poor, the agencies will help solve the problem under consideration. The proposals outlined in this section have the advantage of assuring self-starting and independent affirmative agency action to secure information directly from the poor concerning their position with respect to rulemaking substantially affecting them. An effective pipeline from the poor to those who are responsible for rulemaking decisions could result. The fact that the government would bear the sole or primary financial burden for this mode of assuring consideration of the poor's interests in rulemaking also enhances its attractiveness and effectiveness.

C. *The Inadequacy of Affirmative Agency Efforts*

Procedures to assure self-initiated affirmative official action to ascertain from the poor their views with respect to agency rulemak-

ing will, if sound in their details, undoubtedly be helpful; but such procedures are entirely inadequate solutions for the problem at hand in at least one major respect. They do not completely compensate for that which the poor currently lack. Economically underprivileged people do not have the resources necessary to assure a technically sound and consistently available articulate presentation of their views concerning rulemaking to the appropriate agencies. Those segments of our society with adequate economic resources have long employed legal counsel—with their special technical proficiencies, knowledge, and skill as advocates—for these purposes. By the use of lawyers' professional abilities, the well-financed have assured that the kind of representation actually afforded their interests before government policy makers is qualitatively high, and much more effective than it could possibly be otherwise.

The poor are entitled to, and must have in order to make their interests known effectively, both the quantity and quality of representation in rulemaking before federal agencies that commercial corporations and labor unions consistently utilize. That necessitates furnishing the poor, in one way or another, with legal counsel for this particular purpose. Because the poor lack the personal and organizational resources to hire such skilled, persistent, and knowledgeable help, affirmative agency efforts of the kind discussed above, although useful, would still result in qualitatively inadequate representation in rulemaking for the economically underprivileged segment of our society. The reason for this is that existing sources of public and private legal aid to the poor, such as legal aid and public defender programs, do not usually provide the economically underprivileged segments of our society with representation in rulemaking. These programs are primarily, if not exclusively, concerned with serving the interests of individual poor clients in adjudicative or potentially adjudicative situations.

III. A CLEARINGHOUSE COORDINATOR?

The poor might obtain the quantity and quality of representation they need for their views in federal rulemaking if a well-financed clearinghouse-coordinator organization was created. Such an organization could systematically furnish all poor people's groups in this country with information concerning existing or proposed federal administrative regulations having a substantial impact on the poor. In addition, it could encourage and coordinate participation in federal rulemaking by organizations representing the eco-

nomically underprivileged. Where necessary, this entity could also finance participation in rulemaking by various poor people's groups. That is, the clearinghouse coordinator might make conditional limited-purpose grants to poor people's organizations so that they could individually hire personal legal counsel to represent their views in a particular rulemaking matter. Such a clearinghouse coordinator would not itself attempt to play any direct role as an advocate in the rulemaking process. It would not act as a separate representative of the poor. An organization of this type could be financed by private contributions, government grants; or both, and, it could be constituted as an independent private body under the control of all of its constituent users in order to assure the maximum satisfaction of its clients.

Utilization of this kind of clearinghouse coordinator has several advantages as a solution to the problem of improved representation for the poor in federal rulemaking. It would encourage and facilitate more frequent and continuous representation of poor people's interests in the rulemaking process by organizations and groups representing some segment of the economically underprivileged. The clearinghouse coordinator might also result in representation for more of the many divergent and disparate interests present in that group in our society loosely characterized here as "the poor" than would otherwise be the case. In addition, the existence of such a body might induce a better and more accurate presentation of the views of the poor on many matters than might be the case with some other solutions. This is true because the source of the views and the representation of those views would be relatively close to the poor themselves. Since this solution would provide poor people's groups with funds to engage their own separate and personal counsel for the purposes of representation and advocacy in rulemaking proceedings, it would assure that the views of those organizations are accurately, articulately, knowledgeably, and aggressively presented to the agencies in question.

Still, such a clearinghouse-coordinator organization is probably an inadequate and inefficient solution to the problem at hand. It assumes that existing organized groups purporting to represent the poor can or will do an adequate job of protecting those people's interests with respect to federal rulemaking if such bodies are kept informed of the facts, their efforts are coordinated, and sufficient financing is made available to them. This is a questionable assumption, although admittedly it is hard to prove or disprove entirely on the basis of undisputed evidence. Existing poor people's organizations

have sometimes been aware of proposed or existing rules of special concern to the poor generally, and yet have failed to act.²³ In many of these instances, their failure cannot be attributed entirely to a lack of organizational resources.

It should be reiterated that most poor people do not belong to organizations dedicated to protecting and advancing their interests; and the views of "poor people's groups," or of the controlling leadership of such groups, may frequently be out of touch with, or divergent from, the interests of the mass of the poor. The clearinghouse-coordinator proposal will not, therefore, consistently assure adequate representation in rulemaking for the collective interests of the poor as a general group. The device may assure representation in rulemaking only for the views of organized poor people's groups, or for the views of the leadership class of those groups. Depending on the specific case, that kind of representation may or may not be adequate to protect the interests of the mass of the poor people in this country.

The grant-financed efforts of numerous poor people's groups, each seeking to represent separately the interests of the economically underprivileged in federal rulemaking, may also be unduly duplicatory and therefore wasteful and unnecessarily burdensome to the administrative process. Furthermore, many administrative difficulties will appear in any effort to entrust a mandatory grant-making responsibility to the clearinghouse coordinator. Must every organizational applicant seeking funds with which to represent the poor in federal rulemaking be financed? If not, which groups in any given situation should be financed? These difficulties could be largely avoided if, depending on the facts of each case, the clearinghouse coordinator had the option of representing the interests of the poor itself or contracting with others to do so. In addition, freedom for each poor people's organization to hire its own separate lawyer for these purposes may be much more expensive and less effective than providing the poor with one specialist law firm working full time to represent their collective interests in federal rulemaking.

For all of the above reasons the clearinghouse-coordinator approach to solving this problem is inadequate. It is too likely to result in uneven and inconsistent representation for the collective interests

23. The Department of Agriculture's Commodity Distribution and Food Stamp programs for the poor are an example. Although poor people's organizations were aware of the existence of those programs and the Department rules under which they were operated, they did not seem to take any active interest in those programs until the last year or so.

of the poor as a class in federal rulemaking. Moreover, it seems relatively uneconomical and inefficient. As subsequent discussion will demonstrate, a more desirable solution to the problem under consideration can be formulated. That solution could assure more adequate representation for the poor in federal rulemaking than the clearinghouse coordinator. At the same time, it could also incorporate, by one means or another, most of the special advantages of the clearinghouse coordinator.

IV. THE INDEPENDENT POOR PEOPLE'S COUNSEL

A. Generally

The most desirable solution to the problem under consideration would seem to be the creation of a people's counsel organization which would hire a staff to represent the interests of the poor in all federal rulemaking that substantially affects them.²⁴ Such a counsel would be an artificial representative *for* the poor in this process without any pretense of being a democratically chosen spokesman of

24. This seems to be the general philosophy of the Feighan Bill, H.R. 17974, 90th Cong., 2d Sess. (1968), the text of which follows:

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

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

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

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

Senator Hart introduced the same bill in the Senate as S. 3703, 90th Cong., 2d Sess. (1968).

the poor. This counsel, as an advocate, would be charged with the responsibility of separately and independently representing the collective interests of the poor as a class in all federal rulemaking. Where the interests of the poor on a pending rule are divergent, it would also be responsible for assuring the representation of those disparate views either in its own presentation or by other individuals or organizations. In performing its representational responsibility for the economically underprivileged, such an advocate would be under an affirmative duty to seek the advice and help of relevant sources of every kind, whether private or governmental, individual or organizational. It would be obliged to use every device available to keep in as close touch as possible with the needs and views of those whose interests it purports to represent. Although such a counsel's staff would probably be middle class, great pains should be taken, and special procedures instituted, to prevent it from being captured or dominated by a middle-class point of view.

As an aid in this respect, it might be desirable to establish official advisory committees to the poor people's counsel in each area of major concern such as welfare programs, housing, employment, education, and so forth. The membership of such committees should be composed of individuals who are as representative of the poor of this country as possible. These committees should not, however, become the exclusive source for the poor's communication with their people's counsel. There is always a danger that committee members, regardless of the care exercised in their appointment, may have divergent views and interests from the mass of the economically underprivileged. For this reason, the people's counsel should hold informal hearings among the poor on the larger and more important issues so that it can better represent their interests on those subjects. Close liaison between the people's counsel and Office of Economic Opportunity (OEO) community action groups, legal aid societies, civil rights organizations, and other poor people's groups throughout the country is also crucial. This will help to assure that the people's counsel will remain as reflective as possible of the real interests, views, and needs of those people in our society that it ultimately must serve.

B. *Specific Functions of the Poor People's Counsel*

The people's counsel would do everything necessary to represent effectively the interests of the poor in all federal rulemaking substantially affecting them. Such a body would perform most of the

same functions for the poor with respect to the federal rulemaking process that Washington law firms perform for their well-financed clients. It would monitor the activities of federal agencies to assure that it is fully informed with respect to all rulemaking or potential rulemaking affecting the interests of the poor. When a federal agency proposes new rules of concern to the economically underprivileged, counsel for the poor would present their views on the desirability of the proposed regulations and actively lobby for the interests of the poor. This would include the drafting of substitute rules for the ones suggested by the government agency. Additionally, the people's advocate would formulate, and urge the appropriate authorities to adopt, entirely new rules and revisions of old rules substantially affecting poor persons. To perform these functions, the people's counsel would need an adequate staff not only of lawyers, but also of economists and other social scientists. This would assure that it will be capable of competently responding in kind to the arguments and technical data presented by the personnel of the various agencies with which it must deal.

In addition, the poor people's advocate would be charged with some of the specific obligations of the clearinghouse coordinator. That is, it would keep organizations representing the poor informed as to all federal rulemaking affecting their interests, and it would coordinate and facilitate those organizations' separate participation in such rulemaking if any of them had the desire and capacity to do so.

The people's counsel should also be authorized, in its discretion, to make contracts with other organizations as a means of helping to represent, in the rulemaking process, minority or divergent viewpoints with respect to the interests of the poor. Interjection of such minority or divergent views into the rulemaking process may be a function that the people's counsel will want to contract out to others because, by doing so, it might avoid some possible internal conflicts of interest in its organizational setup. The extent to which this contracting power is actually used ought to be left to the sole discretion of the people's counsel. Nevertheless, the expectation is that the staff of the people's counsel will normally perform all of the representation functions assigned to it.

The people's counsel would occasionally propose to the President or Congress, or both, new legislation (or executive orders) geared to institute reforms in administrative programs substantially affecting the poor. An agency may refuse to exercise its existing authority to make the kind of rules deemed necessary by the people's advocate

to protect the interests of its constituency. Or an agency willing to make such rules may not have the authority to do so because legislation forbids it or fails to authorize it. In all of the above cases Congress can correct the situation by statute and thereby ensure the promulgation of rules satisfactory to the people's counsel. As a result, the advocate of the poor should be empowered to propose legislation to Congress or the President when that would be an aid in performing its primary responsibility—effectively representing the poor's collective interests in federal rulemaking.

The people's counsel should also be empowered to play an independent role in the judicial review of federal administrative rules. As a representative of the poor, the counsel should be able to challenge in court, under its own name, the validity of any federal rule substantially affecting poor persons. Only with this authority will the views of the people's counsel have any creditable weight with the agencies before which it is to operate. The image and attendant effectiveness of the people's advocate will be greatly enhanced if federal agencies know that the people's counsel can freely institute judicial review of agency rules under its own name and solely on its own initiative. Absent that authority, the people's counsel might be totally ignored by the administrative establishment; officialdom would know that there is little bite behind the counsel's bark. Power to seek judicial review of an agency's rules on the grounds that they are unauthorized, are in conflict with a statute, are unconstitutional, or have been promulgated without the required procedure is, therefore, very important. The poor's advocate should not be forced to give up after it unsuccessfully opposes the promulgation of a certain rule that is antithetical to the interests of the economically underprivileged if that rule is vulnerable to attack in the courts.

The ability to sue in its own name as an official representative of the poor is also especially important to the people's counsel because that right frees the counsel from any dependency on particular poor persons who would otherwise have to be the named plaintiffs in such suits. Since it is responsible for representing the collective interests of the poor, the people's counsel should not be put in the position of having to reconcile that duty with the individual interests of a particular poor person acting as official plaintiff in a court case. In addition, if the poor people's advocate can sue in its own name, many administrative difficulties and extra expenses can be avoided. Congress should, therefore, specifically vest the people's counsel with this right. Delegation of that authority to such a counsel would not, of course, preclude other individuals and organizations with

standing from seeking judicial review of federal agency rules on behalf of poor people's interests.

A very broad precedent supporting the right of a representative body to seek judicial review of administrative action adversely affecting those whose interests it seeks to protect is *Office of Communication of the United Church of Christ v. FCC*.²⁵ That case held that a church has standing as a "party in interest" to seek judicial review as a representative of its members as listeners whose interests the FCC is required to protect. Since that organization was a voluntary-membership body seeking to assert the rights of persons who freely chose to join it, the *Church of Christ* case might be distinguished from the situation under consideration here. However, if an act of Congress expressly authorized the people's counsel to seek judicial review of federal rules having a substantial impact on the poor, in its own name as an official representative of such persons, the standing of that counsel would be clear. Of course, a question might be raised whether a case or controversy exists in a judicial proceeding pitting an artificial poor people's representative accorded such a statutory right to judicial review against an agency whose rules are challenged on behalf of the poor. However, it seems clear that one exists. A statute of Congress would impose a legal duty on the people's counsel to protect the interests of underprivileged persons in federal rulemaking—a duty that would include attempts to invalidate improper rules in court; and the various federal agencies have an adverse legal obligation to defend the integrity of their rules against attack by others. Some might argue that *Muskkrat v. United States*²⁶ casts doubt upon the ability of such a people's counsel to sue in its own name as a representative of the poor, even after Congress specifically empowers it to do so. But that case is probably no longer the law.²⁷

As a wise allocation of its resources, the people's counsel may frequently elect to assist other agencies representing the poor to prosecute court cases relating to the validity of federal administrative regulations instead of instituting such suits itself. To this end it might distribute to appropriate legal aid organizations memoranda explaining that specified regulations may be subject to successful attack in the courts. In addition, the people's advocate could give

25. 359 F.2d 994 (D.C. Cir. 1966).

26. 219 U.S. 346 (1911) (holding that Congress could not authorize named Cherokee Indians to institute suits on their own behalf and on behalf of other Cherokees having similar allotments to determine the validity of acts of Congress restricting alienation of certain land and increasing the number of persons entitled to share in it).

27. See K. DAVIS, ADMINISTRATIVE LAW TEXT 374 (1959).

technical or financial aid to a local legal aid organization attempting to prosecute, on its own, a test case concerning some federal rule that is inconsistent with the poor's interests. The people's counsel could also generally coordinate the efforts of legal aid groups with respect to the judicial review of federal agency rules.

The people's counsel should also be empowered to intervene under its own name on behalf of the poor in those agency adjudicative proceedings substantially affecting the economically underprivileged. The poor as a group may have as vital an interest in the outcome of certain agency adjudication as they do in most rulemaking proceedings affecting them. Many very important administrative policies are established as a result of ad hoc agency adjudication. At present, the collective interests of economically underprivileged people are inadequately represented in such federal administrative adjudication; effective participation in those proceedings requires certain skills and expertise not available to most local legal aid societies who have had little experience with the intricacies of adjudication before federal agencies. Therefore, apportioning this function to the poor people's counsel seems wise.

Representation of the poor in agency adjudicative proceedings is closely and intimately tied to the counsel's other responsibilities. Assigning this function to the people's advocate will economically utilize the expertise in federal administrative law that it will necessarily acquire through the performance of its other duties. However, the people's counsel will not be empowered to *initiate* adjudicative proceedings before federal agencies in its own name; as an official representative of the poor, it will be limited to participating in such proceedings as an intervenor. Where necessary, traditional channels of legal aid can be expected to initiate such agency adjudicative proceedings in the name of individual economically underprivileged clients.

Ordinarily the people's counsel should not perform the responsibilities of an ombudsman or personal legal counsel. That is, it should not normally handle the individual grievances of, or seek remedies for, particular poor clients. An ombudsman or personal legal counsel becomes preoccupied with the details of numerous individual claims and is therefore likely to lack a sufficiently broad independent perspective about the best ways of serving the poor as a whole. If it acted to represent particular clients, the proposed body's individual caseload would be much larger than its job of affirmatively representing the poor as a class in federal rulemaking. As a result, the latter function may be obliterated by the former function. In

addition, since all citizens, rich or poor, may experience administrative arbitrariness and ineptitude, all should have access to an ombudsman. But to be effective, the office contemplated here must concentrate on and become expert in the special problems of the poor. It must look at these problems and proposed solutions solely from the viewpoint of the poor. Furthermore, the people's counsel should be primarily concerned with affirmatively representing the interests of such individuals prior to, and as a means of avoiding, their need for an ombudsman; but because of the nature of an ombudsman's responsibility, a people's counsel charged with that additional function may see the needs for affirmative representation in rulemaking primarily in terms of the poor's appearance in its office for ombudsman's help. However, there may be very rare occasions when the people's counsel should be able to represent a particular person because that is the best or only means by which to test a certain agency policy affecting the poor as a class. In those cases it should be free to do so, but only if absolutely essential to its primary function as advocate for the collective interests of the poor in federal rulemaking.

Finally, it should be recognized that the interests of the poor and the interests of higher income groups may sometimes be identical with regard to certain rulemaking or agency adjudication. To assure adequate representation for the economically underprivileged, the people's counsel must have the independent authority to participate on behalf of the poor in *all* rulemaking and agency adjudication of concern to those people. However, a wise allocation of the advocate's resources should lead it to concentrate its efforts on representation of the poor in those situations where the interests of the poor are not adequately protected by the endeavors of other more affluent groups.

C. *Locating and Structuring the People's Counsel*

1. *A Government Office of People's Counsel*

The proposed people's counsel might be constituted as a permanent, single-purpose, and relatively independent federal government office located outside of any agency before which it would have to represent the poor. A number of arguments of varying merit have been made in favor of making the poor's advocate an integral part of the governmental establishment. It has been contended that federal agencies might be more receptive to a presentation of the poor's views by another part of the official establishment than by outsiders. Therefore, the argument continues, as a part of the

governmental structure the people's counsel might be more effective than if it were outside of that structure. If it were part of the official establishment, such a people's counsel might also be accorded access to useful information and resources that it otherwise might not be able to obtain. Furthermore, indicating that representation of the poor's interests has special importance by making it a part of the government itself might give the economically underprivileged the feeling that the official establishment really cares about their interests. As a government office, the people's counsel might also have a certain prestige and respectability not otherwise obtainable which would facilitate the recruitment and retention of a competent staff.

In practice, many of these assertions about the advantages of placing the people's counsel inside of government may prove to be unrealistic or erroneous. Moreover, location of the people's counsel as a part of government may actually be disadvantageous for a number of reasons. As a full-time employee of the United States Government, the poor's advocate is more likely than otherwise to become, at least over time, a captive of the establishment—out of touch with the poor, docile, and therefore ineffective. After all, a certain *in terrorem* effect would always exist because the appropriations for the office would continually be subjected to congressional approval. And the professional associations of the staff of the people's counsel under these circumstances would be with other government officials, all working for the same principal, and all having common interests and problems in the long run.

The idea that a government agency can do an effective job because it would be a member of the team is chimerical. One of the basic strengths of our legal system is its reliance on the adversary system. The handling of things by a member of the team smacks of "Big Brotherism." The poor would probably lack confidence in a people's counsel who, although charged with representing their interests, was part of the very government establishment they wanted to influence. The poor might well believe, regardless of actual performance, that any full-time government employee purportedly representing their interests was really not doing so. Furthermore, the underprivileged segments of our society seem to reject the basic philosophy underlying the approach that would appoint a government official to represent their interests. In the past few years the more militant elements of the poor have demanded that the poor themselves be accorded a direct voice in controlling their destiny. Finally, locating the people's counsel as a part of the federal establishment may make it less effective than otherwise possible because

its freedom to innovate and experiment may be curtailed by government red tape and bureaucratic requirements.

There is some precedent supporting the suggestion that a special government house counsel be created to represent a group unable to represent effectively its own interests before federal agencies because of its large size, amorphous nature, and lack of organization. There was an independent Office of Consumers' Counsel charged with asserting consumers' interests in bituminous coal proceedings before the National Bituminous Coal Commission.²⁸ The Department of Agriculture also had, at one time, a Division of Consumers' Counsel which participated in proceedings within that department on behalf of consumers.²⁹ A similar position seems to have existed for a period in the National Recovery Administration, the Department of Labor, and the Department of the Interior.³⁰ More recently, President Johnson announced the creation of the Office of Consumer Counsel in the United States Department of Justice.³¹ This new office did not begin to function until the very end of 1968 because the first appointee died before he could assume his duties. The status of the office is now unclear due to the change in national administrations. In any case, the newly created Office of Consumer Counsel would not be an adequate solution for the problem at hand since the interests of the poor affected by the rulemaking process are substantially broader than those interests deriving from their status as consumers.

History may support the idea that a people's counsel of the sort contemplated here should not be constituted as a part of the government establishment. Almost all of the consumer's counsel offices organized as separate entities within the federal establishment have atrophied and disappeared. Most of them seem to have faded because, among other things, they were ineffective and made no significant contribution to the administrative process. Although not completely clear, the reasons for the conspicuous lack of success of these offices seem to have included their intimate connection with the government establishment (as an official and integral part of it), and their structural position within that establishment—that is, the fact that they were located inside of the very agencies before which they were to represent the consumer's interests.³²

28. 1968-69 U.S. GOVERNMENT ORGANIZATION MANUAL 687, 708.

29. *Id.* at 691.

30. *Id.* at 687.

31. See White House Press Conference of Betty Furness, Special Assistant to the President on Consumer Affairs, and Attorney General Ramsey Clark discussing the establishment of this office (mimeo Feb. 6, 1968).

32. On the operation of these consumer counsels see generally R. BAKER, THE

2. *A Private Office of the People's Counsel*

A second means of constituting the people's counsel is to utilize a private organization outside of government for these purposes. By relying on a body outside the federal establishment, the people's representative in rulemaking proceedings may be able to be more closely tied to and identified with the needs of the poor than would be possible if it were an official organ of the United States Government. A nongovernmental body may also be able to communicate more effectively with the poor than an official one. As a private organization separated from the government hierarchy, it may be less susceptible to being captured by the ideas and values of the government agencies before which it would represent the interests of the poor. A private people's counsel may also be less susceptible than a similar public counsel to intimidation by government agencies; if so, the private organization would be a more aggressive and persistent representative of the poor's interests in rulemaking than a public body.

As suggested above, such a private body may also be more flexible and thus better able to experiment and innovate in the performance of its assignment than a government-based equivalent. This greater freedom may be especially useful with respect to recruiting a staff and administering its activities. Moreover, this freedom may mean that a private people's counsel would be more efficient in the long run than a government body. As noted earlier, the poor are likely to have greater confidence in a private counsel's representation of their interests than in a public counsel's performance of that job because their advocate would not be part of the very establishment which they are trying to influence. The actions of a private counsel may also be more visible to the poor than the actions of a public counsel which could easily get lost in the huge federal bureaucracy and become relatively invisible to outside viewers. This greater visibility might make a private counsel more responsive to the interests of the poor and a greater source of satisfaction to them.

On the other hand, it has been urged that such a private organizational representative of the poor might not be as influential or effective in rulemaking proceedings as an official agency of the

NATIONAL BITUMINOUS COAL COMMISSION: ADMINISTRATION OF THE BITUMINOUS COAL ACT, 1937-1941 at 221-53 (1941); H. JOHNSON, THE BLUE EAGLE FROM EGG TO EARTH 295-96 (1935); L. LYON, P. HOMAN, G. TERBORGH, L. LORWIN, C. DEARING, & L. MARSHALL, THE NATIONAL RECOVERY ADMINISTRATION 123-28, 210-14 (1935); Lewis, *The "Consumer" and "Public" Interests Under Public Regulation*, 46 J. POL. ECON. 97, 103-06, 106 n.10 (1938); E. NOURSE, J. DAVIS, & J. BLACK, THREE YEARS OF THE AGRICULTURAL ADJUSTMENT ADMINISTRATION 391-95 (1937).

United States charged with the same obligation. By virtue of its official status, a public people's counsel charged with representing the poor may be offered greater cooperation and opportunity for participation in rulemaking affecting the poor than a private organization charged with the same duty. In addition, a private people's counsel may not be, in and of itself, as effective a mechanism as a public people's counsel to convince the poor that the federal government really wants their interests represented in its rulemaking process. A more likely disadvantage of a private body might be its greater susceptibility to capture by the interests of some small segment of the poor, with the result that it would only serve the interests of that special group among the poor rather than the interests of the poor as a whole. However, this disadvantage can be offset by structural devices geared to avoid that situation; and it must be weighed against the specific advantage that the private organization is less susceptible to being captured by the "government view" and more likely to be in close touch with the real needs of the poor.

3. *The Public Broadcasting Corporation Model: A Compromise Solution*

A third solution to the problem of properly positioning the people's counsel is a beneficial compromise between the alternative of locating the advocate for the underprivileged inside the federal government and locating it entirely outside and separate from that establishment. The poor's representative described herein could be constituted as a completely independent, federally chartered corporation similar in most respects to the recently created Corporation for Public Broadcasting³³ or the long established American National Red Cross.³⁴ These organizations are hybrid public-private bodies. As such, they provide a model for the people's counsel which may combine the advantages of the purely public body with the advantages of the purely private body and minimize the disadvantages of each.

The Corporation for Public Broadcasting, for example, was created by a special act of Congress as an independent, nonprofit, and no-stock entity.³⁵ It is headed by a bipartisan body of fifteen members whose qualifications and fixed terms of office are set by statute. They are appointed by the President with the advice and consent of the Senate and are authorized to make policy for the body

33. 47 U.S.C. § 396 (Supp. III, 1965-1967).

34. 36 U.S.C. § 1 (1964).

35. 47 U.S.C. § 396 (Supp. III, 1965-1967).

and direct its affairs. The act creating the corporation specifies its purposes and powers. It also expressly authorizes the body to obtain grants from, and make contracts with, individuals and private and governmental organizations and institutions. According to the statute, the Corporation for Public Broadcasting must submit detailed annual reports to the President and Congress outlining the activities, financial condition, accomplishments of the organization, and any recommendations it deems appropriate. In addition, the statute requires an annual audit of the corporation's books by an independent certified public accountant. The financial operations of the body and its grantees' use of corporation funds may also be audited by the United States Government for those fiscal years during which federal funds are involved.

But the public broadcasting body is otherwise independent of federal authority and is more nearly private than public. The statute specifically declares that it is not "an agency or establishment of the United States Government."³⁶ Neither the directors of the corporation nor its agents are federal employees by virtue of their connection with the organization. In addition, full-time federal government employees are specifically excluded from appointment to the governing board of the corporation. Finally, the enabling act expressly notes that nothing contained in any of its provisions "shall be deemed . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control . . . over the Corporation or any of its grantees or contractors" ³⁷

The private corporate structure of a people's counsel modeled after the Corporation for Public Broadcasting assures it the advantages of a purely nongovernmental body. An organization of this kind is effectively insulated from federal control of its day-to-day policy determinations. It can aggressively represent the interests of the poor before federal agencies and advocate views distasteful to officialdom without fear of crippling government intervention. Such a body is also free, because of its private organizational structure, of all of the operational rigidities and inflexibility associated with a government agency. Like a purely private entity, such a corporation is not bound by the rules of the federal bureaucracy with respect to such things as the hiring and compensation of staff, and the means by which its business is conducted. Consequently, this corporate entity will have as much freedom to experiment and

36. 47 U.S.C. § 396(b) (Supp. III, 1965-1967).

37. 47 U.S.C. § 398 (Supp. III, 1965-1967).

adapt its practices to changing exigencies as a purely private organization. The structure of a corporation of this kind also permits it to draw very easily on both public and private means of support without unduly complicating the organization's affairs or threatening its independence in the way that a government agency's independence would be threatened.

In addition, a people's counsel corporation of the type under discussion here, like a purely private entity of that sort, can be more closely tied to, and identified with, the needs of the poor than a similar government body. This can be achieved by stipulating certain specific qualifications for appointment to the organization's private governing board. Similarly, an entity modeled after the Corporation for Public Broadcasting may also be able to communicate with the poor more easily and flexibly than if it were a direct part of the federal establishment. Because this kind of entity is not part of the "official government team," it may be less susceptible than a purely public body to being intimidated or captured by the ideas, values, and interests of the agencies with which it deals. The economically underprivileged may also have more confidence in a people's counsel structured in this way than in one located within the federal government; it is apparently independent of federal influence and is controlled by a private board structured to reflect the interests of the poor. The actions of such a government-chartered but independent counsel may also be more visible to the poor than a similar government counsel lost inside the vast federal establishment.

If the people's counsel were constituted as a body like the Corporation for Public Broadcasting, it would also have many of the important advantages of a government-based people's counsel. In quasi-public form, it may have higher status and prestige than a purely private people's counsel. Thus, it might well be able to secure a more qualified staff and a stronger board of directors than could a private body. Such an organization can easily be funded by the national government and can deal to some extent as an official equal with federal agencies. As a quasi-official body, federal agencies might be more receptive to its presentation of the poor's views than if those views were presented by a purely private body; and, a quasi-official people's counsel might be accorded access to information and resources not as easily obtainable by a purely private entity. This seems to have been true of the Red Cross, for example. Constituting the people's counsel as such a quasi-official body might also give the poor a feeling that the federal government itself really cares

about them and is attempting to ensure fair representation for their views with respect to rulemaking that vitally affects their interests. At the same time, the independent structure of the people's counsel organization assures the poor that a meaningless "Uncle Tom" has not been created.

The above discussion suggests that the best way of structuring the people's counsel is to establish it as a quasi-public body modeled on the Corporation for Public Broadcasting. At the start, such a body would, of course, require action by Congress. After it was set up, it would not be dependent on the government to any appreciable extent except perhaps for part of its financing—an aspect which will be discussed below. Careful drafting of the enabling statute should assure the creation of an effective and meaningful advocate for the poor in all federal rulemaking substantially affecting them.

D. Financing the People's Counsel

Financing the people's counsel raises additional problems. It is clear that a rather large infusion of new money will be needed to support such an entity on a long-term, continuing, and effective basis. Resources currently available to the poor and their organizational representatives are totally inadequate to support this new responsibility in any satisfactory way. The source of the extra money required could be federal, private, or both. Utilization of federal money for this purpose has some distinct advantages. The function which must be performed is too important and urgent a part of the federal administrative process to entrust its support to the uncertainties of private fund raising. Only an infusion of federal money can guarantee, relatively soon, the kind of funding that is necessary for this project to assure proper, immediate representation of the type contemplated here. The circumstances of the era in which we live suggest that it is too late to talk solely in terms of a short-term demonstration project. What is needed—and needed now—is adequate representation for the poor in federal rulemaking on a permanent, reliable, and quantitatively sufficient basis.

However, it may be possible to secure the funds needed to promote a quasi-public people's counsel from nongovernmental sources. Large charitable foundations might provide a long-term guarantee of adequate revenue, especially if they understood the vital and special importance of this particular project. In addition, individual and business contributors might be induced to support

such a body in the same way that they support charities such as legal aid societies. However, to attract substantial gifts of private funds from individual or business donors, the people's counsel corporation must be a tax exempt charity. In order to clear up any doubts on that subject, Congress should specifically stipulate in the statute creating the people's counsel that it is tax exempt for these and other purposes.

A number of arguments suggest the long-term desirability of financing such a people's advocate exclusively from nongovernment funds if that should prove practical, feasible, and realizable sufficiently quickly. As a contractor with the federal government—bound to provide in return for monies furnished the representation required—the people's counsel becomes, to some extent at least, a tainted instrument of the government in the eyes of the poor. Even if it is not true, the poor may feel that their counsel will not bite the hand that feeds it. Furthermore, because of the grant-making agency's authority to discontinue grants to the people's counsel, that agency will be in a position to exert pressure on the advocate for the poor which might be deleterious to the most vigorous performance of its duties. If the people's counsel even fears that aggressive and persistent representation in rulemaking of certain unpopular views favoring the poor might induce a withdrawal of federal funds, it may become timid, lethargic, and unnecessarily cautious. In addition, a grant of federal funds is rarely made without relatively detailed conditions, and such strings might remove some of the desirable flexibility and capacity to innovate and experiment normally possessed by a privately financed operation of the same sort.

However, the above objections to the use of federal funds are not sufficiently important to be controlling if government money is in fact necessary to finance such a people's counsel quickly, adequately, and on a long-term basis. If government financing is required, the OEO might logically be considered as a funding agency. The sole purpose of the OEO is to help the impoverished of this country. In addition, it is in an especially good position and has the specialized resources to evaluate the faithfulness and effectiveness with which the people's counsel represents the interests of the poor. Through its Community Action Programs, Vista Volunteers, Legal Services Offices, and Job Corps Centers, the OEO is in daily, intimate contact with the poor. It also has the advantage of a broad and continuing experience with the poor and their special needs and problems, and a particular interest in providing funds to secure adequate legal representation for the economically underprivileged. Empowering

the OEO Legal Services Program to make grants to a people's counsel for the purposes outlined in this Article might just round out this federal agency's current attack on inadequate legal representation for the poor generally.

On the other hand, there is a very persuasive reason to appoint another federal agency as the grant-making body. The OEO is one of the most significant federal agencies making rules with a substantial impact on the poor. That body will, therefore, be one of the agencies before which the people's counsel will continuously have to represent the collective interests of the poor. If the OEO were designated as the agency to finance the people's counsel, it would necessarily be put in a position whereby it could influence—perhaps detrimentally—its grantee's representation of the poor with respect to the OEO's rulemaking. Regardless of the purity of the OEO's actions in this regard, such a structural situation might cause the people's counsel to be unnecessarily timid in representing the poor's interests before the OEO. Designation of the OEO as grant maker for this purpose would also make less credible to the poor the efforts of the people's counsel to represent their interests before the OEO. Even if it were untrue, the poor might think that their counsel would be likely to play ball with its benefactor. For these reasons, any government grantor of funds to support the people's counsel should not be an operating agency whose programs have a large impact on the poor.

V. SECTION 4 OF THE ADMINISTRATIVE PROCEDURE ACT

A. *Generally*

Even if the above recommendations are adopted, there is inadequate assurance that the interests of the poor will be represented in federal rulemaking unless some means is devised by which to guarantee such persons notice of proposed regulations substantially affecting them and an opportunity to submit their views to the proper authorities. The required notice and opportunity-to-participate provisions of section 4, subsections (b)-(e) of the APA might be adequate for this purpose were it not for the blanket exemptions from those provisions found in section 4(a).³⁸

38. Administrative Procedure Act § 4, 5 U.S.C. § 553 (1964):

- (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
- (1) a military or foreign affairs function of the United States; or
 - (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
- (b) General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served

A majority of the federal administrative programs substantially affecting the poor are excepted from the notice and opportunity to participate requirements of subsections (b)-(e) by the exemption for matters relating "to public property, loans, grants, benefits or contracts" found in subsection (a)(2). This means that in rule-making for most programs of special concern to the poor, federal agencies need not give any notice of proposed regulations in the Federal Register. Similarly, in the excepted situations, federal agencies need not allow "interested persons," including the poor or their representatives, to participate in rulemaking "through the submission of written data, views, or arguments" or through "the right to petition for the issuance, amendment, or repeal of a rule." Of course, the relevant agencies have the discretionary authority to give notice and allow participation in the excepted situations, but they are under no obligation to do so.

B. Should the APA Be Modified To Cure this Problem?

Question 3 of the special questionnaire sent to the relevant federal agencies as part of this study asked:

In developing and promulgating rules for the implementation of each of these programs [with a substantial impact on the poor], does your department or agency follow the provisions of 5 U.S.C. 553(b)-

or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rulemaking proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
 - (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
- (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.
 - (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date except—
 - (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
 - (2) interpretative rules and statements of policy; or
 - (3) as otherwise provided by the agency for good cause found and published with the rule.
 - (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

553(e) [APA section 4, subsections (b)-(e)], even when the rulemaking proceeding is excepted from these provisions by one of the exclusions in 5 U.S.C. 553(a) [APA section 4(a)]? If you do not do so, please describe the procedures you do employ in rulemaking in each of these programs.

The overwhelming majority of answers to this question indicated that the reporting agencies do not follow the notice and opportunity-to-participate procedures of subsections (b)-(e) when their rulemaking is excepted from them under section 4(a).³⁹ Only a very few agencies indicated a contrary practice, and even these confessed to inconsistency in this regard.⁴⁰ In addition, rulemaking procedures actually utilized by the agencies in the excepted situations are inadequate substitutes for those found in subsections (b)-(e) of APA section 4. Substitute procedures are not consistent and do not, in most cases, assure adequate notice to the poor or a sufficient opportunity for their participation. In some cases not governed by subsections (b)-(e), the agencies simply determine the rule they think appropriate and promulgate it without notifying or consulting with anyone outside the agency.⁴¹ In other cases, agencies give notice to, and engage in informal consultation with, whomever they happen to think appropriate under the circumstances.⁴²

39. The Department of Agriculture, for example, reported that "the Department does not follow the provisions of 5 U.S.C. 553(b)-553(e) in developing and promulgating rules for the programs listed above"; the Department of Housing and Urban Development reported that "the provisions of 5 U.S.C. 553(b)-(e) are not followed for programs covered by the exemption"; and the Veteran's Administration reported that "in developing and promulgating rules for the implementation of veteran's programs we do not generally follow the provisions of 5 U.S.C. 553(b)-553(e), as our rulemaking procedures are excepted by the provisions of 5 U.S.C. 553(a)(2)."

40. For example, the Department of Labor reported that "in cases of rulemaking excepted from 5 U.S.C. 553 the Department of Labor does nevertheless follow the provisions of section 553 when it deems it appropriate or desirable to do so." The Department of Transportation also reported that while it does follow § 553(b)-(e) [APA § 4, subsections (b)-(e)] for some programs exempted from § 553 (APA § 4), at the present time it does not do so for most such exempted programs.

41. For example, the Small Business Administration reported that "under the exemption in 5 U.S.C. § 553(a), rules for [the Local Development Company Loan Program and the Economic Opportunity Loan Program] are initially published and issued in the form adopted by the agency." The Department of Labor reported as to rulemaking exempted from § 553 (APA § 4) that it "frequently gives public notice of proposed rulemaking and invites public participation therein when the proposed rule is expected to have widespread effects and when for any other reason it is considered desirable to obtain the views and objections of those to whom the rules would apply. Otherwise, the rules are evaluated by the bureau concerned, and are adopted and published in the Federal Register."

42. For example, the Tennessee Valley Authority reported that "the formulation and implementation of TVA policies in carrying out its program of resource development use are excluded from the rulemaking procedure of 5 U.S.C. § 553 by the provisions of subsection (a). Such policies and the implementations thereof are determined by the TVA Board and are recorded for internal guidance in an administrative code.

Question 4 of the questionnaire asked the same federal agencies responding to the prior question the following:

What disadvantages, if any, do you see in a statute which would eliminate the exclusions now in 5 U.S.C. 553(a) [APA section 4(a)] *as they may apply to . . .* [your programs with a substantial impact on the poor], and thereby would make the provisions of 5 U.S.C. 553(b)-553(e) [APA section 4, subsections (b)-(e)] applicable to all rulemaking relating to these programs? (Assume that the several exceptions now in sections 553(b) through (e) would remain unchanged.)

Although a number of agencies saw no substantial disadvantages in eliminating the blanket exclusions of subsection (a) under the specific conditions indicated in the above question,⁴³ most respondents thought it undesirable to eliminate any of these exclusions. The reasons advanced for maintaining the section 4(a) exceptions to the requirements of subsections (b)-(e) varied: elimination of the exceptions is unnecessary;⁴⁴ it would make rulemaking too cumbersome and thereby deprive the agency of desirable and necessary flexibility in the adoption of its rules;⁴⁵ it would cause needless and injurious delay in the final promulgation of rules for some programs;⁴⁶ it

They are brought to the attention of interested units of government, organizations, and institutions, through discussion and negotiation and appropriate press releases." The Department of Agriculture responded with respect to its food programs that it does not follow § 553(b)-(e), but that "before their adoption, proposed regulations and amendments thereto are discussed with district personnel of the Department and with representatives of the State agencies, in general conferences, regional conferences or operating as task force groups." (Note that recipients of these food programs or their representatives were not among those listed as being consulted.)

43. The Department of Labor reported that it "does not anticipate substantial disadvantages to the programs listed in response to question 1 from the elimination of the exclusions now in 5 U.S.C. 553(a)" and the Department of Transportation reported that "we would not object to elimination of the exemptions for loans and grants. The Department is, in fact, not taking advantage of the exclusion in the case of Federal airport aid, and is considering following this course in the case of its other grant and loan programs."

44. For example, the Department of Health, Education, and Welfare replied that "we have found that in the grant-in-aid field, publication of notice of proposed rulemaking in the Federal Register is not the most suitable way to focus the attention of interested persons, agencies and groups on the proposal."

45. For example, the Tennessee Valley Authority responded that "application of the rulemaking procedures of 5 U.S.C. § 553 to the TVA resource development program would decrease its flexibility and hinder its effectiveness." Similarly the Department of Agriculture reported that "it would be unnecessarily cumbersome to apply the procedures of the statute and might deprive the Department of a desirable flexibility in the adoption of rules."

46. The Department of the Interior stated, for example, that "we would not favor the elimination of the exclusions in 5 U.S.C. 553(a) since to do so could produce injurious delays in the adoption of regulations." Similarly, the Small Business Administration replied that "it could complicate or delay rulemaking," and the Department of Agriculture reported that the "F.H.A.'s operations would be seriously delayed

would cause a tremendous increase in agency work and operating costs;⁴⁷ it would be insufficient as a means to assure in all cases adequate participation by the relevant people in rulemaking and, therefore, might sometimes needlessly require an agency to follow two sets of procedures in order to involve properly the right persons;⁴⁸ it might put the agency and those most directly affected by its policies in an adversary position, thereby discouraging mutual cooperation toward obtaining the best solutions to common problems;⁴⁹ and, it might conflict with some specific provision of the agency's enabling act.⁵⁰

In light of the injurious effect which these exemptions have on the ability of the poor to represent their interests in rulemaking, the above reasons for continuing them for programs substantially affecting the poor do not seem persuasive. It should be noted that elimination of the across-the-board exemptions in section 4(a) would still leave section 4(b)(B) in force. This provision states that "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore, in the rules issued) that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest," it does not have to utilize such procedures in its rulemaking. Furthermore, if the policies expressed in subsections (b)-(e) are presently sound respecting unexcepted situations, they should be equally sound with respect to "public property, loans, grants, benefits and contracts." The reason

and reduced in effectiveness if its rules were subjected to the mandatory notice and public procedure requirements."

47. For example, the Veteran's Administration responded that elimination of the section 553(a) exclusions "would lead to heavier workloads within the agency and a resulting increase in cost, as well as delay in implementation of newly enacted laws with a resulting delay in awarding benefits thereunder." In addition, although the Department of Labor saw no substantial drawbacks to repeal of the exemption in section 553(a) it did note that it "would, of course, substantially increase the cost of Government."

48. For example, the Office of Economic Opportunity responded that "the major disadvantage in a statute which would eliminate the exclusions now in 5 U.S.C. 553(a) is that it would require OEO to follow two sets of procedures, those of 5 U.S.C. 553, which would generally prove ineffective in reaching the poor, and those currently followed, particularly by CAP, which have proved effective and are constantly being made more effective."

49. The Tennessee Valley Authority responded that "procedures for the formulation of policies under the rulemaking requirements of 5 U.S.C. § 553 would place TVA and its distributors in an adversary position where the tendency would be for each distributor or group of distributors to try to gain an advantage in the formulation of the policy rather than working with TVA and other distributors in a mutual effort to find the best possible solution to each problem as it arises."

50. For example, the Department of Health, Education, and Welfare reported that with respect to some programs, "the authorizing statute provides for rulemaking procedures other than those provided by the APA"

for this is that the previously noted objections to the application of subsections (b)-(e) to the classes now excepted by subsection (a) can also be leveled against the applicability of the former provisions to rulemaking not presently excepted by subsection (a). Consequently, there are no persuasive arguments which preclude repeal of all exemptions contained in section 4(a) *as they may apply to programs with a substantial impact on the poor.*

The exemptions contained in section 4(a) of the APA might, therefore, be amended to require federal agencies to follow the provisions of subsections (b)-(e) in *all situations where their rule-making has a substantial impact on the poor.* A statutory change of this kind is somewhat broader than, but generally similar to, that contained in a recent bill introduced by Congressman Feighan of Ohio.⁵¹ Congressman Feighan's bill would authorize the Attorney General of the United States to lift the exemption contained in section 4(a) whenever he deems that desirable to protect the interests of the poor. Once the Attorney General lifted the exemption as to a particular rulemaking situation because the "interests of persons of limited means . . . make it appropriate," any "interested person," rich or poor, could presumably assert rights to participate under subsections (b)-(e). As noted earlier, agencies have unlimited discretion to permit public participation in situations excepted by section 4(a), but they are not required to do so; the Feighan bill would only extend this same discretion to the Attorney General where he decides the interests of the poor require it.

Some might argue that the Feighan bill, or a broader revision of section 4(a) expressly requiring federal agencies to follow the provisions of subsections (b)-(e) for *all* rulemaking having a substantial impact on the poor, raises serious fifth amendment due process questions of an equal protection nature. The argument is that statutory revisions of this sort give the poor an unfair and irrational advantage over all other Americans. The proposed modifications would require federal agencies to provide notice and an opportunity to participate in normally exempted situations where the poor would be benefited by such rights; but these modifications would not oblige agencies to provide these opportunities where they would only benefit the more affluent. However, this classification is rational because, unlike the poor, the American upper and middle classes have adequate alternative means for protecting their interests in rulemaking.

51. H.R. 17974, 90th Cong., 2d Sess. (1968); *see* note 24 *supra*.

To protect their collective interests, the more affluent members of our society do not need formal notice of proposed rules and an official opportunity to present their views to the appropriate authorities. After all, most official policy makers are middle-class persons who have had middle-class experiences and daily associations. Consequently, those who are responsible for making administrative regulations are oriented toward the middle-class point of view and are generally conversant with the collective interests of that group. They are, therefore, likely to understand and protect the collective interests of the more affluent, even where such persons do not have a chance to represent their interests formally in rulemaking proceedings vitally affecting them. In order to equalize the poor's position in rulemaking with that of better financed segments of society, the poor may need special guarantees to assure full consideration of their views.

Modification of the section 4(a) exemptions along the lines suggested above would assure that the poor and their representatives, including the people's counsel, would have a reliable means by which to discover and participate in proposed rulemaking of concern to them; they could simply watch the Federal Register. Such a change could probably be effected either by statute or by an executive order, since the President has the authority to command his subordinates to do that which they now have the discretion to do. Since a purely procedural requirement of this type would not seem to interfere with the substantive policy-making functions of the independent federal agencies, they may also be bound by such an order.

However, there is a substantial evidence that section 4(a) needs a general legislative overhaul. Alteration or repeal of that provision has been proposed apart from any more specific consideration of its effect on the ability of poor people to represent their interests adequately in the rulemaking process.⁵² Testimony adduced in the course of congressional hearings suggests the possible desirability of across-the-board revisions of the section 4(a) exemptions.⁵³ Consequently, it may be wise to leave the provision as it is pending further inquiry into the advisability of amending it generally. Instead of narrowly altering the provision at this time in order to solve the particular

52. See, e.g., S. 163, 88th Cong., 2d Sess. § 4 (1964) (Comm. Revision); S. 518, 90th Cong., 1st Sess. § 4 (1967).

53. *Hearings on S. 1663 Before the Subcom. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964); *Hearings on S. 518 Before the Subcom. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967).

problem under consideration, federal agencies should simply be urged, in strong terms, to follow the provisions of subsections (b)-(e) for all rulemaking substantially affecting the poor.

C. *Special Notice and Hearing for the People's Counsel*

For the present purposes, another proposal can be made which would partly obviate the need to amend the current exemptions contained in section 4(a). All federal agencies contemplating the promulgation of rules substantially affecting the poor should be *required* to notify the people's counsel of the pendency of such rules and to give this advocate for the underprivileged an opportunity to present the views of the poor. Imposition of this type of duty on a federal agency is not unprecedented. For example, Budget Bureau Circular A-85, discussed previously,⁵⁴ directs federal agencies to follow specific procedures with respect to the development of rules and policies for federal assistance programs that include among their eligible recipients state or local governments or quasi-public agencies. Unless special circumstances preclude it, issuing agencies are required to provide the Advisory Commission on Intergovernmental Relations (ACIR) with a copy of all proposed regulations—usually not less than forty-five days prior to their intended promulgation. The ACIR is then under a duty to transmit that information to various state and local government associations which have, normally, three weeks in which to comment to the agencies on the proposed regulations or policies. Another similar obligation to provide special notice and opportunity to appear is imposed by statute on the Interstate Commerce Commission:

Before hearing or disposing of any complaint (filed by any person other than the Secretary) with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, the [Interstate Commerce] Commission shall cause the Secretary [of Agriculture] to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard.⁵⁵

A similar requirement should now be adopted for all federal agencies with reference to their proposed promulgation of rules substantially affecting the economically underprivileged. If such a procedure were made mandatory, the present exceptions contained in section 4(a) would not seriously prejudice the ability of the poor to

54. See page 523 *supra*.

55. 7 U.S.C. § 1291(a) (1964).

have their views represented in the formulation of rules substantially affecting them. When it received notice of such contemplated rule-making, the people's counsel would disseminate that information to all interested poor people's organizations. After obtaining feedback from them, the people's advocate would affirmatively represent the views of the economically underprivileged to the relevant agency. The effective and economical operation of the people's counsel therefore makes it desirable to impose the following requirements on federal agencies: they must notify the poor's "official" group counsel of all proposed rulemaking substantially affecting poor persons and give it an opportunity to communicate to appropriate officials the views of the economically underprivileged with respect to those proposed rules.

It is true, of course, that this limited requirement would not be as satisfactory a cure for the problem as an outright modification of section 4(a) in all cases where poor people's interests are concerned. A substitute provision of the kind suggested above would not assure notice of proposed rulemaking to anyone but the people's counsel and those informed by the people's counsel; and in such circumstances no one but the people's counsel would have a right to present formally the views of the poor with respect to those rules. However, pending general revision of section 4(a), this seems a desirable requirement and a minimally satisfactory substitute guarantee for present purposes.

To ensure that the administrative process is not unreasonably burdened in some situations, an exception similar to that found in APA section 4(b)(B) should be engrafted onto the narrow requirement discussed above. Federal agencies should be allowed to promulgate rules substantially affecting the poor without giving prior notice and an opportunity to be heard to the people's counsel "where the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and . . . [an opportunity for the people's counsel to present its views prior to promulgation of the rules] are impracticable, unnecessary or contrary to the public interest." In cases of this sort, agencies should be required to notify the people's counsel, as soon as practicable, of any consummated rulemaking substantially affecting the poor. Moreover, they should also be required to provide it an opportunity to present the views of the poor with respect to the desirability of amending or rescinding any such rules. This require-

ment will at least facilitate a reconsideration of accomplished rule-making in light of the views of the poor where presentation of their position is impractical prior to rulemaking.

The specific requirements suggested here with respect to giving the people's counsel notice and an opportunity to be heard could be imposed by statute or executive order. The latter method might be as efficacious as the former in binding independent regulatory agencies, since the order would deal only with a matter of procedure and would not attempt to invade their substantive policy-making functions. The ease with which such an order could impose or remove these requirements, or modify them as the need dictates, may also make it a more desirable tool for this purpose than a statute.

VI. CONCLUSION

Any attempt to cure the poor's lack of representation in federal rulemaking substantially affecting their interests requires a number of remedies rather than a single one. Congress should institute procedures to facilitate and encourage greater self-initiated efforts by relevant administrative agencies to ascertain the views of the poor. Some body must also perform the functions of a clearinghouse coordinator in order to facilitate greater affirmative participation by the poor and their organizational representatives in rulemaking. To ensure consistent, affirmative representation of high quality for the collective interests of the poor, Congress should create a people's counsel with the responsibilities described above. To perform its function properly, the people's counsel must receive notice of contemplated rulemaking affecting the poor, and must have an opportunity to present poor people's views on the proposed rules to the relevant agencies.

All of these measures in combination should—if properly executed in light of their purposes—provide an adequate remedy for the problem at hand. These recommendations are desirable because they will improve the administration of government. They will assure that the administrative decision makers in the federal establishment are better informed about the interests of the poor than at present. These proposals should also eliminate one source of unnecessary tension between the poor and the federal establishment. They will provide procedures whereby the poor can get a fair hearing on the formulation of significant public policies affecting them. The specific proposals made here will not create any sub-

stantial negative impact on the rulemaking process. They will make important affirmative contributions to that process. Since the lack of representation for the poor in federal rulemaking is a critical problem, these proposals should be implemented as swiftly as possible.

APPENDIX A

Recommendations Suggested to the Administrative Conference of the United States on the Basis of the Above Study of Representation for the Poor in Federal Rulemaking.

In this context the term "poor" refers to that group of persons in our society unable to secure adequate representation of its collective interests in federal rulemaking because its members lack the individual or organizational financial resources to do so.

The rulemaking referred to is that defined by the Federal Administrative Procedure Act § 2(c), 5 U.S.C. § 551(4).

I (a) Federal agencies should engage in more self-initiated affirmative efforts to ascertain directly from the poor their views with respect to rulemaking substantially affecting them. For this purpose agencies should increase their use of existing procedures and should devise and utilize new procedures.

(b) Where feasible and practicable agencies should do as many of the following as are necessary to assure that they are fully informed with respect to the relevant interests of the poor.

(1) Agencies should make a special effort to assure that the poor are effectively informed of all proposed rulemaking substantially affecting them, and should provide opportunities for the poor to submit their views with respect to such rulemaking.

APPENDIX B

Recommendations Adopted December 10 and 11, 1968, by the Administrative Conference of the United States With Respect to Representation of the Poor in Agency Rulemaking of Direct Consequence to Them.

(These are the only statements on this subject attributable to the Administrative Conference of the United States.)

A. AGENCY EFFORTS

1. Federal agencies should engage more extensively in affirmative, self-initiated efforts to ascertain directly from the poor their views with respect to rulemaking that may affect them substantially. For this purpose, agencies should make strong efforts, by use of existing as well as newly devised procedures, to obtain information and opinion from those whose circumstances may not permit conventional participation in rulemaking proceedings. The "rulemaking" referred to is that defined by the Administrative Procedure Act, § 2(c), 5 U.S.C. 551(4) and (5).

2. Agencies should employ as many of the following procedures as are feasible, practicable, and necessary to assure their being fully informed concerning the relevant interests of the poor:

(a) Agencies should seek to inform the poor of all rulemaking proposals that may affect them substantially and should provide opportunities for the poor to submit their views concerning these and related proposals.

(2) Agencies should hold formal public hearings or informal conferences in close geographic proximity to the poor affected by contemplated agency rule-making.

(3) Agencies should specially invite individuals constituting a representative cross section of the poor to submit their views orally or in writing with respect to proposed regulations substantially affecting the poor.

(4) Agencies should conduct field surveys among the poor to discover their attitudes with respect to particular government policy-making substantially affecting them.

(5) Agencies should use advisory committees made up of representatives of the poor as continuing consultants with respect to all programs having a substantial effect on such persons.

(6) Agencies should, when necessary to assure adequate representation for the poor, pay the personal expenses and wage losses incurred by poor individuals incident to their representation in agency rulemaking hearings of such people's interests. Congress should clearly authorize federal agencies to make, in their discretion, such payments.

In deciding whether the use of any one or more of the above devices is feasible, practicable, or necessary in a given situation, agencies should resolve every uncertainty in favor of utilizing them; but their enumeration should not exclude or discourage the development and use of other devices to achieve the same result.

III (b) Federal agencies should follow the provisions of 5 U.S.C. § 553(b)-(e) for all rulemaking with a substantial impact on the poor, even though some such rule-

(b) Agencies should hold formal public hearings or informal conferences in close geographic proximity to the poor substantially affected by contemplated rulemaking.

(c) Agencies should take care to invite individuals constituting a representative cross-section of the poor to submit their views orally or in writing as to proposed rules substantially affecting the poor.

(d) Agencies should conduct field surveys among the poor to discover their attitudes concerning particular government policy-making substantially affecting them.

(e) Agencies should use advisory committees made up of representatives of the poor as continuing consultants for all programs having a substantial effect on such persons.

(f) When necessary to assure adequate representation for the poor, agencies should pay the personal expenses and wage losses incurred by individuals incident to their participation in rulemaking hearings. Congress should support agency requests for funds and for authority, where none exists, to make discretionary payments for this purpose. Agencies already authorized to make such payments in whole or in part should use their existing authority and should allocate funds accordingly.

In deciding whether the use of any one or more of the above devices is feasible, practicable, or necessary in a given situation, agencies should resolve doubts in favor of utilizing them; but their enumeration should not exclude or discourage the development and use of other devices to achieve the same result.

In carrying out paragraphs 1 and 2 of this Recommendation, agencies should consult with and coordinate their efforts with other federal agencies having responsibilities in this area and should make maximum feasible use of the facilities of such other agencies for communicating with and obtaining expressions of the views of the poor.

3. Agencies should be encouraged in appropriate circumstances to determine that the exemptions in 5 U.S.C. 553(a)(2) should not be applied with respect to

making is presently excepted from those provisions by the exemptions contained in § 553(a).

rulemaking which may have a substantial impact on the poor.

B. PEOPLE'S COUNSEL

II (a) (1) An organization should be created to employ a staff to act as "people's counsel." The people's counsel should represent the collective interests of the poor as a class in all federal administrative rulemaking substantially affecting them.

4. (a) An organization should be authorized by statute to employ a staff to act as "People's Counsel." The People's Counsel should represent the interests of the poor in all federal administrative rulemaking substantially affecting the poor.

(2) The people's counsel should be charged with assuring that the views of significant separable minority interests among the poor are represented in that process.

(b) The People's Counsel should be charged with assuring that the views of significant separable minority interests among the poor are represented in such federal administrative rulemaking.

(3) The people's counsel should be required to act as an information clearinghouse, disseminating intelligence respecting rulemaking substantially affecting the poor to all interested poor people's organizations.

(c) The People's Counsel should be required to disseminate to all interested poor people's organizations pertinent information concerning rulemaking substantially affecting the poor.

(4) The people's counsel should be authorized to intervene in its own name to represent the interests of the poor in federal agency adjudicative proceedings substantially affecting those persons.

(d) The People's Counsel should be authorized to participate suitably in its own name to represent the interests of the poor in any federal agency proceedings in which the poor have a substantial interest.

(5) The people's counsel should be empowered to seek judicial review of federal agency rules in its own name, and on its own motion, as a representative of the poor. This recommendation is not intended to alter the kinds of agency action amenable to judicial review or the scope of that review.

(e) The People's Counsel should be authorized to provide representation for organizations and groups of the poor who seek judicial review of administrative action substantially affecting their interests. This recommendation is not to alter the kinds of agency action amenable to judicial review, the requirements of standing to seek review, or the scope of that review.

(6) As an incident to its main responsibilities the people's counsel should be empowered to recommend to Congress or the President, or to both, such legislation or other action as it deems appropriate to solve problems of the poor.

(f) As an incident to its main responsibilities the People's Counsel should be empowered to recommend to Congress or the President or to both such legislation or other action as it deems appropriate to correct deficiencies in or otherwise improve federal programs having a substantial impact on the poor.

(b) (1) To provide for the performance of the functions outlined in recommendation II (a) Congress should create a new single-purpose people's counsel corporation modeled on the Corporation for Public Broadcasting (47 U.S.C. § 396 et seq.).

5. (a) Congress should provide for an appropriate body to perform the functions outlined in Section 4. Deserving of consideration as such body would be a new single purpose corporation, to be created by Congress, modeled on the Corporation for Public Broadcasting, Pub. Law 90-129, 81 Stat. 368 (1967), 47 U.S.C. (Supp. III) 396, and to be known as

the People's Counsel Corporation. In the event this form of organization is adopted, the following considerations should apply:

(2) The people's counsel corporation should be made tax exempt and authorized to accept grants of private funds. Gifts to the corporation also should be made deductible as charitable contributions for federal income tax purposes.

(3) Federal financing of the people's counsel corporation should be made available to the extent necessary to assure its effective operation.

(4) The governing board of the people's counsel corporation should be constituted to give the poor meaningful representation thereon. It should also be constituted to ensure close communications and an identity of viewpoint between the poor and the people's counsel provided to represent their collective interests.

III (a) An executive order should require all federal agencies to notify the people's counsel of any rules they propose to promulgate that would have a substantial impact on the poor. They should also be required by that executive order to give the people's counsel an opportunity to present the views of the poor with respect to such proposed rules. Exceptions to these obligations should be permitted only "when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that [such] notice and . . . [an opportunity for the people's counsel to present its views] thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). In these exceptional cases agencies should be required to notify the people's counsel, as soon as practicable, of any consummated rulemaking substantially affecting the poor, and required to give that counsel, as soon as practicable, an opportunity to communicate to the agency its views with respect to the desirability of amending or rescinding any such consummated rulemaking.

(1) The People's Counsel Corporation should be made tax exempt and authorized to accept grants of private funds. Gifts to the Corporation should be made deductible as charitable contributions for federal income tax purposes.

(2) Federal financing of the Corporation should be made available to the extent necessary to assure its effective operation.

(3) The governing board of the People's Counsel Corporation should be constituted to give the poor meaningful representation thereon. Such body should be constituted to ensure close communication with the poor and effective representation of the viewpoints of the poor.

6. All Federal agencies should be required by Executive order to notify the People's Counsel of all proposed rules which would have a substantial impact on the poor. Agencies also should be required by that Executive order to give the People's Counsel an opportunity to present the views of the poor with respect to such proposed rules. Exceptions to these obligations should be permitted only "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that [such] notice and . . . [an opportunity for the People's Counsel to present its views] are impracticable, unnecessary, or contrary to the public interest." (See 5 U.S.C. 553(b)(B).) In these exceptional cases, agencies should be required to notify the People's Counsel as soon as practicable of any consummated rulemaking substantially affecting the poor, and should be required to give the Counsel as soon as practicable an opportunity to communicate to the agency its views concerning the desirability of further action with respect to such rulemaking.

Without prejudice to creating or empowering any other appropriate body to perform the general functions outlined in paragraphs 4, 5, and 6, any special provision therefor should be so structured as to take maximum advantage of the capabilities in this field of non-government organizations, and of other public bodies, including notably the Office of Economic Opportunity.