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The Public and the Nation's Forests[†]

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THE NATION'S FORESTS are a vast experiment in public ownership. The people of the United States hold in common a rich and splendid kingdom of timber, rivers, minerals and mountains—well over two hundred million acres from New England to Alaska.

Ownership is easy, but effective ownership, including a voice in planning and management, is difficult to achieve. Managing the forests is no mere caretaker's job. There are fundamental choices to be made—choices which pit one portion of the public against another, and which can change irrevocably the character of the domain as a whole.

Forest land can be managed primarily for the exploitation of its material resources—its timber crop, grazing lands, minerals, water supply, and hydroelectric power. Or it can be given over to mass recreation—summer and winter sports, camping, picnicking, and resorts. Or it can be preserved for essentially spiritual values—a wilderness retreat from frantic city living; a sanctuary for the qualities of man that are “best when least in company.”

Today's growing population tears insatiably at the forests. As people spread into every corner of the land the forests shrink. Armies of mechanized campers invade. Dam builders covet choice valleys. Sheep nibble the high pastures. The power saw turns beauty into board feet. Roads drive deep wounds into the solitudes.

Management must decide between the competing demands on the forests. When different uses clash, which shall be favored? How are local needs to be balanced against broader interests? Who is to have the benefit of the economic resources, and on what terms? How are the conflicting recreational demands of fishermen, skiers, hunters, motorboat enthusiasts, and automobile sightseers to be satisfied? If tens of millions of people cannot be offered solitude, who is to enjoy it? Should the requirements of the future outweigh the demands of today?

How to make such decisions—and similar ones concerning every area of public ownership—is a major dilemma for democratic government.

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Government today has become so vast and complex that often it is impossible for the people, or their elected representatives in Congress, even to be informed of the issues. Professional bureaucracies grow up to perform the work of management and planning, and decisions touching the vital interests of the commonwealth are made in rooms insulated from the voice of the people.

In large measure, the power to make fundamental policy for the publicly owned forests has fallen to small professional groups. Bitterly controversial decisions—choices between basic values—are made by these groups with little or no outside check. How this has come about, and whether there is any way the people can or should assume a voice in determining the future of their forest heritage, are questions that will be explored herein.

I

CONGRESS DELEGATES ITS RESPONSIBILITIES

In a democracy, laws and policies, including laws governing publicly-owned resources, must theoretically be made in public by the people's elected representatives. But in today's overcomplicated world an overwhelmed Congress has been forced to delegate a large measure of legislative power to specialized executive and administrative agencies whose officials are not elected or directly controlled by the people.

When congressional relinquishment of the lawmaking function first assumed in major proportions, in the early days of the New Deal, the Supreme Court tried to halt the trend. The justices declared that legislative power as such cannot be delegated and that Congress can permit the executive agencies to make "regulations" only within the boundaries of carefully prescribed standards.¹ But growing government soon broke through this constitutional retaining wall, and the courts eventually ceased to demand strict standards for delegation.²

Congress has delegated control over different portions of the nation's forest land to three not always cooperative executive agencies of the federal government: The Forest Service in the Department of Agriculture, and the National Park Service and the Bureau of Land Management in the Department of the Interior. The Forest Service has the largest share. It administers all public lands reserved as national forests. The National Park Service has jurisdiction over areas of special scenic or historic significance, including parks, monuments, battlefields, and other reservations. The Bureau of Land Management controls immense stretches of public land, much of it treeless, but its holdings include choice timber on the

¹ *Panama Ref. Co. v. Ryan*, 293 U.S. 389 (1935).

² *E.g.*, *Lichter v. United States*, 334 U.S. 742, 785 (1948).

west coast and other forests in Alaska. Each of these agencies has been granted sweeping legislative and policy powers by Congress.

The Forest Service

The basic charter of the Forest Service is a 1960 statute declaring that:

It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. . . . The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. . . .³

The two crucial terms used above are defined as follows:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.⁴

Earlier statutes giving the Secretary legislative authority were left standing as additional sources of power. A few of these will be mentioned to show the general nature of the standards fixed as "guides" to the Secretary's action. He is authorized, on thirty days' notice, to sell timber in the national forests "for the purpose of preserving the living and growing timber and promoting the younger growth . . ." to the extent "compatible with the utilization of the forests."⁵ He can set aside areas for town sites upon a "satisfactory showing of need therefor."⁶ He may permit the use of national forest land for hotels, resorts, facilities, summer homes, stores, or commercial, industrial or public buildings, provided only that such use does not "preclude the general public from full enjoyment of the

³ Multiple Use Act §§ 1-2, 74 Stat. 215 (1960), 16 U.S.C. §§ 528-29 (Supp. III, 1962).

⁴ 74 Stat. 215 (1960), 16 U.S.C. § 531 (Supp. III, 1962).

⁵ 30 Stat. 35 (1897), 16 U.S.C. § 476 (1958).

⁶ 72 Stat. 438 (1958), 16 U.S.C. § 478a (1958).

natural, scenic, recreational, and other aspects of the national forests."⁷ When he finds that lands are "chiefly valuable for agriculture, and . . . may be occupied for agricultural purposes without injury to such national forests and . . . are not needed for public purposes" he may have them opened to homestead entry "in his discretion."⁸ He may permit the use of rights of way for electrical plants, power lines, radio and television, and communications facilities "upon a finding . . . that the same is not incompatible with the public interest."⁹ Under a similar standard, he may grant rights of way for roads and railroads,¹⁰ and for dams, ditches, canals, and reservoirs.¹¹

The National Park Service

The National Park Service in the Interior Department is required to preserve the special values of its lands; it cannot open them to multiple use. Nevertheless, the Service can make policy within wide statutory boundaries. Thus, the Secretary of the Interior is authorized to make such rules and regulations "as he may deem necessary or proper" for the use and management of the parks; sell or dispose of timber "where in his judgment the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery" in any such park; provide "in his discretion" for the destruction of such animals and plant life "as may be detrimental" to the use of any of the parks; grant privileges and leases for the use of land for the accommodation of visitors for periods not exceeding thirty years; grant privileges to graze livestock "when in his judgment such use is not detrimental" to the primary purpose for which the park was created; and grant such privileges, leases, and permits and enter into contracts relating to the same "without advertising and without securing competitive bids."¹² In addition, he may grant rights of way for power and communication facilities if these are not incompatible with the public interest;¹³ build airports in or in close proximity to the national parks if an airport is necessary to the proper performance of the Department's functions;¹⁴ build roads, bridges, and trails;¹⁵ and contract for services and accommodations for the public.¹⁶

⁷ 38 Stat. 1101 (1915), 70 Stat. 708 (1956), 16 U.S.C. § 497 (1958).

⁸ 34 Stat. 233 (1906), as amended, 16 U.S.C. § 506 (1958).

⁹ 31 Stat. 790 (1901), 16 U.S.C. § 522 (1958); 36 Stat. 1253 (1911), 66 Stat. 95, 96 (1952), 16 U.S.C. § 523 (1958).

¹⁰ 30 Stat. 1233 (1899), 16 U.S.C. § 525 (1958).

¹¹ 33 Stat. 628 (1905), 16 U.S.C. § 524 (1958).

¹² 39 Stat. 535 (1916), 45 Stat. 235 (1928), 72 Stat. 152 (1958), 16 U.S.C. § 3 (1958).

¹³ 36 Stat. 1253 (1911), 66 Stat. 95 (1952), 16 U.S.C. § 5 (1958).

¹⁴ 64 Stat. 27 (1950), as amended, 16 U.S.C. § 7a (1958).

¹⁵ 43 Stat. 90 (1924), 16 U.S.C. § 8 (1958).

¹⁶ 46 Stat. 382 (1930), 16 U.S.C. § 17b (1958).

The Secretary may also authorize timber sales, grazing, leases of land, and rights of way in specific parks; for example, in Yosemite Park he may "sell and permit the removal of such matured or dead or down timber as he may deem necessary or advisable for the protection or improvement of the park"¹⁷

The Bureau of Land Management

The miscellany of forest lands under the control of the Bureau of Land Management in the Interior Department is subject to no single pattern of statutory regulation. The lands revested or reconveyed under the Oregon and California Railroad and Coos Bay Wagon Road grants—among the nation's finest forests—are to be managed:

for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.¹⁸

Timber in Alaska may be sold by the Secretary of the Interior if necessary for consumption in Alaska; he may sell "so much thereof as he may deem proper."¹⁹ In cases not otherwise governed by law, the Secretary may sell timber on the public lands if the sale "would not be detrimental to the public interest"; he may also allow public or nonprofit bodies to take timber "in his discretion."²⁰ In addition, he may sell dead, down or damaged timber²¹ and permit some residents to cut timber.²²

In general, lands under the jurisdiction of the Secretary of the Interior, not otherwise reserved, may be disposed of in small units to any governmental body or nonprofit corporation for "public" or "recreational" purposes.²³ Small tracts may also be sold or leased to private individuals for residence, recreation, business or community sites unless this will impair the use of water for grazing or irrigation.²⁴ In addition, various types of rights of way may be granted.²⁵ Many other statutes bear on these lands;

¹⁷ 37 Stat. 81 (1912), 16 U.S.C. § 54 (1958).

¹⁸ 50 Stat. 874 (1937), 43 U.S.C. § 1181a (1958).

¹⁹ 30 Stat. 414 (1898), 48 U.S.C. § 421 (1958).

²⁰ 61 Stat. 681 (1947), 30 U.S.C. § 601 (1958).

²¹ 37 Stat. 1015 (1913), 44 Stat. 890 (1926), 16 U.S.C. § 614 (1958).

²² 26 Stat. 1099 (1891), as amended, 16 U.S.C. § 607 (1958).

²³ 44 Stat. 741 (1926), 68 Stat. 173 (1954), 43 U.S.C. § 869 (1958).

²⁴ 52 Stat. 609 (1938), 68 Stat. 239 (1954), 43 U.S.C. § 682a (1958).

²⁵ 55 Stat. 183 (1941), 43 U.S.C. § 931a (1958); 68 Stat. 1146 (1954), 43 U.S.C. § 931c (1958); 68 Stat. 1146 (1954), 43 U.S.C. § 931d (1958); 26 Stat. 1101 (1891), as amended, 43 U.S.C. § 946 (1958); 31 Stat. 790 (1901), as amended, 43 U.S.C. § 959 (1958); 36 Stat. 1253 (1911), as amended, 43 U.S.C. § 961 (1958).

they add up to broad general authority for the Bureau of Land Management.

The standards used by Congress to delegate authority to plan for the forests are so general, so sweeping, and so vague, that Congress has actually turned over virtually all of its responsibilities to the agencies. "Multiple use" does establish that the forests cannot be used exclusively for one purpose. But beyond this it is little more than a phrase expressing the hope that all competing interests can somehow be satisfied, and leaving the real decisions to others. The "relative values" of various resources are to be given "due consideration" but Congress has not indicated what those values are or what action shall be deemed "due consideration." Congress has directed "harmonious and coordinated management of the various resources," but it has left the Forest Service to deal with the uncooperative fact that different uses of resources often clash rather than harmonize. Most significantly, Congress has told the Forest Service to "best meet the needs of the American people," but it has left it entirely up to the Service to determine what those needs are.

This last phrase shows the extent of congressional abandonment of its lawmaking and policy making power. What is the job of Congress if not to determine the needs of the people and how they should be met? The Forest Service has been given authority to decide whether the American people need the forests more for resources, recreation, wilderness, or dams and public power. And because Congress has offered no standards or policies of its own, almost any choice by the Forest Service would be within its delegated authority. Whether the Service cuts trees, builds dams, puts up hotels, or leaves the woods undeveloped, it would be hard indeed to hold the outcome to be legally in conflict with any congressional mandate.

The standards used in legislation concerning the forests under the Bureau of Land Management, and to a large extent those concerning the national parks, are equally vague. Standards such as "not incompatible with the public interest," "extent compatible with the utilization of the forests," and "satisfactory showing of need therefor" are less policies than euphemistic phrases of abdication, giving away all real power; they are like the mumbled "drive carefully" employed by fathers when handing over the car keys.

The kinds of power granted by Congress are awesome—nothing less than the power to determine irrevocably the character and use of the nation's forest heritage. For example, the power to permit timber to be cut and sold, possessed to some extent by all three agencies, is the power to make a permanent choice between wilderness and a forest busy with roads and bulldozers. The authority to permit the construction of perma-

ment buildings, specifically granted to the Forest Service and the Park Service, is sufficient to allow the commercialization of recreation on a resort basis; parts of Yosemite and Glacier Parks illustrate this.

Since Congress has transferred its functions in connection with the forests to three executive agencies, it becomes all-important to inquire about the nature of the process by which these agencies exercise their power. Are decisions made openly or in private? Are they made after deliberation and debate? Does the public have a chance to participate? Is there any check or review of what is decided? Answers to these questions will measure the degree to which the people retain control over policy making for their forests.

II

THE POLICY MAKING PROCEDURES IN THE AGENCIES

Elaborate internal procedures have been adopted by the forest agencies to exercise their management, policy, and planning functions. Decisions are reviewed and re-reviewed from field offices up to carpeted Washington chambers in stately administrative progression. Yet with only a few exceptions—important but limited—decisions are made wholly within the executive agencies, without notice to or participation by the public, and without effective check or review beyond the Secretary of Agriculture or Interior.²⁶

In the Forest Service, procedure begins at a planning stage. National, regional, and subregional guides are prepared, with the assistance of Forest Service personnel on all levels.²⁷ These tend to be very general, however. Specific decisions usually follow an upward route from local Forest Service officers, who make the proposals, through review at a regional level, to final approval in Washington. If the decision requires funds, it will also be considered by budget officials in the Department of Agriculture, by the Budget Bureau, and ultimately by Congress as part of the appropriation procedure.

Throughout this activity there are outside influences of varying importance. Local rangers are officially encouraged to participate in local civic activities, and to discuss the Service's plans on the local level. The Service

²⁶ An excellent general description of policy formation and decision making for the public lands is found in CLAWSON & HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* 132-94 (1957).

²⁷ Illustrations of the three types of planning documents are: FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, *DEVELOPMENT PROGRAM FOR THE NATIONAL FORESTS* (Misc. Pub. No. 896, Nov. 1961); FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, *MANAGEMENT OBJECTIVES AND POLICIES FOR THE HIGH MOUNTAIN AREAS OF NATIONAL FORESTS OF THE PACIFIC NORTHWEST REGION* (April 1962); FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, *EAST SIERRA SUBREGION MULTIPLE USE GUIDE* (1961).

appoints national and regional advisory councils which consult from time to time. On every level there are informal contacts with representatives of organizations, members of Congress, public officials, and interested persons who write in.

Procedures and influences in the National Park Service and the Bureau of Land Management are not dissimilar, but generally speaking they are less elaborate. All three agencies make "institutional" decisions—group decisions in which it is difficult to pinpoint individual responsibility.

In none of the three agencies do the over-all procedures provide an opportunity for the general public to participate. The agencies maintain close informal contact with some outside persons and organizations, but these are not equivalent to the public. No general notice of the pendency of particular decisions is given and no general opportunity to be heard is afforded. There is no procedure by which the public can initiate proposals. The post office is always available but the influence of letters on official action is uncertain.

In short, there is a wealth of informal influence on the decision making process, but virtually no formal public rights. The distinction is an important one, because the informal "public" is selective; and because formal expressions of views must be given a degree of consideration and review that informal expressions cannot expect.

One exception to the practice described above occurs whenever proposed action will interfere with the contractual rights or other legally protected interests of a particular individual. Then the individual affected may seek to have the decision reconsidered. The Forest Service has detailed regulations governing the procedures in such situations.²⁸ The aggrieved person is permitted to file a written request for reconsideration, and may present evidence at a hearing, after which the agency renders a final decision based upon the record made at the hearing. The Bureau of Land

²⁸ 36 C.F.R. § 211.2 (1960). There are actually two separate procedures. The first—§ 211.2(a)(1)—applies to the following persons:

Any person having a contractual relationship with the Forest Service (other than one relating to the construction, alteration or repair of public buildings or works, or to the purchase of administrative supplies, equipment, materials or services), including an application therefor, aggrieved by any administrative action or decision of an officer of the Forest Service relating thereto

This is the class of persons entitled to hearings. A second class of persons, entitled only to file a written statement and to have a reviewing officer prepare a statement of review and explanation, is described as follows: "Any person aggrieved by any administrative action of an officer of the Forest Service other than those relating to contractual relationships . . ." § 211.2(b). The key word here is "aggrieved" which in its legal meaning is limited to persons suffering certain types of "legal injury." Compare Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958).

Management has regulations for hearings on timber management units and rights of way in its northwest forests.²⁹

This special procedure is actually of very narrow effect. It confers no rights on the general public. Only in rare cases would any person have an individual legal grievance against the broader management or planning decisions of the agencies. Cancellation of a contract to sell timber could be reviewed at the instance of the buyer, but the underlying decision about the use of the land for lumbering, watershed, or recreation would usually not touch on any legal rights.

A far more important exception in terms of public participation is the so-called advisory hearing procedure. When an announced decision produces a loud enough clamor, the forest agencies have sometimes held advisory public hearings. This procedure is used on an *ad hoc* basis by the Park Service; the Forest Service has formally adopted it to assist in the making of wilderness classification decisions. This procedure, although it applies to only a tiny proportion of decisions concerning the forests, reveals a great deal about the underlying problem of public participation in forest planning. Accordingly, the wilderness hearings will be considered in some detail.

The Wilderness Advisory Hearings

The Forest Service has recognized the desirability of preserving some forests in their natural state, by regulations providing for the classification of sections as wilderness areas or wild areas. Such areas are closed to lumbering, to roads, and to the more civilized forms of recreational use; they are to be preserved as much as possible in their primitive condition.³⁰

Wilderness and wild areas may, under Forest Service regulations, be established, modified, or eliminated by order of the Secretary of Agriculture, in the case of the former, or the Chief of the Forest Service, in the case of the latter.³¹ According to the regulations, such action may be preceded by an advisory hearing at which members of the public can appear and present their views.³² Notice of contemplated action must be given at least 90 days before the effective date.³³ Then "if there is any demand for a public hearing" the regional forester is directed to hold one,

²⁹ 43 C.F.R. §§ 115.2-9, 115.14 (1954).

³⁰ A wilderness or wild area is one in which "there shall be no roads or other provision for motorized transportation, no commercial timber cutting, and no occupancy under special use permit for hotels, stores, resorts, summer homes, organization camps, hunting and fishing lodges, or similar uses . . ." 36 C.F.R. § 251.20(a) (1960).

³¹ 36 C.F.R. §§ 251.20(a), 251.21 (1960).

³² 36 C.F.R. § 251.20(c) (1960).

³³ *Ibid.*

and to make a report of it to the Chief of the Forest Service, who submits recommendations to the Secretary of Agriculture. The regulations contain no additional details.

The above regulations, which have the force of law, are supplemented by the *Forest Service Manual* and the *Forest Service Handbook* which are interoffice directives to Forest Service officials. Under the manual, action toward establishment, modification, or elimination of a wilderness or wild area is started by a district ranger, who prepares a report in standard form describing the area, and assessing its "value for recreation versus value for other uses." The report then goes to the forest supervisor, who reviews it, amends it if necessary, and forwards it to the regional forester with recommendation for approval or disapproval. The latter can reject it or forward it to the Chief.³⁴

If the Chief tentatively approves, the regional forester causes notice of the proposed action to be posted for a period of 90 days to six months. The notice includes the statement that a hearing will be held if there is reasonable demand. The regional forester must also see that the notice is brought to the attention of groups known to be interested in wilderness and wild areas. If the regional forester determines that there is demand for a hearing, it is his responsibility to call one.

The hearing itself is held before a presiding officer appointed by the regional forester.³⁵ Ordinarily he is an attorney with the Department of Agriculture.³⁶ The time and place of the hearing are apparently discretionary with the regional forester. The hearing is public and informal. After an opening statement by the presiding officer, a Forest Service representative outlines the proposal under consideration. Other persons are then permitted to present their views. Cross-examination is not permitted, but questions for other speakers may be addressed to the presiding officer. After the hearing the presiding officer prepares a report containing a summary of the issue and the testimony, and this is submitted to the Chief to assist him in making his decision.³⁷

The Adequacy of Advisory Hearings

In any hearing procedure the crucial elements are notice to the public, opportunity to be heard, the method of decision, and the method of reviewing the decision. The advisory hearing procedure raises problems in connection with each of these elements.

³⁴ FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FOREST SERVICE HANDBOOK §§ 2321.32-33 (Oct. 1958).

³⁵ *Id.* § 2321.34.

³⁶ *Id.* § 2321.34a.

³⁷ *Id.* § 2321.34.

Forest Service regulations go to considerable lengths to provide adequate notice: publication in local newspapers, posting, and special notification of interested groups. The difficulty is that wilderness classification is of interest to the public as a whole, yet only local people, plus certain special interest groups, are likely to hear about the Forest Service proposal. Hence the hearing is likely to be a debate among local interests, rather than a weighing of the forest plan in terms of national goals. The people of eastern cities have a major stake in forest policy, yet they are unlikely to be represented at hearings, while nearby hamlets take clamorous part. Perhaps there is no realistic way that notice could be given nationally. But the problem is real enough.

Opportunity to be heard is freely granted to all those seeking to participate in an advisory hearing. The difficulty here is that the issues open for discussion at the hearing may be, as a practical matter, severely limited. It is likely to be a pro or con debate on the Forest Service proposal without any practical way to consider alternatives. This is not necessarily the fault of the Forest Service procedures, but may be inherent in the nature of the advisory hearing itself.³⁸

The process of deciding, on the other hand, raises problems which quite clearly flow from the specific hearing procedures fixed by the Forest Service. A proposal to establish or change a wilderness area is initiated by local Forest Service officials. These same officials are then responsible for the appointment of an officer to preside at the hearing. This officer, who is usually a local attorney for the Department of Agriculture, performs only the very limited function of reporting the testimony. According to Forest Service practice, the real decision is that of the regional forester and the Chief, both of whom are responsible, with their subordinates, for the original recommendation.

This procedure combines in one group of persons the functions of advocate and judge, and makes no provision for a detached judgment. It thereby does violence to the well-established principle of separation of functions embodied in the Administrative Procedure Act,³⁹ in court decisions and in

³⁸ The problems mentioned in the last two paragraphs are documented and considered in Webb, *Forest Service Reclassification Procedure: The Three Sisters Controversy*, 1962 (unpublished, Yale Law School Library). In 1954 a hearing was held on a Forest Service proposal to eliminate part of a wilderness area to make lumbering possible. Local interests were predominant at the hearing. The principal issues discussed were the need of the local economy for additional lumber business, various other local needs, and the relative merits of various boundaries for the wilderness area. Although the evidence in favor of the Forest Service proposal was far from convincing, its new boundary was subsequently adopted by the Secretary of Agriculture without explanation other than the statement that the reduced wilderness area would satisfy the wilderness needs in that locality.

³⁹ 60 Stat. 239 (1946), 5 U.S.C. § 1004(c) (1958).

various studies of administrative procedure.⁴⁰ It is the long experience of lawyers that distinterested, well-considered decisions are most frequently secured by a clear-cut separation between those who advocate and those who decide.⁴¹ The danger to be prevented is not necessarily bias or unfairness, but simply the likelihood of a closed or made-up mind, a weakness to which all humans are subject. Many agencies called upon to decide between competing interests have established a separate group of hearing officers who do not share in day-to-day work. It is too much to expect that foresters who initiate and argue in support of a particular proposal can then adequately evaluate public criticism or counterproposals which often represent thinking they have rejected.

A fourth problem with present advisory hearings is that there is no requirement comparable to that found in section 4(b) of the Administrative Procedure Act that the decision be supported by a statement of reasons. A statement of reasons can be a barren formality. But it can also have the effect of requiring someone to consider the testimony at the hearing and explain to himself (and therefore to others) why one point of view is to be accepted and another rejected. After all, in a purely advisory hearing the public may talk, but there is no assurance that anyone will listen. Requiring that decisions be explained might encourage listening. Furthermore, a statement of reasons provides a reviewing officer with some tangible basis for determining whether a decision is justified.

This leads to a final defect in the Forest Service advisory hearing procedure: lack of procedures for public participation in review. If an initial decision is made after a hearing, and based upon reasons publicly stated, there should be opportunity for dissatisfied persons to make objection and argument (at least in writing) before the Chief of the Forest Service or the Secretary of Agriculture makes a final decision. The present procedure has little provision for the correction of error, and little to ensure that final decisions are made only after genuine deliberation.

In summary, if it is accepted that public participation in forest agency planning is desirable, the advisory hearing procedure has serious shortcomings. It does not live up to the standards of the Administrative Procedure Act and the general law that has developed around the act. Yet advisory hearings (which are used for only one of the many types of forest decisions) are better than nothing, and better also than reliance on informal consultation with certain groups and interested individuals.

⁴⁰ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41-45 (1950).

⁴¹ See 2 DAVIS, *ADMINISTRATIVE LAW TREATISE* 13.01-11 (1958).

III

PUBLIC RIGHTS IN THE AGENCY PROCESS

Since forest agency procedures offer so little effective opportunity for participation by the general public, it becomes important to ask whether the public has any rights established by statutes or the courts. In other words, does the general law offer any means by which members of the public can force an agency to heed their views?

In the few instances where citizens have attempted to challenge management decisions concerning the public lands, the complainants were rebuffed by the courts. In 1961 the Superintendent of Yellowstone Park undertook an elk-slaughtering program that aroused intense controversy. Three men, all outfitters and guides, brought a suit in which they alleged that the Superintendent's action would drive them out of business; that it was a wanton, cruel, and needless slaughter; and that the Superintendent had shown a highhanded and autocratic attitude toward the complainants. Dismissing the suit, the court said that it could not "correct mistakes or wrongs allegedly resulting from abuse of discretion or from absence of necessity"; the courts "cannot assume a wisdom superior to that of the executive or legislative departments with respect to the disposition of animals in Yellowstone Park."⁴² Similarly, a land classification decision under the Taylor Grazing Act has been held to be non-reviewable⁴³ as has a proclamation setting aside an area as a national monument.⁴⁴ And when a citizen sought to challenge a Presidential proclamation prohibiting the hunting of wild geese, he was told that there was no judicial review because the action was "a proper exercise of the unlimited and unreviewable discretion vested and reposed by the [Migratory Bird Treaty] Act."⁴⁵

Congress seems to have intended these results. None of the statutes conferring on the Department of the Interior or the Department of Agriculture powers over forest management provide that the public must be permitted to participate in basic decisions of the National Park Service, the Forest Service or the Bureau of Land Management. Congress, at least in those specific statutes, has vested sole policy making authority in the agencies.

There is, however, a general statute dealing with the procedures of all government agencies. This is the Administrative Procedure Act, passed in

⁴² *Frost v. Garrison*, 201 F. Supp. 389, 391 (D. Wyo. 1962).

⁴³ *Sellas v. Kirk*, 200 F.2d 217 (9th Cir. 1952), *cert. denied*, 345 U.S. 940 (1953).

⁴⁴ *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945).

⁴⁵ *Lansden v. Hart*, 180 F.2d 679, 683 (7th Cir.), *cert. denied*, 340 U.S. 824 (1950).

1946.⁴⁶ The act lays down procedural requirements for two types of agency processes: "adjudication" and "rule making."⁴⁷ Of the two, most forest management decisions more nearly resemble "rule making." The procedure required by the act for "rule making" is as follows: (1) notice of proposed rule making must be published in the Federal Register; (2) interested persons must be allowed to submit their views orally or in writing; (3) the agency must incorporate in any rules adopted "a concise general statement of their basis and purpose."⁴⁸

If the forest agencies conformed to these requirements, there would be a substantial increase in public participation. The agencies do not observe these procedures, however, and it is far from certain that the act requires them to do so.

In the first place, the "rule making" provisions do not apply to "any matter relating . . . to public property."⁴⁹ While it may be argued that this refers only to property in the narrow sense of buildings or street lamps, the exception can certainly be read to sweep in all forms of public ownership. Secondly, forest management decisions might be held not to come within the act's vague and unpredictable definition of "rule making."⁵⁰ In addition, even in cases of action that clearly is "rule making," an agency is not required to observe the act's procedures if it finds, for good cause, "that notice and public procedure are impracticable, unnecessary, or contrary to the public interest."⁵¹

The act does state that interested persons may appear and present their views to "any agency" on "any issue" unless this would interfere with the orderly conduct of the public business.⁵² But this provision has rarely been employed in practice, and it is doubtful if it confers on the public any enforceable rights if an agency chooses to slam the door.

Unless the three forest management agencies voluntarily subject themselves to the Administrative Procedure Act, the question of its applicability to them can be settled only by court decision. But here another difficulty arises; under the act judicial review is barred with respect to agency action

⁴⁶ 60 Stat. 237-44 (1946), 5 U.S.C. §§ 1001-11 (1958).

⁴⁷ 60 Stat. 237 (1946), 5 U.S.C. § 1001(c), (d) (1958); 60 Stat. 238 (1946), 5 U.S.C. § 1003 (1958); 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1958).

⁴⁸ 60 Stat. 238 (1946), 5 U.S.C. § 1003 (1958).

⁴⁹ *Ibid.*

⁵⁰ "Rule" means 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 . . ." 60 Stat. 237 (1946), 5 U.S.C. § 1001(c) (1958).

⁵¹ 60 Stat. 238 (1946), 5 U.S.C. § 1003(a) (1958).

⁵² Section 6(a) of the act, containing this provision, is discussed in Newman, *What Agencies Are Exempt from the Administrative Procedure Act?*, 36 NOTRE DAME LAW. 321 (1961).

that is "by law committed to agency discretion."⁵³ The issue has not been squarely decided, but it seems rather likely that building a road, classifying a forest area for lumbering or recreation—in fact, all management and planning actions—would be held to be within "agency discretion."⁵⁴ In summary, little assistance to the public can be expected from the Administrative Procedure Act.

Leaving aside the uncertainties and exceptions of that act, are there any rules of general law under which the public may have a right to participate in forest planning? Here a highly technical but probably insurmountable legal obstacle bars the path. The courts have held that the public as such cannot complain of government action; only an individual with the specialized interest called "standing" can assert any rights.⁵⁵ Under this principle, a member of the public could complain of action concerning the forests only if he had an individual contractual or other special interest to distinguish him from other members of the public. A concessionaire with a contract to maintain a hotel on national park land might have such a right; one whose favorite fishing spot in a national forest was threatened by bulldozers surely would not. It was on grounds of "lack of standing" that the courts held that a group of American citizens, citizens of Pacific islands, and other nationals could not challenge proposed nuclear testing.⁵⁶ In view of the nature of forest management decisions, it would be rare for anyone to have "legal standing" to participate or protest.

Behind this technical legal rule of standing lies a major problem: who is the "interested public" in terms of a planning decision? It has already been suggested that it is not just the special interests—loggers or concessionaires—that are affected, but the entire population that uses or might use the forests for any purpose. Suffice it to say here that this problem of "interest" lurks under the surface of all discussions of "public rights" in the agency process.

In any event, while the law is always in a state of change, it is clear that neither Congress nor the courts have recognized public legal rights in forest management beyond the point of voluntary invitation by the agencies themselves. It should be added that it is far from clear that judicial review of a

⁵³ 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958).

⁵⁴ See 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 (1958).

⁵⁵ "Standing" has defied definition. Even a lawyer as free from jargon as the late Judge Jerome Frank could only explain that absent a statute a citizen has no "standing" to complain in court about government action unless the action "invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interest must be either of a 'recognized' character at 'common law,' or a substantive private legally protected interest created by statute." *Associated Indus. v. Ickes*, 134 F.2d 694, 700 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

⁵⁶ *Pauling v. McElroy*, 278 F.2d 252 (D.C. Cir. 1960).

typical Forest Service or Park Service decision would have any important effect even if it could be obtained. Courts cannot review the wisdom of agency decisions, but only the limited question of whether a given action was a proper exercise of the power granted by Congress. Given statutory authority as broad as the Multiple Use Act, it is hard to see how a court could overturn as "unauthorized" any imaginable decision concerning policy or planning for the forests.

IV

THE PROFESSIONALS AND THE PUBLIC

Is a greater role for the general public in forest management possible or desirable? These questions invite two lines of inquiry. First, is forest management so much a technical field of specialized knowledge that only professionals can intelligently contribute to it? Second, even if forest management is not so technical, is unrestricted management by professionals desirable because it is most likely to achieve a balanced response to the public interest? Each line of inquiry needs separate consideration.

Management Issues: Technical or Public?

Virtually every forest management decision depends in part upon information of a technical nature. A knowledge of timber, soil, watershed, fire hazards, and recreation is essential to determine what uses can be made of a particular section, and under what circumstances. But when the technical information is fully known and evaluated, it will not necessarily dictate, in and of itself, the management choices to be made.

The theory of multiple use administration is that management requires conscious planning because the national forests and their resources are not adequate to fully satisfy individual desires for space and other resources. In other words, after the possible uses have been ascertained, there must often be a choice between them.⁵⁷ It is this choice that involves non-technical value judgments, as well as basic planning for the future.⁵⁸

Wilderness classification offers a prime example of a conscious choice between uses, and a choice between the present and the future. The *Forest*

⁵⁷ For a thoughtful discussion of this problem see Garratt, *Forest Land Use—Everybody's Business*, Yale Alumni Magazine, May 1962, p. 16.

⁵⁸ CLAWSON & HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* (1957) contains, in chapter 2, a thorough survey of the uses of federal land, and in chapter 6, a projection of the future.

Service Handbook recognizes this when it states that, to merit classification as wilderness, an area must satisfy, among others, this condition:

Its tangible and intangible values as a wilderness area must fully offset the value of all resources which would be rendered inaccessible or otherwise unavailable, both within and adjacent to the proposed boundaries, as a result of the classification.⁵⁹

And there must even be a choice among kinds of recreation:

The wilderness classification precludes many other types of use and it is necessary to consider all competing values. A majority of people who go to the forest for recreation do not have the ability or the desire to get away from the easy travel made possible by roads. They are interested in camping near their cars, picnicking, touring, and visiting summer homes or resorts. Many feel that the wilderness classification is discriminatory because it permanently excludes them from areas which might otherwise be developed for their enjoyment.⁶⁰

Wilderness classification clashes with many economic interests. It shuts off all revenues that would otherwise grow from the forests. Moreover, it directly hurts certain specific elements in the economy. Among these are the lumber industry, segments of the tourist recreation industry, and local county school and road districts, which by law are entitled to 25% of the receipts from timber sales from national forests within the county.⁶¹

Can it be said that the issues in wilderness classification depend wholly upon specialized knowledge? Clearly the answer is no. On the contrary, the ultimate issue is essentially political—the choice between the desires of different segments of the community. This is the kind of issue on which the public may have independent views. Thus, in New York State the entire forest preserve was set aside as wilderness through the political process, by virtue of a famous provision in the state constitution:

The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. . . .⁶²

Significantly, the constant proposals to amend the “forever wild” clause of the state constitution to permit more civilized forms of recreation always produce widespread debate among the general public.

⁵⁹ FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, *FOREST SERVICE HANDBOOK* § 2321.31(4) (Oct. 1958).

⁶⁰ *Ibid.*

⁶¹ 35 Stat. 260 (1908), as amended, 16 U.S.C. § 500 (1958).

⁶² N.Y. CONST. art. XIV, § 1.

Wilderness classification is not the only decision demanding a choice between conflicting interests. For example, use of the forests for grazing may interfere with their recreational and other values, as John Ise has pointed out:

The general rule is that *any* grazing of a forest is injurious, whether by domestic or wild animals, although there may be exceptions to this. . . . [T]he problem of the Park and Forest services often is: How much damage are we justified in inflicting on the land for the sake of promoting wool or meat production?⁶³

Building a dam for irrigation purposes creates a lake that may look scenic on a map but may actually be an eyesore because of changing water level. Ise says:

A dam usually raises the level of a lake reservoir in the spring of the year, killing the trees along the shores; but this water is for irrigation use, and by the end of the summer the level of the lake is far down, perhaps to the point where there is scarcely any water left, and there is revealed a broad shore strip of dead trees, black stumps, trash, mud, or dry earth. A dammed lake is usually damned scenically.⁶⁴

The greatest disaster ever to occur to a national park was the drowning of Hetch Hetchy Valley in Yosemite, a magnificent canyon, to supply water to San Francisco via a dam on the Tuolumne River.⁶⁵

The major economic use of the forest is lumbering. A decision to lumber has consequences for all other potential uses. It affects grazing and watershed. It profoundly affects recreation, even mass recreation, since the appearance and availability of the woods is altered, and the public is crowded into other areas. Lumbering permanently changes the character of the region, introduces roads and machinery, and intrudes an element of civilization virtually impossible to eradicate. Even such a seemingly technical question as whether to lumber a wind-damaged wilderness area to protect it against fire may involve major choices of policy, for wilderness values can be destroyed under the appearance of protecting them.

Choices between interests must also be made in such "managerial" decisions as whether to permit hotels, picnic grounds, ski jumps (with or without recorded yodels), or motorboats on forest lakes.⁶⁶

⁶³ ISE, *OUR NATIONAL PARK POLICY* 302-03 (1961). See also CHAPMAN, *FOREST MANAGEMENT* (1960).

⁶⁴ ISE, *supra* note 63, at 313; CHAPMAN, *supra* note 63, at 114.

⁶⁵ ISE, *supra* note 63, at 85.

⁶⁶ Articles in the *Sierra Club Bulletin* highlight some of these controversies as seen by conservationists. On wilderness areas, see *Sierra Club Bull.*, Jan. 1959, pp. 6-7; Feb. 1959, pp. 10-15; Nov. 1959, pp. 7, 10-11; Jan. 1961, pp. 4-7. On roads, see Jan. 1959, pp. 14-15; June 1960, pp. 10-11. On power lines, see Mar. 1960, pp. 14-15. Dams are discussed throughout ISE, *OUR NATIONAL PARK POLICY* (1961).

Such choices all require specialized information as a preliminary. How suitable is an area for grazing; how much damage will a given number of animals cause; how great would be the economic return; what are the alternatives? But with this information in hand, the competition of interests still remains and a choice must still be made—a choice on which the public might have intelligent views.

Moreover, management involves not only conflicting interests but policy determinations concerning each use. For example, even after it is decided to devote an area to recreation, judgment is necessary about the relative desirability of closed or open shelters, giant campgrounds, concessions, paved paths to scenic attractions, and so forth; these decisions determine the character of the recreational use. Here again, the issues are understandable enough to make public participation possible. "Housekeeping" often involves assumptions about what the public wants. Before concrete bridges for horses are built to keep riders' feet dry while crossing streams, before raucous, gasoline-powered "tote gotes" are allowed to shatter the forest calm, before luxurious hotels are built, and before a man-made waterfall of fire is approved as a nightly tourist attraction in a valley famous for its natural waterfalls, the public might well be given an opportunity to express "non-technical" views.

Enough has been said to make the point that many types of forest management decisions pose questions on which the public, if consulted, could have something intelligent to say. Expert advice on these questions is indispensable. But in view of the general policy of Congress, expressed in the Administrative Procedure Act, that interested members of the public should have an opportunity to participate in the formulation of agency decisions of general and future effect, and in view of the fact that the forests and parks are of uniquely great interest to the general public, exclusion of the public from most decisions is difficult to justify on the ground that they are "technical" only.

The Experts and the Public Interest

The mere fact that many forest management issues are non-technical ones of interest to the public does not demonstrate that they should be decided by the public. "The public" can be short-sighted, ill-informed, and indifferent. Professional managers, on the other hand, can sometimes take a broader, more detached, and more knowledgeable view of the public interest, and thus give the public better service.

Strong arguments exist in favor of leaving forest management to the experts. But the issue is not whether the public or the experts are to manage, but whether, and to what degree, the experts should be made aware of, and responsive to, public opinion. The answer to this question in part

depends upon whether the experts have shortcomings that public participation might remedy.

One problem common to many groups of professional managers in government is the tendency to lean heavily in the direction of one of the various conflicting elements of the public that is served. For example, the Interstate Commerce Commission has often been charged with being "railroad-minded" although it has responsibilities as well to the customers of railroads, to truckers, and to the public as a whole. The same charge of "one-sidedness" has been heard concerning the Maritime Board, the Federal Power Commission, and others.

The Forest Service is sometimes said to be unduly sympathetic to the lumber industry, one of its "clients." In other words, it is said to emphasize the timber management and sales part of its function over other aspects of "multiple use." Another complaint sometimes heard is that the Service, which has an unusually decentralized administrative organization, is overly concerned with the immediate local needs of communities near the forests, and correspondingly less responsive to over-all national and long-range needs.⁶⁷ Whether or not these particular complaints are justified is not important; they merely suggest a general administrative tendency that must be guarded against.

A related but different tendency of professional managers is that they sometimes develop a definite point of view or mode of thinking which makes them less receptive to attitudes beyond their own perspective. Foresters tend to think about forests in certain ways. They tend to think in terms of productivity. For example, a leading forester once spoke of the Adirondack wilderness preserve as an area condemned to "economic waste," "offset by no tangible public benefits."⁶⁸ He argued that lumbering does not destroy scenic values; "even clear cutting followed by fire affronts the eye only until nature heals the wounds with green."⁶⁹ Rangers preparing recommendations on wilderness classification are told to be particularly conscious of the loss of an area for lumbering. They are asked to discuss:

Economic and social values, if any, which would be withdrawn from use if area were established but which might be realized from commodity use, if area were not established. Discuss particularly the effect of withdrawing commercial timber on the allowable cut of adjacent working circles.⁷⁰

⁶⁷ The principle of decentralization is stated in *FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FOREST SERVICE MANUAL* § 1214 (May 1962). On the danger of "capture" of Forest Service officials by local interests, see KAUFMAN, *THE FOREST RANGER* 75 (1960).

⁶⁸ CHAPMAN, *FOREST MANAGEMENT* 505-06 (1960).

⁶⁹ *Id.* at 509.

⁷⁰ *FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FOREST SERVICE HANDBOOK* § 2321.33(8) (Oct. 1958).

Even with respect to beauty in trees the "professional" attitude may differ from that of the public:

Many people like big timber and do not understand or appreciate vigor or thrift in a tree. To them, a large overmature, spiketopped, catfaced, conky old veteran is magnificent, has character and is much to be preferred to a thrifty intermediate tree. Annual growth and clear lumber are of little concern to people enjoying the area for recreation, hence a big branching wolf tree may be much more desirable than a clear-boled tree.⁷¹

Another characteristic trait of professional government is the tendency for the managers to think of themselves more and more as owners. Having devoted their lives to a particular job of management, they begin quite unconsciously to think of "their" post office, "their" television channels, or "their" forests. This can lead them to feel that they alone know what is best, and without realizing it they may close their ears to the comments of "outsiders."

The profession of forestry has strong elements of solidarity. A vigorous *esprit de corps*, a proud history, and many common experiences bind foresters together. The same is true of Park Service officers. Such experts sometimes come to believe that they can best perform their responsibilities without "interference" by those who are mere amateurs.

These three tendencies of government agencies—to lean toward one interest, to develop their own point of view, and to develop a resistance to "outside" interference—are found in many different agencies. What makes these tendencies especially significant in the area of forest and park management is the degree to which the responsible agencies engage in long-range planning and permanent choices based upon notions of the public interest. Planning of this sort peculiarly requires receptivity to many points of view. Indeed, it can be argued that in a democracy the "public interest" has no objective meaning except insofar as the people have defined it; the question cannot be what is "best" for the people, but what the people, adequately informed, decide they want. Professional forest and recreation managers, no matter how dedicated, are not necessarily qualified to engage in this form of planning on their own.

V

TOWARD A POPULAR VOICE IN FOREST PLANNING

Professional government, typified by the forest agencies, is an inevitable development. As everything else gets more complicated and special-

⁷¹ *Id.* § 2312.32c(1) (Aug. 1959). This section was omitted by a March 1962 amendment to the Handbook.

ized, government must do likewise if it is to govern at all. Neither the people nor their representatives in Congress can cope with or even fathom the detailed problems of each specialized area. The professionals are today's badly needed managers and trustees. But professional government, even at its best, is not easily harmonized with the idea of representative democracy. Decisions are made for the people's benefit, but they are not made by the people.

Because the Forest Service, the Park Service, and the Bureau of Land Management, each of which represents a high standard of dedicated professional service, operate so largely without congressional direction, executive supervision, or public participation, the people lack real control over the management of their forests. Such loss of control does not necessarily mean bad management; the management may be the finest possible. But the choices made are not necessarily those of the people, and it is the core of the democratic faith that in the end only the people know their own best interests.

What, if any, remedies are available for this problem, which is common to so many of the specialized agencies of government? Congress is the logical starting place for such an inquiry, since excessive congressional delegation of power is in a narrow sense the cause of the problem. Plainly, Congress could draft new forest statutes spelling out "public interest" in specific detail and deciding, to some extent at least, the relative "values" to be placed on exploitation of resources, recreation, water power, wilderness, and other conflicting uses.

Ultimately, Congress does settle some disputes. A highly controversial dam like the one proposed for Echo Park in Dinosaur National Monument,⁷² major conflicts between water storage needs and the preservation of national parks and monuments,⁷³ basic wilderness policy such as is set forth in the proposed Wilderness bill,⁷⁴ and the establishment of new forests and parks are matters that Congress continues to pass upon. But these disputes are not the central problem we have been considering. It is the less dramatic area of forest planning and management, with all its subdued but vital policy conflicts, that raises the great problems. And in this area Congress has shown increasing reluctance to exercise its power.

⁷² See ISE, *OUR NATIONAL PARK POLICY* 476 (1961).

⁷³ See Colorado River Storage Project Act § 1, 70 Stat. 105 (1956), 43 U.S.C. § 620 (1958): "Provided further, that as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument."

⁷⁴ See, e.g., Statement of Senator Anderson on S. 174, 87th Cong., 1st Sess., 107 CONG. REC. 181-82 (daily ed. Jan. 5, 1961).

Perhaps Congress will assert itself more, but meanwhile it is necessary to look elsewhere if public ownership of the forests is to be meaningful.

Can the courts provide a degree of supervision that Congress has failed to give? The experience of recent times suggests that the answer is no. Judicial review plays a very important role in insuring the fairness of agency adjudication. Adjudication is the ordinary business of courts and they are well equipped to oversee an agency's performance of this work. But what can a court do when it is asked to review agency planning? The courts can set aside action that is plainly outside the scope of the agency's authority, that violates the Constitution, or that was taken in defiance of procedures set down by Congress. But if minimum requirements for agency action are met, and they almost invariably are, the courts' usefulness is largely at an end. Courts are out of their element when they try to pass on the merits of policy judgments. And when they attempt to supervise in detail the procedures that are followed in the making of such judgments, they are likely to produce not better results but a procedural mire in which participants flounder and action stagnates.

A device that the agencies themselves have utilized to permit public participation is the advisory committee which consults on matters as requested by the agency. Members of such committees are chosen by the agencies to represent various organizations and interest groups. However, the tendency of these committees is to represent mainly special interests. And there is no evidence that such committees provide a real check on agency action. Nor is the receptivity of the agencies to informally expressed views a substitute for clear-cut rights.

Perhaps the greatest conceptual difficulty in approaching the problem of controlling agency action dealing with publicly owned resources is the failure to recognize candidly that the agencies are really performing legislative functions. It may well be best to admit this fact (whether or not it does violence to constitutional principles) and stop looking to Congress or the courts to supply an inappropriate form of restraint. After all, there are safeguards peculiar to the legislative process itself which may offer a better starting point.

What are the principal checks on legislative action? The greatest is the elective process, a process from which agency officials are well sheltered. But there are other safeguards. In the first place, the public usually has plenty of notice of pending legislation, so that it can make its views known. Virtually nothing is secret in a legislature. Second, hearings usually are held to give the public an opportunity to state its views directly to the lawmakers. Third, there is debate, opposition, delay, and deliberation within a legislature. Fourth, legislation is usually accompanied by a report giving reasons to support it. And finally, the legislation is reviewed by the

executive in the glare of publicity, so that he too is subject to popular pressure. Sometimes legislatures disregard these safeguards, but rarely is it to the good of the legislative process.

Could this pattern be adapted to the forest management work of the Forest Service, the National Park Service, and the Bureau of Land Management? Adequate public notice of most major plans and decisions would be an important step toward preventing arbitrary or ill-considered decisions. Such notice would give the public an opportunity to consider and debate long-range agency plans determining what portions of a forest area should be put to particular uses. It would also give warning of important specific decisions, such as highway construction or lumbering, before irrevocable action was taken. Even if notice were limited to publication in the *Federal Register*, it would be available to interested groups.

Hearings might not be warranted for every type of agency action; they could easily drag everything to a halt. But the Forest Service advisory hearings have proven useful, and they could be used for other major decisions besides wilderness classification. Moreover, they might be used at the preliminary planning stage as well as to check on decisions already tentatively made. In either case, they would be more useful both to the public and to the agency if conducted by a person effectively independent of the proposing function in the agency, and if this person were allowed to make his own report on the merits, for the information of those empowered to reach a final decision.

The element of debate, deliberation, or opposition is difficult to introduce. On important issues, it might be desirable to provide opportunity for argument or submission of written views to the agency chief or department secretary, so that the person vested with final power of decision would have the benefit of several points of view. The risk is that this would become cumbersome, but the advantage, in avoiding rubber-stamp review, might outweigh the risks.

Another way to accomplish this same objective, one sometimes used in government today, would be to institutionalize different points of view. Outside groups or viewpoints can be given permanent representation within the agency structure. Thus the Forest Service might be given a division charged with the duty of protecting recreation, or wilderness, or grazing, from assaults by other uses. Such inside watchdogs can sometimes restore balance to an agency's viewpoint and guard special interests more effectively than the unorganized public. They offer self-criticism in what may otherwise be an institutional monolith.

The new Bureau of Outdoor Recreation in the Interior Department is supposed to coordinate all recreational planning. It is too early to know

whether it will prove an effective representative and partisan of recreation in the agency decision process.

Finally, those supporting a decision ought to be required to give reasons for it. This might, as it does sometimes in Congress, help to clarify issues and provide a focus for debate.

Subjecting every agency decision to piecemeal scrutiny would not be desirable; it might well prove paralyzing. But this would certainly not be true of scrutiny of long term management plans, which by their nature are not urgent. Such plans are already a part of Park Service and Forest Service procedure. Public views should be considered in the formation of plans, in the review of plans after they have been made in tentative form, and where specific action is taken that may be inconsistent with an existing plan. This would permit the public to participate in planning for the forests without subjecting each individual management decision to time consuming wrangles. It would be essential, however, that long term plans be reasonably definite and specific. Some of those that have been adopted are so general that they leave all real issues undecided. In any event, some major specific decisions, such as building a dam or a large hotel, undoubtedly deserve individual consideration.

The public needs one final right—the right to initiate. Of course anybody can make suggestions, whether procedure is available or not. But such suggestions may get short shrift. A procedure is needed to ensure serious consideration and review of proposals by the public concerning forest management. A proposal with substantial backing should require a hearing, and consideration above the local level.

It is hard to predict what effect these proposals would actually have. Agencies sometimes assimilate “procedural reforms” without any change in their actual practices; the reforms merely add to the richness of agency ritual and thereby further conceal the real process. Thus, if the forest agencies choose to ignore the public while going through the motions of listening, little real good would be accomplished by more hearings. Some government agencies actually listen and some do not.

Procedural reforms may also have too strong an effect. They may cramp an agency into an arthritic stiffness. The agency may come to believe it can do nothing without months or years of procedure, and as a consequence do nothing most of the time. This has sometimes happened to administrative agencies, and the consequence is that the public exchanges a vigorous, if unrepresentative, professional government for drift or maintenance of the *status quo* by default.

Despite these hazards, ventilation is basically healthy. Bringing decisions out into the open air is perhaps the greatest single insurance against arbitrariness. Secret decisions are undemocratic and often unsound, for

the agency, cut off from other points of view, may become the prisoner of its own preconceptions. The value of a hearing before an agency is thus much the same as the more general value of free speech in a republican government. A hearing cannot insure a wise decision but it can provide the opportunity for a wise one, and prevent some bad mistakes. Notice and hearings would require the forest agencies to stop, look, and listen.

CONCLUSION

As the planet we live on becomes more and more crowded, more wrinkled by worries and complexities, more pressed by needs, the earth's valuables increasingly have to be shared. The work of government as manager of the nation's public resources becomes one of its major tasks. Decisions about this common property—water power, air space, channels of communication, atomic energy, as well as forests—vitally affect each man's well-being.

But the people have lost effective control over these decisions to the professional management of bureaucracies. These structures, so largely independent of Congress, the President, and the courts, have a natural tendency to believe that they can decide things more wisely for the people than the people can decide for themselves. This attitude, that the experts "know best," is held by sincere and well-intentioned men. Perhaps it does produce the wisest decisions. But it is at war with the democratic concept.

The unavoidable fact is that the agencies, and the forest agencies in particular, are engaged in basic planning. They are making fundamental policy concerning resources, and in the process accommodating the conflicting interests in society. In discussing recreation, the *Forest Service Manual* says this:

Recreation resources of the national forests will be made available for public use and enjoyment, insofar as this is consistent with the over-all management of the national forests for the greatest public good. Their proper place in the management of the various resources will be determined through specific analysis and weighing of all relevant factors.⁷⁵

Thus the Service recognizes, in the matter-of-fact pages of its manual, that its ultimate job is nothing less than the definition of "the public good"—a task once reserved for philosopher-kings. This is the tremendous responsibility that Congress has delegated to all the forest agencies.

The great danger is that an entrenched professional bureaucracy will be shortsighted in its perception of the public good. It may see only the

⁷⁵ FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FOREST SERVICE MANUAL § 2302(1) (May 1958).

needs of the next decade when planning for a century is essential. It may see only local demands when national needs demand consideration. It may see where immediate economic gain lies but fail to see the values of "non-economic" uses. It may prove unable to adapt to changes, to innovate, to create.

Procedural reforms cannot be expected to solve the dilemma of how planning for "the public good" can be accomplished in a democracy. Professional planners and managers cannot be dispensed with. But some means of public participation, however inadequate, would at least offer the beginning of a broader-visioned and more democratic system of planning.

For the experts and professionals do have their limitations. Experts can tell us whether an area of forest can be lumbered at a commercially feasible price. But can they tell us whether an "overmature, spiketopped, catfaced, conky old veteran" should be saved for future generations?