COMMENTARY

The Role of CUBs in the Reclamation of American Government

by Robert C. Fellmeth

Political scientists now describe the American system of government as a "pluralistic model." Although somewhat obtuse, the term acknowledges that the civics model we studied in ninth grade has yielded to a "mixed" system. That is, the purity of constitutional democracy has been influenced by unofficial actors, including political parties, private interests, and entrenched bureaucracies. While many of these additions to the American three-branch design may well be benign, the increasing power of those organized around a narrow profit stake in public policies increasingly presents a threat of malignant character.

Some political theorists have foolishly rationalized that private organized influence simply represents "intensity of interest" entitled to greater weight than would be produced by the strict application of one person-one vote democracy. The problem with this conclusion is its failure to consider that there are many different kinds of intensely held interests, and that those which are now dominant represent intensity of *economic* interest in the here and now. Current apologists discount the fundamental ethical call of humankind to represent a set of diffuse interests—diffuse but nevertheless entitled to intensity of consideration: the concerns of consumers at large, the helpless and unorganized, and the future we leave to our legatees through the millennia to come.

The representation of the broad and long-term public interest is a vision America's founders expected our public officials to carry with them, and to guide them as they pondered the merits—and only the merits—of the issues which are the subjects of their official deliberations. To the extent those with such a public charge delegate their powers to those whose concern is narrow, pecuniary, self-interested, and temporal, that vision is betrayed.

The most unsettling form of private interest contamination is borne through private trade association and political action committee (PAC) influence of state officials. It is now a consensus judgment in the most arcane towers of academia: the three branches, constitutionally checking each other as they make public decisions in the perceived interests of the general citizenry, are no longer the determinants of American public policy. Rather, private interest groups have an influence substantially greater than was countenanced in our constitutional design.

How did we create an overlay of private influence to circumvent our traditional values of public control of public institutions? What are the implications of that creation? The answer is complicated, and disturbing to those who maintain some reverence for the principles of Jefferson and Adams.

Trend #1: The Horizontalization of America. Three trends in recent history particularly threaten the sustenance of democratic values. First, we have become a horizontalized society. There was a time when we related to each other more intimately in a vertical format: doctors identified with their patients, attorneys with their clients, businesses with their customers. We were a nation of small and for the most part independent entrepreneurs, subject to marketplace discipline. Increasingly, we have become a nation of employees, large corporate farms, factories, and, at the retail level, chains. In most industries and trades, we have organized around our occupational grouping. We now identify with our trade or professional peers. We have formed trade associations by the thousands. We are organized as never before in history along horizontal lines—each occupation with its own association, separate bureaucracy, and political action program.

The horizontalization that has occurred has been facilitated by strong support for its political manifestation—the now ubiquitous PACs. Normally, where competitors at the same level of production (such as physicians, or oil companies, or auto dealers, or banks) meet and discuss any subject, they are subject to strict scrutiny and limitations. They are by definition a "conspiracy or combination" under state and federal antitrust law. Competitors are supposed to compete, not cooperate. Cooperation undermines democracy and, instead of the consumer determining the marketplace by choosing between different products, the producers can determine (at least in the short run) the marketplace by limiting what is offered by private agreement. Such agreements can be to limit supply, not produce a product, not deal with another entity, allocate bids or territories, or fix prices. Such agreements are most likely to restrain trade, and constitute a felony offense.

But the most serious of these restraints—horizontal price fixing—seems to have an exception. In an abuse of the *Noerr-Pennington* doctrine,[1] trade associations believe that they may in fact fix prices horizontally at higher levels if they use the proceeds for purposes of political influence. Where a trade association representing the brunt of a market for a product or service so assesses its membership, the monies raised for its own political purposes do not come from the stockholders who own the enterprises and for whose benefit they are raised. Rather, applied industrywide, the assessment acts as an indirect tax on the consumers of that industry. Hence, when the insurance industry wanted to raise money for 1988 political initiative campaigns in California, it raised over $60 million dollars by agreeing to assess itself 1% of the premiums collected the prior year. This assessment was passed on to the public, which paid the bill—more than the amount spent by either national party on the presidential campaign in that same year. It cost the insurance industry little or nothing. Hundreds of associations have this kind of pass-through quasi-public power—the ability to assess the public huge sums using cartel arrangement and antitrust exemption, often in order to mislead the public, abuse its interests, and undermine the integrity of its government.

Trend #2: The Corruptive Influence of Political Money. The second troubling trend has been the influence of money on the making of public decisions. Certainly the problem of bribery remains, accentuated by the tendering of job offers to public officials while still in public employ, and the common offer of honoraria for speaking—which, for much of the nation, can consist of three minutes of ringing oratory at a breakfast meeting with the three lobbyists of the benefactor PAC. But much more troubling is the influence of campaign contributions. At present, for example, California has *no* limitations on campaign spending or campaign contributions except for a limited number of local races. One PAC can give $500,000

to a single candidate. Exacerbating this problem are newly-enacted state office term limits which require huge campaign funds by public officials who need to move to new seats and challenge those incumbents, who in turn must raise large war chests for defense.

Trend #3: The Growth of the Regulatory-Industrial Complex. The third recent dynamic is the growth of regulatory agencies. These agencies have been created by legislative act in substantial numbers—California now has over 200. Regulatory boards and commissions now "license" or regulate most of the economy of the state. They determine who can and who cannot practice a trade or profession—ranging from barbers and contractors to physicians and attorneys. They determine the state of our environment—the future of the land and water of the state, the heritage we shall leave our progeny. And they regulate our financial institutions and our utilities.

The regulation of financial institutions carries with it the particularly important determination of our basic financial health as a society: the flow of capital for new investment, the supply of credit for consumer purchases of autos, appliances, and homes. These institutions operate under restricted conditions of competition, and often in an adhesive manner *vis-a-vis* consumers—through the use of standardized contracts and the unilateral determination of late charges, balloon payments, prepayment penalties, etc. The financial industry's regulation has included unusual protection financed by public resources: the assessment of fees for publicly arranged insurance (fees which are assessed industrywide and passed through to consumers as an indirect tax); and by general fund taxpayer backstop.

In general, these regulatory agencies operate without close examination by legislatures and journalists, and substantially out of the public light. They are often governed by officials with immediate economic conflicts of interest as to the public policies they are empowered to decide. Most of them are current practitioners of the very trade or participants in the very industry they are charged to restrain in the public interest. Hence, not only are the regulatory agencies administered by persons often appointed by officials subject to campaign contribution influence, and governed by boards responsive to the same corrupting dynamic, but they consist of persons presently practicing in the trade or industry allegedly regulated for the protection of the broad public. Decisions are subject to the political power of the PACs, stimulated by job offers, and augmented by actual industry investiture as public officials.

Regulatory agencies operate under very general enabling statutes and are given broad authority to legislate through rulemaking. They have the power to define the requirements to engage in a business or trade, and specify what is and is not a violation of law. And they act as courts to discipline administratively those who violate state law or their rules, including the power to fine and expel licensees from their chosen occupation. Unlike formal judicial proceedings, however, these officials are permitted to engage in private or *ex parte* communications about pending rules or cases with persons who are parties to or interested financially in the outcome. Their decisions are subject to court review, but courts now substantially defer to their judgments on matters of substance.

A regulatory agency operates formally as a neutral legislator or judge, compelled to weigh two conflicting interests: the likely public-protection spirit of its enabling legislation, versus the constitutional requirement not to "take" contrary to law. That is, an agency may not deprive a regulated entity of property or limit its rights without due process and perhaps without just compensation. This is the setting for the momentous decisions made by regulatory agencies. In this context, and quite apart from the identity of the decisionmakers, the *imbalance* of advocacy before the agency exacerbates the distortion. As noted, those with an immediate profit stake have almost unlimited financial resources for purposes of advocacy, and they dominate in state regulatory proceedings. The balance is tilted against the broad interests of society—that is, consumers in general, taxpayers, the environment, the weak and dispossessed, children, and the future. In these agencies, influence by those organized to keep or to take for their immediate financial gratification is most manifest.

Confronting the Systemic Breakdown: The Options

The dilemma which confronts our democracy on a basic level is how to deal with the forces undermining democratic responsiveness; how to restore and preserve the proper concern for broader interests; how to check the excessive influence of groups with immediate financial goals; and how to bring a balance of advocacy before the tribunals determining important public policy. This is the political reality of the last decade of the twentieth century.

Option #1: Atomize. There are three basic approaches to rectifying the current dangers. The first is to atomize the excessive horizontal organization for political purposes by limiting campaign contributions, reversing the *Noerr-Pennington* doctrine which arguably permits industry to tax consumers to finance political activities, or applying antitrust principles. We recognize the right of each individual to engage in private business, but we enforce antitrust law to preclude collusion which undermines the economic democracy of a marketplace responsive to general consumer demand, determined from the bottom up by individual purchasing preferences. There is no divine law preventing us from applying this same rule to the political arena: you can do whatever you want as an individual, but we are limiting your right to act politically as an *organized commercial* entity.

However attractive this first option may be to utopia aficionados, it suffers from serious defects, including properly revered counter-values respecting the rights of political association. However, options two and three are worthy of serious consideration.

Option #2: Create an Independent State Which Makes Decisions on the Merits. The second tactic is to create an informed and fairly balanced political state—by assuring that there is a wall of integrity between those making decisions on our behalf and those with a profit-stake interest seeking to influence them. We accomplish this reform through the public financing of campaigns; the prohibition of all private honoraria, gifts, gratuities, and future employment from private groups to public officials; and by requiring public officials themselves to have no vested profit stake in the policies they decide for the general weal. To the extent expertise is needed, adequate and equally independent agency staffs properly provide it. And we assure balanced advocacy between groups with narrow, pecuniary interests and groups with broader interests.

Option #3: Organize the Diffuse and Dispossessed to Counterbalance. The third tactic is to organize more general interests to counterbalance the intensive organization of those easily coalesced around a profit stake. This tactic comports with the widespread—and perhaps regrettable—acceptance of the "pluralistic" model by political scholars. It has the advantage of fitting into the current societal ground rules of advocacy and influence. Most important, it satisfies the primal tenet of social change: never try to take anything away

from anybody. It is easier to not give someone something than to take it away after it has been given. Stated more pointedly, it is easier to add another actor to the play than to cut the parts of those who have learned their parts and have been profiting from them for many years.

CUBs: Ninth-Grade Civics Brought to Life

In this setting, the concept of citizens' utility boards (CUBs) is ingenious. It does not cost the taxpayer money. It does not subtract or directly challenge the political rights of any group. It simply facilitates the horizontal organization of those otherwise not in the script—those whose interests are most seriously underrepresented. It responds to the American instinct to let people organize and participate; to allow someone in; to provide balance and fairness to a legislative or judicial proceeding.

The CUB option partially addresses two of the three remedial strategies most capable of successful actualization. It provides more balanced advocacy in regulatory proceedings themselves—a kind of technical equity making the results more legitimate in terms of due process concepts. And it creates a political entity by horizontally organizing those who lack formal representation in the influence of public officials. To the extent political scientists correctly view such public officials as driven in vector-like fashion by their sources of influence, such political organization is essential. The CUB concept recognizes the reality that even if one were to succeed in accomplishing the second tactic of creating a wall of integrity so that the state made decisions on the merits of the issues, it would still be necessary to counterbalance advocacy before those neutral decisionmakers. Even where the decisionmaker is well-intentioned and deliberating on the merits, information and advocacy are also power and will often determine the result.

CUBs have begun to organize in a most propitious forum warranting their presence: the public utility commissions (or public service commissions) which regulate monopoly utilities. Here, the political power of those with a vested profit stake (the utilities) is momentous in terms of campaign contributions and often the selection of the regulators themselves. Legal and advocacy resources are even more egregiously imbalanced. The utilities are able to assess the costs of their legal advocacy from the ratepayers. This cost is considered by law a virtually automatic "prudent expense" passed through for direct consumer assessment—even where incurred at extremely high levels. Expert witnesses, in-house and retained counsel, and the use of utility staff give these entities an overwhelming advantage in any rulemaking or ratesetting proceeding. There are few limits on what can be spent, and those in whose interests the advocacy is advanced—the stockholders of the company—pay for little or none of it.

Utility regulators have an explicit constitutionally imposed duty to provide a fair rate of return to utility stockholders, which must be neutrally balanced against ratepayer, environmental, and other interests. The regulator is not a consumer advocate and is not permitted to impose a tyranny of the majority on the legitimate property rights of utility (or other) investors. Even where the regulator seeks to create an internal and separate staff role to accomplish ratepayer representation, the regulator remains an inadequate proxy for advocacy on behalf of the many. On a theoretical level, the agency staff is too politically removed from the direct control of the general constituency; on the practical level, the staff normally is not free to appeal to the courts a decision of the agency within which it operates. A CUB structure directly controlled by and responsible to ratepayers is capable of more legitimate representation of ratepayer interests, and only it is capable of assuring that balanced advocacy extends to court review, where precedents dictating standards and procedures of special import may be decided.

What CUBs ask for is nothing less than societal ground rules to facilitate what we claim to be our most cherished birthright—to organize, to contribute voluntarily, to discuss social issues, to provide helpful information to public officials, to counterbalance governmental proceedings dominated by one group at the expense of a larger group whose interests form the *raison d'etre* of the forum itself.

CUBs ask that public assets be made available simply so that citizens can communicate one to the other for these purposes; so they may establish private democratic institutions to enrich public democratic institutions, to the detriment of no one—except to the extent "detriment" consists of additional evidence and arguments to inhibit imbalanced and unfair rules and adjudications.

Our political, corporate, securities, and commercial laws allow for the organization, legal recognition, and—in many respects—the public subsidy of those organized around their direct and immediate financial concerns. Laws give individuals immunity from personal civil liability where corporations are formed, and confer numerous tax advantages on various commercial forms of organization—from limited partnerships to real estate syndications. There is no "natural order" to these societal ground rules; they represent policy choices about facilitating human organization for beneficial purposes. Adjusting our laws and rules to facilitate the organization of those underrepresented and excluded interests creates no radical precedent—even if the form of such stimulation may be different. Encouraging the general public to organize creates a defensible "pluralism"—where the whole plurality is included. Where generalized interests are present and strong, government by self-interested trade-offs of those immediately profiting is counterbalanced.

As Beth Givens' CUB study establishes, CUBs are not merely capable of performing such a function. They have proven themselves on four separate fields of encounter: Wisconsin, San Diego, Illinois and Oregon. CUBs have, at no expense to any citizen who does not wish to participate, influenced public decisions to limit what would otherwise be monopoly excesses by many billions of dollars, hundreds of times more in amount than their total cost to those voluntarily contributing. Nor has their impact been confined to rates. In a single contested case, the San Diego CUB (UCAN) was a primary litigator successfully halting what would have been the largest utility merger in United States history. The 1991 decision of the California Public Utilities Commission rejecting the merger found its direct and indirect social costs to be staggering—a decision to reject which few had anticipated at the outset of the request, and one attributable substantially to CUB advocacy and its ability to organize thousands of ratepayers around the issue.

Moreover, as Givens' study implies, the CUB model may well be properly extended into other industries such as insurance and finance, where analogous abuses addressed by CUBs are equally capable of amelioration by application of the CUB concept. What would have been the course of the savings and loan debacle had federal and state regulators been forced into open and informed examination of the practices of those regulated and the implications of their own policies on the public weal? We believe that the CUB concept addresses the underlying modern infirmity in the American governmental structure, and that it certainly would have made a difference in our financial institution

crisis, where our contentions about secret and industry-solicitous proceedings of regulatory agencies are particularly applicable. The hundreds of billions of dollars in public resources lost through this single series of unforgivable blunders could have ended world hunger, and substantially reclaimed the earth from its now-dominant human predators in the bargain.

The CUB model is an allegory for what ails the body politic in general. And it is also the antidote—an elixir of citizen energy, based on three age-old repositories of American value: fair play, balance, and the right of all of us to be heard—even the majority.

FOOTNOTE

1. The *Noerr-Pennington* doctrine allows competitors to combine and restrain trade—where undertaken for purposes of political advocacy before government. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).