1982

Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings

Carl W. Tobias
University of Richmond, ctobias@richmond.edu

Follow this and additional works at: http://scholarship.richmond.edu/law-faculty-publications
Part of the Administrative Law Commons

Recommended Citation
Carl Tobias, Public Funds and Public Participation, 82 Colum. L. Rev. 906 (1982).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.
Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings

Carl W. Tobias*

A number of federal agencies have recently relied upon implied power to reimburse expenses incurred by public participants in administrative proceedings.1 When the United States Department of Agriculture (USDA) and the Food and Drug Administration (FDA) attempted to exercise this authority, their efforts were challenged by parties who, relying on a purportedly controlling decision of the Second Circuit,2 contended that participant funding was an impermissible exercise of administrative power. The USDA initiative was upheld in district court,3 but the FDA program was invalidated by a divided Fourth Circuit panel.4

The dispute over agency reimbursement has not been confined to the courts. Explicit and strong differences of opinion over citizen compensation have also arisen in the legislative and executive branches of government. Because the question of whether agencies have implied power to fund remains a compelling and unresolved issue, it is an appropriate time to analyze this complex problem.

* Associate Professor of Law, University of Montana. Legal consultant, Food and Drug Administration. B.A. 1968, Duke University; LL.B. 1972, University of Virginia. The author wishes to thank Professor Bari R. Burke, Dean Richard A. Merrill of the University of Virginia Law School, Professor Thomas P. Huff, William A. Rossbach, Roy A. Schotland, and Harvey J. Shulman for their suggestions, and James McKenna and Allan McGarvey for valuable research assistance made possible by the Harris Trust. The views expressed in this Article are not necessarily those of the FDA.

1. The terms "reimbursement," "compensation," and "funding" are used interchangeably in this Article to mean the voluntary payment from agency resources for fees and expenses incurred by public participants in agency proceedings. "Authority" and "power" also are used synonymously. "Implied authority" is used in a very general sense to describe the source of agency power to make such payments. However, the authority is not "implied" in the sense that power to incorporate a bank was implied in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), from express powers to tax, borrow money, and regulate commerce, by way of the necessary and proper clause of the Constitution. Congress has granted modern-day agencies broad express substantive authority to regulate in the public interest, and has included in their mandates general residuary clauses instructing agencies to do everything necessary to achieve that goal, as well as residuary spending clauses instructing agencies to spend for all necessary expenses. Thus, what was drawn by implication in McCulloch is expressly granted these agencies. The question that has fueled the participant-funding debate, and that this Article attempts to resolve, is the scope of this delegated authority, for while the residuary power is expressly granted, it does not specifically address participant compensation.

2. Greene County Planning Bd. v. FPC, 559 F.2d 1227 (2d Cir. 1976), cert. denied, 434 U.S. 1086 (1978).


The first section of this Article is an historical survey of the developments that have led to the extant disagreement in the judiciary, Congress, and the agencies. In the next section, the cases treating participant reimbursement are assessed, and thereafter a comprehensive analysis of the legal principles raised by the exercise of implied compensation authority is presented. The Article concludes with an evaluation of the performance of the funding programs to date and the implications of this experience for implied reimbursement power.

I. Survey of the Developments in Participant Reimbursement

Many of the developments that led to disagreement within the judicial, legislative, and executive branches over the question of agency funding authority occurred during the "Reformation of American Administrative Law" that has taken place in the last twenty years. These events may best be examined by defining the problem that participant compensation was intended to meet, by reviewing the origins of the concept of reimbursement, and by surveying executive and legislative treatment of participant funding generally and the authority issue specifically.

A. Definition of the Problem

Congress, in creating many administrative agencies, intended that they regulate private behavior in the public interest. The agencies exercise considerable discretion, and decisionmaking has become a fundamentally legislative process in which regulators must ascertain and balance the competing contentions of the various private entities affected by administrative action. Satisfactory performance of these tasks has been undermined, however, by the significant disparity of participation in agency proceedings between commercial and noncommercial interests. Industrial concerns have a substantial stake in agency decisionmaking, and "generally possess the high degree of involvement, the economic strength, and the organizational cohesion required to present their views to the agencies consistently and coherently." By

7. See Stewart, supra note 5, at 1682-84, 1711-15.
8. This problem has been explored comprehensively in Cramton, The Why, Where and How of Broadened Public Participation in the Administrative Process, 60 Geo. L.J. 525 (1972); Gellhorn, supra note 6; Stewart, supra note 5. Imbalance in participation, however, is only one of many theories propounded to explain administrative decisionmaking that seems biased toward industry. See generally Cramton, supra, at 527-30; Stewart, supra note 5, at 1681-89, 1713-15; Note, Federal Agency Assistance to Impecunious Intervenors, 88 Harv. L. Rev. 1815, 1815-17 (1975).
9. Note, supra note 8, at 1816.
contrast, those that might oppose positions of regulated parties generally are diffused, and individually have a rather insignificant interest in the outcome of any single proceeding. While administrative determinations may have considerable collective impact on them, substantial transactions costs and free-rider effects make problematic their organization for the purpose of influencing agency choices on a continuing basis.

When nonindustry interests do not participate, administrative officials cannot ascertain their views on issues of fact, law, or policy. Moreover, the pervasive presence of regulated parties virtually ensures that the extra-agency input upon which decisionmakers do rely in reaching determinations comes almost exclusively from one source. Because input is provided predominantly by commercial interests, it is not surprising that administrative choices reflect industry perspectives. The imbalance in participation fundamentally undercuts not only the appearance of fairness in agency decisionmaking but also its substance.

In response to these and other considerations, officials in each branch of government have taken action during the last fifteen years designed to expand the opportunities for public involvement. Courts have required that members of the public affected by agency determinations be permitted to participate in administrative proceedings, and that decisionmakers accord “adequate consideration” to their views.

Since the mid-1960’s, Congress has provided for citizen involvement in a number of specific areas. The executive branch also has been active, with Presidents Ford and Carter strongly endorsing, and even promoting, expanded public participation, and with numerous agencies increasing possibilities for citizen involvement. By 1975, as a result of judicial, legislative, and administrative action, public participation in agency proceedings had become an accepted norm of the administrative process.

Merely creating the legal opportunity for citizen involvement, however, was insufficient. Proponents realized that the “single greatest obstacle to active public participation in regulatory proceedings” was the lack of finan-

---

10. See Cramton, supra note 8, at 529.
11. See Stewart, supra note 5, at 1715.
12. See id. at 1686, 1714-15; Cramton, supra note 8, at 529.
13. In the landmark case of Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), the District of Columbia Circuit rejected the agency's decision to prohibit "intervention on behalf of the public [that] would have vindicated the broad public interest relating to a licensee's performance of the public trust inherent in every license." Id. at 1006; see also National Welfare Rights Org. v. Finch, 429 F.2d 725 (D.C. Cir. 1970). For comprehensive treatment of this trend, see Gellhorn, supra note 6; Stewart, supra note 5, at 1748-60.
16. "In order to comply with the mandate of decisions like Church of Christ, most federal agencies have expanded the scope of their intervention procedures." Note, supra note 8, at 1817-18 (footnote omitted); see, e.g., 47 C.F.R. § 1.223 (1981) (FCC); 21 C.F.R. §§ 12.40, 12.45 (1981) (FDA).
cial resources available to meet the considerable costs of involvement.\textsuperscript{17} If citizen participation could improve the quality of agency decisionmaking, it seemed advisable to facilitate involvement by providing financial assistance.\textsuperscript{18} The idea of participant funding was developed to address these concerns.

B. Origins of the Concept of Participant Reimbursement

The first serious consideration accorded by a governmental entity to the idea of participant compensation appears to have occurred at the Administrative Conference of the United States during the late 1960's.\textsuperscript{19} The Conference recommended\textsuperscript{20} that agencies "pay the personal expenses and wage losses incurred by [indigent] individuals incident to their participation in rulemaking hearings."\textsuperscript{21} It urged Congress to appropriate funds for this purpose and suggested that agencies with existing authority financially support public involvement.

During 1969, the Federal Trade Commission (FTC) considered the idea of compensation for indigent respondents in its unfair practice hearings.\textsuperscript{22} Thereafter, the Commission sought the opinion of the Comptroller General on agency authority to reimburse expenses incurred by both impecunious respondents and indigent intervenors. The Comptroller responded affirma-

\begin{footnotes}
\item[17] 3 Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess., Study on Federal Regulation: Public Participation in Regulatory Agency Proceedings vii (1977) [hereinafter cited as Public Participation Study]. Indeed, as early as 1966, even as Judge Burger was fashioning the right of public participation, he recognized that the staggering "expense of participation in the administrative process" would "operate to limit the number of those who will seek participation." Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966). For cost estimates, see Public Participation Study, supra, at 17-22; Cramton, supra note 8, at 538; Gellhorn, supra note 6, at 389-96.


\item[19] Congress created the Administrative Conference in 1964 and set out its most important powers and duties in 5 U.S.C. § 574 (1976). The Conference is to "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress or the Judicial Conference of the United States, in connection therewith, as it considers appropriate." Id.

\item[20] These recommendations were based on a study of representation of the poor in federal rulemaking, conducted for the Conference by Professor Bonfield. See Recommendations Suggested to the Administrative Conference of the United States on the Basis of the Study of Representation for the Poor in Federal Rulemaking I(b)(6), reprinted in Bonfield, Representation of the Poor in Federal Rulemaking, 67 Mich. L. Rev. 511, 556 (1969). The recommendations were only a nascent form of the reimbursement concept.


\end{footnotes}
tively, stating that such expenditure "would constitute a proper exercise of administrative discretion." 23

By the early 1970's, considerable scholarly attention had been devoted to participant funding. 24 In 1971, however, the Administrative Conference reconsidered citizen compensation in the context of a study examining public participation in agency hearings. While the Conference affirmed the importance of citizen involvement, it rejected a recommendation endorsing the idea of administrative reimbursement. 25

C. Implementation of the Reimbursement Concept

The concept of participant compensation did not receive intensive government consideration until the mid-1970's. A survey of developments thereafter reveals both that agency funding has aroused great interest and that it has been accorded a mixed political and administrative reception. Funding programs have been implemented at the direction of Congress under grants of specific statutory authority and on the initiative of the agencies themselves pursuant to implied powers. Neither Congress nor the agencies, however, seem to have fixed ideas about the desirability, scope, or implementation of administrative reimbursement programs. Examination of the administrative, executive, and legislative activity provides a useful perspective for evaluating judicial treatment of prior and potential challenges to compensation and for predicting future developments in this unsettled area of administrative law.

1. Administrative and Executive Action on Participant Reimbursement. Many federal agencies have exhibited interest in compensating members of the public participating in the decisionmaking process. 26 In 1974, the Atomic Energy Commission, later to become the Nuclear Regulatory Commission (NRC), was first to announce that it would conduct rulemaking proceedings on reimbursement 27 and commissioned an independent study of the subject. 28 Informal rulemaking was commenced in 1975, 29 but was terminated in the following year when the agency decided against initiating a funding pro-

---

24. See Cramton, supra note 8, at 543-45; Gellhorn, supra note 6, at 394-97; Lazarus & Onek, supra note 6, at 1098-1103.
27. The rulemaking was in response to a number of requests for financial assistance from intervenors in nuclear licensing proceedings. See 41 Fed. Reg. 50,829 (1976).
28. See Boasberg, Hewes, Klores & Kass, Report to the Nuclear Regulatory Commission on Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings 13 (1975) [hereinafter cited as NRC Report], reprinted in S. 2715 Hearings, supra note 18, at 331, 332. The study contract specifically excluded consideration of the agency's statutory authority to fund. Id. at 14. This exclusion may perhaps be explained by the fact that the Commission had decided to seek an opinion regarding its compensation power from the Comptroller General.
The Commission questioned its authority to extend financial assistance and concluded that the compensation issue could be resolved more appropriately by Congress than by the individual agencies with their "necessarily restricted perspectives and mandates." In 1980, the NRC again expressed interest in funding public participants, inquiring of the Comptroller General about an appropriations committee proscription of reimbursement. Between 1976 and 1980, numerous agencies and departments, acting pursuant to implied authority, initiated compensation rulemaking, promulgated funding regulations, established pilot programs, and reimbursed participants. In 1976, the Federal Communications Commission (FCC) announced a rule providing limited procedural assistance for indigent intervenors, and the FDA issued advance notice of proposed rulemaking on compensation. During the next year, the National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation (DOT) established a twelve-month demonstration effort for participant funding. Advance notices of proposed rulemaking were issued by the Environmental Protection Agency (EPA) and the Civil Aeronautics Board (CAB), and proposed regulations were published by the Consumer Product Safety Commission (CPSC) and the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce. Even the Federal Energy Regulatory Commission (FERC), which as the Federal Power Commission (FPC) had previously opposed the efforts of intervenors to secure agency funding, modified its views. The NOAA and the CPSC established reimbursement programs in the spring of 1978, while the CAB issued its final regulations in December. These agencies appear to have relied on opinions of the Comptroller General supporting their assertion of implied spending authority.

31. Id. at 50,831. The Commission also stated that its decision to abandon the funding idea rested on policy considerations as well as on reservations as to the scope of its authority. Id. at 50,829.
32. Letter from Leonard Bickwit, Jr., General Counsel, NRC, to Elmer B. Staats, Comptroller General (Nov. 2, 1979). Congress, apparently reacting to a favorable response by the Comptroller, inserted an explicit prohibition of reimbursement in the NRC's 1980 appropriation measure, see infra notes & and accompanying text.
33. 41 Fed. Reg. 53,019 (1976). The regulation was in response to a petition of the Federal Communications Bar Association. Id.
35. See 42 Fed. Reg. 2863 (1977). The second part of the preamble to the regulation creating the pilot effort was an advance notice of proposed rulemaking that invited public comment on the advisability of establishing reimbursement on a "department wide and permanent basis." Id. at 2864.
40. Brief for the FERC on Petition for Writ of Certiorari at 8, Greene County Planning Bd. v. FERC, cert. denied, 434 U.S. 1086 (1978).
42. 43 Fed. Reg. 23,560 (1978). The CPSC rule was termed an interim regulation, and the program created was in the nature of a pilot effort. Id.
44. See the preambles accompanying the regulations cited supra notes 41 & 43.
In 1979, President Carter circulated a memorandum urging the heads of all departments and agencies to institute compensation efforts. The USDA and the National Telecommunication and Information Administration of the Department of Commerce issued notices of proposed rulemaking, and the FDA promulgated its final compensation regulations. The Department of Energy (DOE), however, suspended consideration of an unpublished reimbursement proposal pending legislative approval after Congress proscribed expenditure of FERC appropriations on citizen funding. In 1980, the USDA finalized its rule creating a funding program, and the Department of Health and Human Services (HHS) instituted a demonstration project financially to assist qualified persons in commenting on proposed department regulations. Those agencies funding under implied authority discontinued their programs in 1982, influenced by the adverse political climate and by doubts about the scope of their power.

2. Opinions of the Comptroller General and the Office of Legal Counsel. Government legal opinion has supported agency efforts to establish participant reimbursement programs and has been relied upon by the agencies. The Comptroller General has been a consistent and forceful proponent of this exercise of power. In 1976, the Comptroller issued four opinions reaffirming the position on implied funding authority initially articulated in the 1972 FTC

45. Memorandum for Heads of Executive Departments and Agencies from President Carter, supra note 15.
46. 44 Fed. Reg. 17,507 (1979), relying on rationale advanced by the Comptroller General. Id. at 17,508.
47. 44 Fed. Reg. 70,743 (1979), relying on rationale advanced by the Comptroller General. Id. at 70,744.
Two of these decisions were responses to requests of the NRC and the FDA, then engaged in reimbursement rulemaking; the others were triggered by congressional inquiry. In the four opinions, the Comptroller stated that ten agencies—the FTC, the NRC, the FPC, the FDA, the EPA, the Interstate Commerce Commission (ICC), the CPSC, the Securities Exchange Commission (SEC), the FCC, and the NHTSA—possess compensation authority. He reasoned that Congress vests these agencies with responsibility for protecting the public interest through administrative decisionmaking and annually appropriates to each agency funds “[f]or necessary expenses, not otherwise provided for.” If public involvement is necessary to assist the agencies in decisionmaking, authority to compensate citizen participants can be implied from the substantive statutory mandates and residuary appropriation provisions. The Comptroller stated that this power could be exercised if an agency believed (1) that it could not make a required determination without reimbursing interested parties whose participation was necessary for disposition of the matter under consideration and (2) that these entities would otherwise be unable to finance their involvement.

The Comptroller supplemented these rulings on agency funding authority in a 1980 opinion for the NRC. Although the House committee report accompanying the Commission’s 1980 appropriations act stated that no money was to be paid to intervenors, the Comptroller found that the NRC still might legally reimburse participants that year and that only an explicit statutory provision could bar citizen compensation. The Comptroller also declared that the Greene County decision, in which the Second Circuit had ruled that the FPC lacked funding authority, was not binding on other agencies and reiterated his earlier opinion that agencies possess reimbursement power.

53. See supra notes 22 & 23 and accompanying text.
54. See supra notes 27-31 & 48 and accompanying text. The rulings were included in Letter from R.F. Keller, Deputy Comptroller General, to NRC (Feb. 19, 1976), reprinted in S. 270 Hearings, supra note 18, at 418 [hereinafter cited as Letter from R.F. Keller to NRC], and Letter from R.F. Keller, Deputy Comptroller General, to FDA (Dec. 3, 1976), reprinted in id. at 455 [hereinafter cited as Letter from R.F. Keller to FDA].
56. See Letter from Keller to Moss, supra note 55.
57. See, e.g., examples cited supra note 6.
59. Letter from Keller to Moss, supra note 55. The Comptroller later modified the first criterion, saying that
[i]t would be sufficient if an agency determines that such participation “can reasonably be expected to contribute substantially to a fair determination of” the issues before it, even though the expenditure may not be “essential” in the sense that the issues cannot be decided without such participation.
Letter from R.F. Keller, to FDA, supra note 54.
61. Greene County Planning Bd. v. FPC, 559 F.2d 1227 (2d Cir. 1976), cert. denied, 434 U.S. 1086 (1978).
The Office of Legal Counsel (OLC) in the Justice Department also agreed that agencies have funding authority. The Department of Transportation asked the OLC whether its power to compensate intervenors was circumscribed by Greene County. The OLC responded that the Greene County holding was limited to funding authority under the Federal Power Act and that DOT was "required to interpret its own organic statute and any other relevant statutory provisions," to determine whether Congress had granted it reimbursement power.

The OLC opinion troubled ranking members of the Senate Judiciary Committee, who requested that then-Attorney General Bell review the Office's opinion. The Attorney General concurred with the OLC's conclusion, but the senators' inquiry illustrates recurrent congressional reserve on the issue of participant funding.

3. The Legislative Response. Throughout this period, when departments and agencies were formulating their positions on reimbursement and initiating compensation programs, Congress assumed a comparatively passive posture, responding rather erratically to the administrative initiatives. The legislature provided for participant funding by some agencies in substantive statutes while barring reimbursement by other agencies in appropriations acts. In appropriations committee reports, Congress instructed a number of agencies not to compensate, but also indicated that its failure to grant specific authority should not be interpreted as expressing an opinion that agencies lack power. The legislative branch has neither approved nor disapproved proposals that would either prescribe or proscribe funding by all federal agencies. While a trend is evident—apparent congressional receptivity to participant reimbursement in the middle seventies replaced by a growing disenchantment with the concept—ambiguity and lack of permanent direction probably best characterize the legislative approach to the reimbursement concept.

Congress initially addressed citizen compensation in 1974 during consideration of the Energy Reorganization Act. In explaining deletion of a Senate amendment that would have given the NRC specific reimbursement authority, the conference committee stated that its failure to enact legislation providing the agency with specific power did not mean that the Commission
lacked funding authority. Congressional receptivity to funding became more pronounced in the succeeding years, as the legislature in 1975 empowered the FTC to compensate participants in rulemakings under the Magnuson-Moss Warranty Act, and in 1976 granted the EPA similar authority under the Toxic Substances Control Act.

In 1977, congressional treatment of funding became more ambivalent. The legislative branch specifically authorized citizen reimbursement in Department of State proceedings. Moreover, the Senate Committee on Governmental Affairs, in a comprehensive study of federal regulation, acknowledged that several agencies had instituted compensation efforts, specifically approved of them, and recommended that other agencies implement their own programs pending enactment of general funding legislation. The same year, however, the House Appropriations Committee report for fiscal 1978 governing agricultural and related agencies—including USDA, FDA, and the Commodity Futures Trading Commission—prohibited them from spending any money on participant reimbursement.

The inconsistency in the congressional approach heightened in 1978. Congress enacted legislation specifically authorizing participant compensation by FERC, but in legislative history proscribed expenditure of appropriated funds for that purpose. Money was explicitly provided for implementation of demonstration projects by the CAB and DOT, but the Economic Regulatory Administration of the Department of Energy and the NRC were prohibited from reimbursing citizen-participants. Finally, while the House appropriations bill would have again proscribed compensation by the agricultural agencies, the proviso was deleted by the conference committee, which acknowledged that the agencies might undertake funding efforts.

72. See Public Participation Study, supra note 17, at 118-19.
73. H.R. Rep. No. 384, 95th Cong., 1st Sess. 96-97 (1977). However, the report does not state that the proscription was imposed because the committee believed that the agencies lacked implied reimbursement authority.
78. For a discussion of these legislative machinations, see 44 Fed. Reg. 23,044-45 (1979).
Beginning in 1979, congressional opposition to the reimbursement concept became more pronounced. The legislature again prohibited the Economic Regulatory Administration from compensating citizens and imposed similar constraints on the other components of DOE.\textsuperscript{79} Moreover, the conference committees responsible for NRC, NHTSA, and CAB appropriations instructed those agencies that no funds were to be paid public intervenors.\textsuperscript{80} The House Appropriations Committee, however, acquiesced in the continuing USDA and FDA reimbursement efforts.\textsuperscript{81}

Extensive funding prohibitions were enacted in 1980. The appropriations legislation for the Department of Housing and Urban Development (HUD), "sundry independent agencies, boards [and] commissions" including CPSC and EPA;\textsuperscript{82} NRC; most components of the Department of Energy;\textsuperscript{83} the Economic Regulatory Administration\textsuperscript{84} and all transportation agencies\textsuperscript{85} proscribed the use of government money to support nonfederal regulatory intervention. Inclusion of the spending prohibitions in the appropriation statutes themselves, rather than in the committee reports as in 1979, may have reflected congressional reaction to the Comptroller General's opinion that the


\textsuperscript{81} H.R. Rep. No. 242, 96th Cong., 1st Sess. 29-30 (1979). The report summarized USDA's funding program, warned that it would be scrutinized by Congress, and urged other committees to consider the compensation issue.

\textsuperscript{82} Department of Housing and Urban Development—Independent Agencies Appropriations Act of 1981, Pub. L. No. 96-526, § 410, 94 Stat. 3044, 3065. Due to an apparent mixup with respect to the EPA's plans for expending funds on reimbursement—with the result that some members of the House believed that agency officials had not told them the truth—the House proscribed compensation by all of the agencies whose appropriations were grouped with that of EPA. See H. Rep. No. 1114, 96th Cong., 2d Sess. 55 (1980). The Senate Appropriations Committee recommended that funds be provided for reimbursement in certain situations, S. Rep. No. 926, 96th Cong., 2d Sess. 118-19 (1980), but the Senate bill was amended on the floor so that it closely paralleled the House prohibition. See 126 Cong. Rec. S13084 (daily ed. Sept. 22, 1980). Senator Danforth, who offered the amendment, stated that its "purpose . . . is to make clear that no implied authority to create intervenor funding programs is recognized." Id.


\textsuperscript{85} Department of Transportation and Related Agencies Appropriations Act of 1981, Pub. L. No. 96-400, § 316, 94 Stat. 1681, 1697. Included were the ICC, CAB, and NHTSA.
committee reports lacked prescriptive effect. By contrast, a Senate floor amendment that would have prohibited reimbursement by the agricultural agencies failed. Moreover, Congress enacted legislation providing for the award of fees and expenses to prevailing parties in adversary adjudicatory proceedings before administrative agencies, unless the agency position was substantially justified or special circumstances would make an award unjust. In 1981 Congress again used the appropriations process to proscribe funding, imposing restrictions virtually identical to those in 1980.

During this period, Congress had many opportunities to adopt a comprehensive policy on agency compensation. In 1975 and 1977, Senator Kennedy introduced legislation that would have specifically authorized reimbursement by most agencies, and similar bills were offered in the House. The regulatory reform packages introduced in both Houses in 1979 also included general funding provisions. By contrast, the House Judiciary Committee approved a provision of the proposed Regulatory Reform Act of 1980 proscribing agency compensation unless specifically authorized by law.

86. See supra note 60 and accompanying text.
88. 126 Cong. Rec. S15,092, S15,096 (daily ed. Nov. 25, 1980). Senator Armstrong, who offered the amendment, had stated that USDA lacked statutory authority to spend for participant funding. Id. at S15,093-94.
Senate Governmental Affairs Committee voted out a similar measure in 1981. 96 None of the proposed regulatory reform legislation has been enacted. Thus, congressional action on agency reimbursement remains a patchwork quilt. Neither broadly approving nor disapproving the funding concept, and indeed without addressing explicitly the organic compensation authority of agencies, the legislative branch has repeatedly relied upon the annual appropriations process to express an ambiguous and contradictory policy. 97 Against this backdrop, several courts have ruled on the validity of implied agency reimbursement authority.

II. PARTICIPANT REIMBURSEMENT AND THE COURTS

In contrast to the considerable involvement of the executive and legislative branches in the funding issue, few administrative-reimbursement cases have reached the courts. The paucity of litigation is probably attributable to the unsettled state of the compensation concept and the uncertain status of many agency programs. If participant reimbursement were to become a more institutionalized administrative concept, judges might be asked to accord increased consideration to the theoretical and practical problems involved. Despite the currently limited judicial involvement, however, courts deciding the cases reported to date 98 treat the fundamental issues of statutory interpretation and interaction among the executive, legislative, and judicial branches as central to the funding debate, and thus their opinions merit scrutiny.

96. Telephone interview with Glenn Smith, Minority Counsel, Senate Comm. on Governmental Affairs, Nov. 12, 1981. The Senate has subsequently approved the measure, 127 Cong. Rec. S. 2605-07 (daily ed. Mar. 23, 1982).

97. Appropriations measures do not speak to the issue of underlying substantive administrative authority and are controlling only with regard to the funds appropriated therein. A prohibition on funding included in an appropriation statute would bar an agency from spending on reimbursement, even if its organic statute expressly authorized it to do so. If the prohibition were not renewed, that agency could resume funding the following year out of general agency monies.

98. Beside the cases discussed in this section of the text, several other cases have touched on the participant reimbursement issue. In one case, plaintiff challenged the exercise of funding authority by the Department of Energy. The court did not, however, reach the merits of the compensation issue. See Chamber of Commerce v. Dept't of Energy, 627 F.2d 289 (D.C. Cir. 1980). There also are several earlier decisions that allude to participant compensation but do not meaningfully treat the question of agency reimbursement power. See Natural Resources Defense Council v. NRC, 547 F.2d 633, 645 n.34 (D.C. Cir. 1976), rev'd on other grounds sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Citizens for a Safe Environment v. AEC, 489 F.2d 1018, 1022-23 (3d Cir. 1974); Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109, 1118-19 (D.C. Cir. 1971); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966); see also York Comm. for a Safe Environment v. NRC, 527 F.2d 812, 816 n.13 (D.C. Cir. 1975); Citizens for Safe Power v. NRC, 524 F.2d 1291, 1302 (D.C. Cir. 1975) (Bazelon, C.J., concurring); American Pub. Power Ass'n v. FPC, 522 F.2d 142, 147 (D.C. Cir. 1975) (Bazelon, C.J., concurring); Greene County Planning Bd. v. FPC, 455 F.2d 412, 420 (2d Cir.), cert. denied, 409 U.S. 849 (1972).
A. Greene County

The Second Circuit en banc decision in Greene County Planning Board v. FPC, issued in 1977, culminated nearly a decade of controversial administrative and courtroom litigation over the construction of power lines in rural New York state. Several intervenors had persuaded the FPC to select a route less damaging to the environment than that initially recommended by the Commission staff. The intervenors twice asked the agency to pay their participation costs, but their petitions were denied. On appeal of the first denial, a three-judge panel of the Second Circuit declined to order reimbursement because Congress had not specifically authorized it. While the intervenors' appeal of the second adverse agency determination was pending, however, the Comptroller General issued the opinion finding that the FPC possessed compensation power. A different panel then modified the earlier ruling. It deferred to the Comptroller's position, agreeing that authorization for funding of indigent intervenors who contribute significantly to Commission hearings could reasonably be found in the agency's statutory mandate. The panel considered the Comptroller's opinion authoritative and stated that it could not be overturned unless clearly contrary to law. However, the court did not order the Commission to reimburse the participants, but rather remanded the matter to the agency to determine whether compensation was appropriate in the particular instance.

The three-judge panel was reversed in a 5-3 decision of the Second Circuit sitting en banc. Although the court declared that there was no statutory basis for participant funding by the FPC, the precise holding in Greene County is ambiguous. It can be interpreted as broadly denying agency authority to reimburse public participants except pursuant to specific statutory powers. This view is supported by the court's reliance on the general spending restraint of 31 U.S.C. § 628, which provides that "sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others." Moreover, the majority never explicitly examined whether the FPC might have possessed implicit compensation authority, possibly indicating a fundamental rejection of the implied power concept.

The Greene County decision may, however, also have been based on the particular posture of the litigation. The en banc court perceived a violation of the American rule against shifting of fees and expenses between parties to disputes. Because the FPC derived most of the funds for administering its utility licensing program from annual charges assessed licensees, the court may have believed that an FPC award to public intervenors who participated in a utility licensing proceeding would amount to proscribed fee-shifting.


100. Greene County Planning Bd. v. FPC, 455 F.2d 412, 426 (2d Cir. 1972).

The Second Circuit observed as well that the FPC had never deemed itself empowered to pay intervenors’ expenses. The court regarded this as very important, because the interpretation of a statute by the agency charged with its administration is ordinarily entitled to considerable deference. The majority’s position on the judicial deference to be accorded opinions of the Comptroller General, however, was quite different. The Second Circuit flatly refused to defer to the Comptroller on the question of agency reimbursement authority. Indeed, it seemed to view the dispute as presenting a clash between judicial power and that of the Comptroller General, declaring that the courts and not the Comptroller must “determine the intent of Congress as expressed in its legislative enactments.”

B. Chamber of Commerce and Goyan

Two cases decided subsequent to Greene County raise similar issues, but in factually converse contexts. In the Second Circuit litigation, the administrative agency argued that it lacked the power to compensate; in the later cases parties opposed to funding challenged agency findings of authority. Nevertheless, the concept of implied reimbursement power received a mixed judicial reception.

1. Chamber of Commerce. Chamber of Commerce v. United States Department of Agriculture involved a challenge to the USDA’s exercise of an assumed, implied power to pay for extra-agency factfinding. The Agriculture Department had exercised this authority in a proceeding to establish standards for shrinkage of meat and poultry products during distribution. Because the USDA believed that it had insufficient data on the consumer impact of the existing and proposed regulations, the Department, after soliciting bids, contracted with the Consumer Federation of America (CFA) for an analysis of the economic effects of the proposed rules. Plaintiffs, who had consistently opposed the proposed net-weight regulations, sued to enjoin the USDA from paying for or using the CFA study. They contended that the Department lacked the authority to procure such a study.

The court rejected plaintiffs’ claims and upheld the exercise of power to fund. It found support for the USDA’s position on implied reimbursement authority in the broad powers delegated to the Department under the Wholesome Meat Act and the Wholesome Poultry Products Act as well as the USDA appropriations statutes, which permit the agency to expend “such sums as are necessary” to effectuate the mandates of the substantive acts. The court did not expressly defer to the Comptroller’s opinions but relied on their reasoning and cited them authoritatively. Greene County was distinguishable, because the USDA found that it possessed implied power, a deter-

102. Id. at 1239.
104. Id. at 218–19.
106. Id. §§ 451–70.
107. Id. §§ 469, 680.
mination entitled to deference, and because compensation from the Department’s congressional appropriation was not deemed to be fee shifting proscribed by the American rule.

Though the court addressed the issues underlying the question of implied funding authority, it is not clear that the facts involved an exercise of implied compensation power. Contracting with a group to conduct a consumer study to supplement the data base in an informal notice-comment rulemaking proceeding is not identical to reimbursing someone to advocate a particular perspective in a formal adjudicatory proceeding. Whether an agency could compensate in the latter situation was a question subsequently raised in *Pacific Legal Foundation v. Goyan*. In the final analysis, however, the general principle involved in both cases is similar: whether agencies possess similar authority to pay members of the public who can reasonably be expected to contribute to a full and fair determination of the issues involved in administrative proceedings but who might otherwise be unable to participate because of a lack of resources.

2. Goyan. *Goyan* involved a challenge to FDA participant funding. The plaintiffs sought to invalidate a pilot program for reimbursing private parties participating in certain agency proceedings. The FDA had instituted the compensation effort pursuant to its implied powers, relying principally upon the theory propounded in the Comptroller General’s opinions.

The district court in *Goyan* approved the FDA funding program, taking a broad view of the administration’s statutory mandate. It treated peremptorily the argument that agencies could fund only by specific legislative prescription, and explicitly found 31 U.S.C. § 628 inapplicable. The court distinguished *Greene County*, rejecting analogies to fee shifting and the American rule and emphasizing the Second Circuit’s own deference to agency interpretation. The court relied in part upon the Comptroller General’s opinions for its ruling that the agency had implied power. It also found a measure of specific congressional authorization for the FDA experiment in the legislative histories of the 1979 and 1980 appropriations bills, in which Congress indicated its awareness and tacit approval of the FDA’s contemplated reimbursement program.

In a cursory opinion, a divided panel of the Fourth Circuit reversed. Marshaling support from *Alyeska Pipeline Service Co. v. Wilderness Society* and *Greene County*, despite the differences between those cases and *Goyan*, the court trumpeted “the continuing vitality of the rule that, absent congressional authority to the contrary, participants pay their own way in legal proceedings.” The majority also stated that the legislature’s failure,
on several occasions, specifically to authorize compensation by all agencies,\textsuperscript{114} and its specific provision for participant funding by some agencies\textsuperscript{115} meant that reimbursement power could not be implied from general agency authority. Finally, the court found unreliable the inferences drawn from the appropriations materials by the district court, adopted the Second Circuit’s position rejecting deference to the Comptroller, and concluded that it was the role of Congress, and not the agencies, to assume the initiative on participant compensation.\textsuperscript{116}

Judge Murnaghan, the dissenting member of the Fourth Circuit panel, filed a better reasoned opinion. Recognizing the pervasive and necessary function of implicit powers in hierarchical government, he speculated that the majority’s rejection of the FDA program reflected antipathy to the use of government money to promote partisan viewpoints. The dissent observed, however, that “[o]pposing expressions of competing and biased views, even if they are exaggerated or contradictory presentations of the facts, will often lead to a middle ground of truth and accuracy built on the existence of mutually modifying contrary contentions.”\textsuperscript{117} Judge Murnaghan reasoned that redress of the input imbalance attributable to resource inequality among the proponents of various views was perfectly compatible with existing FDA authority and function and a matter particularly appropriate for judicial deference.

The legal issues raised by the establishment of compensation programs pursuant to implied authority are identified, but not comprehensively or clearly developed in the cases. The majorities in \textit{Greene County} and \textit{Goyan} have truncated analysis by drawing overly broad analogies from the American rule against fee shifting and by relying too greatly upon ambiguous congressional expressions. These cases, however, will probably not be the final judicial word on participant funding. Because the legislative status of regulatory reimbursement remains uncertain, primary responsibility for defining the permissibility, and even the scope, of agency-initiated compensation programs may well remain with the courts. Future judicial decisions will not only be important for the specific controversies they decide, but also may affect the substance and timing of eventual congressional resolution of the specific funding authorization issue. The same legal policies that argue for implied reimbursement power may recommend specific congressional action, as continued administration of agency-initiated programs generates operative experience on the basis of which specifically authorized efforts may later be fashioned. There remains, therefore, a need for clear, reasoned, and systematic

\textsuperscript{114} The opinion cited, inter alia, S. 1081, 97th Cong., 1st Sess. (1981), and S. 405, 97th Cong., 1st Sess. (1981). 664 F.2d at 1225–26 n.12; see also supra text accompanying notes 91–94.

\textsuperscript{115} See supra notes 69–71 and accompanying text.


\textsuperscript{117} 664 F.2d at 1228.
articulation of legal issues relating to the exercise of implied compensation power. The following section identifies and develops these issues.

III. A Suggested Analysis of Agency Reimbursement Authority

A. The Concept of Implied Authority

There is no gainsaying the constitutional truism recited in Greene County that "[t]he authority of a Commission to disburse funds must come from Congress."\(^{118}\) Compensation by an agency pursuant to a grant of specific statutory power from Congress is, of course, a valid exercise of delegated authority. But Congress obviously cannot delegate explicitly for every contingency that departments and agencies might encounter. Not surprisingly, therefore, it is well established that federal agencies possess implied as well as express statutory authority.

The Supreme Court held long ago that the Secretary of the Treasury had implied power to require oaths when paying claims, declaring it to be "a general principle of law, in the construction of . . . powers . . . that where the end is required, the appropriate means are given."\(^{119}\) Modern-day courts continue to adhere to the doctrine of implied statutory authority,\(^{120}\) the Second Circuit itself observing that "[i]t has been the law at least since McCulloch v. Maryland . . . that the lawful delegation of a power carries with it the authority to do whatever is reasonable and appropriate properly to effectuate the power."\(^{121}\) Moreover, the Supreme Court has recognized that the general doctrine of implied authority extends to the disposition of the rights and property of the federal government,\(^{122}\) presumably including the disbursement of public money for participant funding.

A body of case law respecting the implied powers of particular administrative agencies also has developed. The FPC, found not to possess implied reimbursement authority in Greene County, is a useful paradigm. Numerous federal appeals court panels have recognized that the broad scope of the

---

118. Greene County Planning Bd. v. FPC, 559 F.2d 1227, 1239 (2d Cir. 1976), cert. denied, 434 U.S. 1086 (1978).
122. Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted. Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941) (emphasis added).
Commission's powers includes by implication the unstated but requisite authority for effective discharge of its duties. The Seventh Circuit, for example, held that the FPC had implied power to establish uniform accounting regulations for its licensees, although no such authority was specifically granted in the agency's enabling statutes.

The test of whether the doctrine of implied powers permits a particular agency to spend in a manner not specifically prescribed by statute will depend on the statutory scope of the agency's authority in general, the existence of an explicit residuary powers or spending clause in its enabling or appropriations legislation, and the nature of the expenditure. An administrative body to which Congress has given a general public interest mandate, a wide range of regulatory responsibilities, and a panoply of administrative devices for effecting the mandate may logically possess implied, adjunct powers to expeditiously implement those specifically provided. Grants of broad statutory authority to undertake such actions or to "make such expenditures as are necessary to execute [agency] functions" also indicate that the scope of these agency powers includes participant compensation. So long as an expense is reasonably necessary and fairly appropriate to efficacious agency decisionmaking, it is no different from any other exercise of an implicit administrative prerogative. Funding members of the public whose participation in proceedings improves the decisional process and contributes to an appearance of fair treatment and consequent public acceptance of agency action comes within the ambit of the power delegated.

The venerable admonition of 31 U.S.C. § 628 that "sums appropriated . . . shall be applied solely to the objects for which they are respectively made, and for no others" does not preclude exercise of implied spending authority to reimburse participants or otherwise. As the Comptroller General has consistently maintained, where Congress has allocated funds for a particular

123. In Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 158 (D.C. Cir. 1967), the court declared:

The [Federal Power] Act is not to be given a tight reading wherein every action of the Commission is justified only if referable to express statutory authorization. On the contrary, the Act is one that entrusts a broad subject-matter to administration by the Commission, subject to Congressional oversight, in the light of new and evolving problems and doctrines.

Id. at 158; see Mesa Petroleum Co. v. FPC, 441 F.2d 182, 187 (5th Cir. 1971); Public Serv. Comm'n v. FPC, 327 F.2d 893, 896-97 (D.C. Cir. 1964); Colorado Interstate Gas Co. v. FPC, 142 F.2d 943, 952 (10th Cir. 1944), aff'd, 324 U.S. 581 (1945); Hartford Elec. Light Co. v. FPC, 131 F.2d 953 (2d Cir. 1942), cert. denied, 319 U.S. 741 (1943); see also Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968).

124. Northern States Power Co. v. FPC, 118 F.2d 141, 143 (7th Cir. 1941).


126. The current Code section has its source in Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535, which provided for the financial regulation of the Treasury, War, and Navy Departments.

127. While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are
purpose, an expenditure that is reasonably necessary to effectuate that purpose may logically be considered application of funds for an object of congressional appropriation. Indeed, the residuary spending clauses, allowing agencies to spend for "all necessary expenses," can be viewed as satisfying the requirement that administrative expenditures be appropriately limited. A more literal and restrictive interpretation of section 628 would sacrifice the administrative flexibility needed for faithful and effective implementation of congressional intent. It could, moreover, threaten the legality of a wide range of agency actions previously authorized by the Comptroller pursuant to the notion of implied spending authority.128

B. Fee Disbursement and Fee Shifting

Although the implied power concept is sufficiently broad to include the disbursement authority delegated to the agencies, it is not the only factor that must be considered in evaluating the compensation power of specific agencies. Administrative rulemaking proceedings in which citizen participants oppose positions of industry and adjudicatory proceedings in which public intervenors challenge industry petitioners seeking authorization for certain activities assume an adversarial cast. Reimbursing entities involved in these proceedings may appear to violate the American rule, which proscribes shifting of fees and expenses from losing to prevailing parties in legal contests. The Supreme Court recently upheld the doctrine in *Alyeska Pipeline Service Co. v. Wilderness Society*,129 declaring that "absent statute or enforceable contract, litigants pay their own attorneys' fees."130

made specifically available. 6 Comp. Gen. 621 (1927); 17 id. 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

Letter from R.F. Keller to NRC, supra note 54, at 420.


130. 128. See *Alyeska Pipeline Service Co. v. Wilderness Society*, supra note 129

The finding in *Consumers Lobby Against Monopolies v. Public Util. Comm'n*, 25 Cal. 3d 891, 909-10, 603 P.2d 41, 51-52, 160 Cal. Rptr. 124, 134-35 (1979), that the Public Utilities Commission (PUC) lacked authority to shift fees between parties to a ratemaking proceeding, is similar to the holding in *Turner*. The same court also found, however, that the PUC was empowered to shift fees between parties to a reparation proceeding because of its quasi-judicial character. Id. at 907-09, 603 P.2d at 50-51, 160 Cal. Rptr. at 133-34. See generally Note, supra note 116. The Colorado Supreme Court has found that the PUC was authorized to shift fees
1. Prototypal Fee Disbursement. Fee shifting between parties and fee disbursement from agency appropriations are similar in that each relieves an entity involved in a legal proceeding of the expense incurred when attempting to vindicate a legal position. By indiscriminately applying the proposition articulated in Alyeska that parties to legal disputes pay their own way, the American rule could be expanded to encompass not only fee shifting, but also fee disbursement. There are persuasive reasons, however, why extension of the American rule against fee shifting to include generic participant compensation would be inappropriate.

Three policy grounds have been articulated in support of the American rule: that persons, especially those who are impecunious, should not be penalized for merely defending or prosecuting a lawsuit; that the time, cost, and difficulties of proof inherent in resolving the question of what constitute reasonable litigation expenses would substantially burden judicial administration; and that independent advocacy might be threatened if attorneys' earnings were determined by the judge before whom they argue. The first rationale and its corollary—"that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel"—are inapplicable to participant funding. Because costs of reimbursing participants are not borne by the losing party, but are paid from money appropriated to the agency, no penalty is imposed upon unsuccessful litigants and no deterrent effect results.

The possibility of using decentralized decisionmakers to process compensation applications and requests for reimbursement tempers the force of the latter two arguments. Determining the amount of reimbursement to be paid need not unduly burden agency administration because the agencies generally do not treat the issue of reasonableness of fees and expenses as one for resolution through litigation. Most agencies set fee schedules in advance and relegate to fiscal officials the responsibility for settling disagreements about the amount of compensation to be paid. To the extent that agencies subject disputes over expenses to resolution in an adjudicatory context, the procedures generally do not involve the agency officer who conducted the proceeding in which costs were incurred. Providing separate personnel and proce-
dures for the specific purpose of handling reimbursement requests minimizes the difficulties that attend judicial awards of fees and expenses.

Decentralized decisionmaking on funding applications and reimbursement requests also means that agency compensation need not endanger independent advocacy in administrative proceedings. Most agencies do not place ultimate responsibility for ascertaining whether and in what amount funding should be awarded with the officer who conducts the proceeding for which compensation is sought.\textsuperscript{135} Reimbursed participants, thus, would have little incentive to tailor their presentations to satisfy the agency officials before whom they appear. It is conceivable, of course, that administrative staff members who process applications might be more favorably disposed toward the funding requests of those applicants who indicate a willingness to advocate the position espoused by the agency.\textsuperscript{136} Agencies have guarded against this, however, by insulating employees with final decisionmaking authority on citizen compensation from the substantive administrative proceedings.\textsuperscript{137}

Fee disbursement, moreover, is not burdened by the restrictive historical legacy that attends fee shifting.\textsuperscript{138} \textit{Alyeska} was rendered in the context of a long line of decisions upholding the American rule, comprehensive legislation governing costs and docketing fees that does not provide for fee shifting, and statutes authorizing recovery of fees and expenses in particular kinds of cases.\textsuperscript{139} None of these considerations applies to fee disbursement. There is no longstanding proscription of administrative reimbursement of public participants, and Congress has enacted substantive measures governing compensation on only a few occasions.

Finally, the essential character of reimbursement is very different from fee shifting. As Judge Lumbard, dissenting in \textit{Greene County}, observed, fee disbursement “involves no direct exercise of compulsion against a private party.”\textsuperscript{140} The benefit to the fee recipient does not come at the expense of legal adversaries. The analogy to fee shifting also fails because of the fundamentally disparate functions of administrative and judicial decisionmakers. As Judge Murnaghan observed in \textit{Goyan}, the agency does not act merely as a disinterested referee supervising a private controversy, but actively pursues the advancement of the public good.\textsuperscript{141} The reimbursement principle legitimately


\textsuperscript{136} This is one charge of abuse in the administration of reimbursement programs leveled by opponents of compensation. See, e.g., S. 270 Hearings, supra note 18, at 10-16.

\textsuperscript{137} See, e.g., 7 C.F.R. § 12.2(f) (1981) (USDA); 14 C.F.R. § 304.7(a) (1981) (CAB). Moreover, the objective nature of the criteria that must be satisfied before reimbursement can be awarded should afford some additional protection. See, e.g., 21 C.F.R. § 10.220(c)(3) (1981) (FDA).

\textsuperscript{138} See \textit{Georgetown Note}, supra note 99, at 943-44.

\textsuperscript{139} See \textit{Greene County Planning Bd. v. FPC}, 559 F.2d 1227, 1242-43 (2d Cir. 1976) (Lumbard, J., dissenting), cert. denied, 434 U.S. 1086 (1978).

\textsuperscript{140} Id. at 1242 (citation omitted); accord \textit{Chamber of Commerce v. United States Dep't of Agriculture}, 459 F. Supp. 216, 221 (D.D.C. 1978).

"calls for the United States itself to pay for the valuable services performed in furtherance of the public interest" and promotes positive values of citizen involvement and informed decisionmaking.

The uncritical and undifferentiated analogies drawn by the Second and Fourth Circuits to classical fee shifting, and the support they invoke from Alyeska and its antecedents, are unwarranted. Policy and historical rationales argue against extending the American rule on shifting of fees and expenses between litigants to include disbursements from agency appropriations for costs of public participation in administrative proceedings. Whether the American rule applies to citizen compensation paid primarily from charges assessed against agency licensees is, however, a closer question.

2. *Disbursement by Agencies Supported by Regulated Entities.* Participant funding by agencies whose administrative expenses are paid mainly with the fees of regulated parties closely resembles the fee shifting disavowed by the American rule. The money awarded participants would come from their adversaries in the administrative proceedings, the commercial entities with whom they have challenged. For example, regulated utilities paid nearly all of the costs incurred by the FPC in operating its licensing program, and the Commission in *Greene County* successfully contended that compensation of public intervenors would in effect be impermissible fee shifting.

Yet, while disbursement paid out of licensee charges has the appearance of fee shifting, and although *Greene County* can be understood as limited to the effect produced by this type of disbursement, the analogy to the American rule must be rejected here as well. Even if this disbursement is assumed to be operatively similar to classical fee shifting, the administrative context and the agency-licensee relationship remove reimbursement from the strictures of the otherwise applicable rule. The powers of the agency to issue licenses and exact licensing fees to cover administrative costs are one with its regulatory responsibilities, hearing and rulemaking authority, and legislative mandate to undertake all actions and pay all expenses necessary to implement its statutory duties. Funding that facilitates efficacious decisionmaking is a legitimate exercise of agency authority that does not violate the American rule, despite an appearance of fee shifting.

More fundamentally, though, scrutiny of the purposes, policies, and effects of reimbursement leads to the conclusion that reimbursement is not fee shifting even where payment derives from administrative charges imposed on the regulated interests. Fees of public participants are not imposed exclusively on the losing party in the same proceeding in the manner that characterizes classical judicial fee shifting. The administrative forum is not the typical adversarial legal arena, and the administrative decision is not a determination

142. 664 F.2d at 1230 (Murnaghan, J., dissenting).
143. See 16 U.S.C. § 803(e) (1974); Brief for Respondent on Rehearing En Banc at 9–13, Greene County Planning Bd. v. FPC, 559 F.2d 1227 (2d Cir. 1976), cert. denied, 434 U.S. 1086 (1978). The Commission noted that "[i]n 1974 the total cost of administering Part 1 of the [Federal Power] Act was approximately 4.3 million, of which 4.2 million was recovered through annual charges." Id. at 12 n.7.
of winners and losers, because the decisionmaking process is directed at furthering the broad public interest. The policies that underlie the American rule—not penalizing the exercise of legal rights, avoiding complex determinations of legal expenses, and preserving independent advocacy—\textsuperscript{144} are met equally well in this context as they are in prototypal fee disbursement. Perhaps most importantly, the perception that the source of money for compensation derives from adversaries may itself be erroneous. Commercial entities pay annual charges to the agency for the cost of administering the regulatory scheme because Congress has so provided. Independently, the agency determines that it needs the input of public participants to make the best substantive decision and pays participant costs as a necessary regulatory expense. There is no shifting of resources from loser to winner, but rather authorized agency expenditure for one of the costs of administering the regulatory system.

C. Judicial Deference

Although, as a general principle, agencies and departments may possess the power to spend appropriated money to implement objectives within their statutory mandates, the extent to which a particular agency or department may go in exercising such authority in specific instances will depend on the wording of its enabling and appropriation statutes, the scope of the legislative delegation, and any extra-statutory congressional expression. The different considerations will be assigned weight of varying degrees of strength by the Comptroller General, the agencies themselves, and individual members of Congress, all of which should be considered by the courts addressing questions of implied reimbursement power. While the positions articulated by legislative and administrative authorities will necessarily enter the judicial calculus, determining the amount of deference that courts should accord to these nonjudicial expressions raises controversial and complex issues. Analysis of the interpretive roles of the legislative and administrative bodies, as well as traditional concepts of judicial function and statutory construction, lead to the conclusion that, except for specific statutory prescriptions or proscriptions, courts should not consider dispositive any of the nonjudicial expressions.

1. \textit{Opinions of the Comptroller General}. Courts ruling on the question of agency compensation power have accorded different weight to the participant reimbursement opinions rendered by the Comptroller General. These determinations have been issued under statutory authority, providing that government officials "may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office [GAO] in passing upon the account containing said disbursement."\textsuperscript{145} Even prior to 1894, when this provision was passed as part of the Dockery Act

\textsuperscript{144} See supra text accompanying notes 131–37.
reorganization of the federal auditing and accounting system, government comptrollers and auditors had performed the judge-like duty of statutory construction. The Attorney General subsequently confirmed that the powers formerly exercised by the accounting officials were assumed by the Comptroller General. The courts have also stated that Comptroller opinions may necessarily be based on the interpretation and application of statutes. But while the Comptroller's determinations estop the General Accounting Office from subsequently challenging agency actions in conformance therewith, and while some judges and the Attorney General have found that these rulings bind the executive branch, there is nearly universal agreement that the Comptroller's opinions can be contested in the courts. Thus, claimants who are denied government payment pursuant to legal determinations of the Comptroller General may judicially challenge those rulings, and the courts will generally review the issues de novo.

Nondeferential review of the Comptroller's decisions comports with the character and authority of the Comptroller's office. While Congress may have designated the fiscal official its principal agent for determining whether federal expenditures comply with the language and purpose of its enactments, the Comptroller's role in supervising executive and administrative spending should not dictate how courts review the Comptroller's rulings. The Comptroller is not vested with administration of the particular statutes under which

148. 21 Op. Att'y Gen. 181, 182 (1895); accord 33 Op. Att'y Gen. 265, 267 (1922); 21 Op. Att'y Gen. 178 (1895). But cf. Morgan, supra note 52, at 1303 n.78 (repeated discussion of "judicial role" of Comptroller General in debates on the Act were all in context of salary and tenure that official should have; beyond that the references were mere hyperbole).
149. See Brunswick v. Elliott, 103 F.2d 746 (D.C. Cir. 1939).
151. See Greene County Planning Bd. v. FPC, 559 F.2d 1227, 1239 (2d Cir. 1976), cert. denied, 434 U.S. 1086 (1978); id. at 1241 n.1 (Lumbard, J., dissenting); United States ex rel. Brookfield Constr. Co. v. Stewart, 234 F. Supp. 94, 100 (D.D.C.), aff'd per curiam, 339 F.2d 753 (D.C. Cir. 1964); see also United States ex rel. Weinberger v. Equifax Inc., 557 F.2d 456, 463 n.6 (5th Cir. 1977), cert. denied, 434 U.S. 1035 (1978); Morgan, supra note 52, at 1300–03.
agencies seek to assert their spending power. Comptroller rulings on disbursement therefore differ from statutory interpretation by agencies in the fields of their substantive expertise, to which courts have traditionally acceded. Judges have been especially reluctant to defer to decisions that conflict with constructions espoused by the agencies themselves. Although courts have acceded to determinations of the Comptroller rejecting challenges of disappointed bidders on government contracts, that deference is probably dictated by concerns peculiar to the procurement context. The public interest in a smoothly functioning process of government contracting would be ill-served by probing judicial review of the multitude of awards in federal bidding contests. Moreover, in resolving disputes over bid protests, the Comptroller's role is analogous to agencies interpreting their delegated authority so that the Comptroller exercises the focused expertise that warrants judicial deference.

The Comptroller General's position on agency power to reimburse public participants, like his rulings generally, cannot command much judicial deference. Nevertheless, to accord Comptroller opinions no more weight than unofficial commentary would be to ignore the import of the supervisory and advisory authority that Congress has actually vested in that official, as well as the office's accumulated expertise. An intermediate course is, therefore, appropriate. As the Goyan district court observed, the Comptroller's "decisions are entitled to more than just cursory consideration, particularly within a context where it appears that his views have been brought to the attention of Congress." The quality of the specific analysis, the length of time and consistency with which the Comptroller has maintained the position, and the degree to which the ruling comports with the view of the agency itself are variables that may also govern the strength accorded the Comptroller's opinions. While Comptroller decisions do not relieve courts of their responsibility for de novo review, the rulings are a factor for judicial consideration in the reimbursement context, as in other judicial determinations on government expenditure.

2. Agency Interpretation. An agency's interpretation of its own power to compensate seems to deserve no greater deference than the rulings of the Comptroller General, even though the courts, with the exception of the Goyan

158. Morgan observes that "[j]udicial rhetoric [in the bid-challenge cases may have] created authority in the GAO that Congress had never chosen to provide." Morgan, supra note 52, at 1344.
appeals panel, have appeared to defer to administrative constructions regarding reimbursement authority. The judiciary generally accords weight of varying degrees of strength to interpretation of legislation by the agency charged with its administration.\textsuperscript{160} The Supreme Court has said that an agency's construction of legislation that it executes "should be followed unless there are compelling indications that it is wrong."\textsuperscript{161} However, the Court has also declared that "administrative interpretations of statutory terms are given important but not controlling significance"\textsuperscript{162} and even that "a departmental construction of its own enabling legislation ... is only one input in the decisional equation."\textsuperscript{163} Identifying the factors on which judicial deference depends is speculative and often complex, and any of the accepted criteria can be offset by others, articulated and unarticulated, in a particular case. As Professor Davis has observed, "the degree of intensiveness of [judicial] review is and probably should be for judicial discretion, and the exercise of discretion must probably depend to some extent upon psychological considerations, as well as upon formulas and theories."\textsuperscript{164}

Despite the uncertainty, courts and commentators have isolated certain considerations that have purportedly guided judges in reviewing administrative interpretations. Principal variables are the comparative qualifications of the agency and of the court to decide the particular question, the nature, scope, and specific exercise of the power committed to the agency by the legislative branch, and whether the issues involve enunciation of general principles or application of legal concepts to particular facts.\textsuperscript{165} Against these criteria, the weight due an agency's construction of its own authority to compensate participants in agency proceedings must be gauged.

The first factor requires deference where administrative interpretation involves application of expertise that is the peculiar province of the agency. Thus, judges generally will accord considerable weight to an agency construction relating to either scientific or technical expertise or that type of experience

\textsuperscript{160} See generally K. Davis, Administrative Law Treatise §§ 5.03-.06, 30.01-.14 (1958); id. § 7:8-.15 (2d ed. 1979); id. § 7:13-.14 (2d ed. Supp. 1982); Schopler, Supreme Court's View as to Weight and Effect to be Given, on Subsequent Judicial Construction, to Prior Administrative Construction of a Statute, 39 L. Ed. 2d 942 (1975).


\textsuperscript{163} Zuber v. Allen, 396 U.S. 168, 192 (1969). The Court exhibited even less deference when it said that "[i]n order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose." Morton v. Ruiz, 415 U.S. 199, 237 (1974) (citing Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)). As one court has observed, "[T]his very nearly eliminates the 'deference' principle as regards statutory construction altogether since if the agency's interpretation is found by a court to be consistent with the congressional purpose, it presumably would be affirmed on that ground without any need for deference." Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976), aff'd sub nom. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

\textsuperscript{164} K. Davis, supra note 160, § 30.08.

\textsuperscript{165} Id.
that comes from resolving problems in the specialized area over which the agency has jurisdiction.\textsuperscript{166} However, "on ordinary problems of interpreting statutes, the courts are the specialists"\textsuperscript{167} and the "final authorities."\textsuperscript{168} The interpretation of administrative enabling and appropriations statutes to determine the existence of implied reimbursement authority clearly involves expertise of the latter kind, and the courts have no reason, on this account, to defer to the agency position.\textsuperscript{169}

The second major consideration requires a determination as to the nature, scope, and specific exercise of the power granted the agency. Where the disputed administrative interpretation involves an exercise of authority that appears to expand the contours of an agency's statutory power, the judiciary generally has not been deferential. In \textit{Addison v. Holly Hill Fruit Products, Inc.},\textsuperscript{170} for example, the Supreme Court stated that the "determination of the

\begin{itemize}
\item \textsuperscript{166} See, e.g., Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568–69 (1980) (administrative agencies are simply better suited than courts to engage in an "empirical process that entails investigation into consumer psychology and that presupposes broad experience with credit practices"); E. I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 54 (1977) (deference to "an agency with great experience in the industry ... given the task of applying ... criteria to particular business situations").
\item \textsuperscript{167} K. Davis, supra note 160, § 30.09; see Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) ("there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term"), aff'd sub nom. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); see also Piper v. Chris-Craft Indus., 430 U.S. 1, 41 n.27 (1977) (presumed expertise of agency of limited value when narrow legal issue is one peculiarly reserved for judicial resolution); Barlow v. Collins, 397 U.S. 159, 166 (1970); Hardin v. Kentucky Util. Co., 390 U.S. 1, 14 (1968) (Harlan, J., dissenting) (little judicial deference to agency where dispute relates to meaning of statutory term, and controversy must ultimately be resolved, not on the basis of matters within the special competence of the agency, but by judicial application of canons of statutory construction); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 694 (D.C. Cir. 1973) (since statutory construction is the "sort of question [that] calls largely for the exercise of historical analysis and logical and analogical reasoning, it is the everyday staple of judges as well as agencies"), cert. denied, 415 U.S. 951 (1974); Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239, 264–72 (1955).
\item \textsuperscript{169} It is possible to argue that courts should defer to agency determinations respecting reimbursement, because the decision to compensate involves questions that agencies are more competent to answer than courts. For example, agencies are better qualified to determine the quantity, quality, and costs of public participation in its proceedings, whether increased public participation might improve the quality of agency decisionmaking, and how best to allocate agency resources. However, this type of distinction—in essence one pertaining to "procedural" expertise—does not find expression in the case law. Moreover, resolution of the issue of agency reimbursement authority calls for a threshold determination that involves primarily if not exclusively questions of statutory interpretation.
\item \textsuperscript{170} 322 U.S. 607 (1944). The \textit{Addison} decision voided a regulation promulgated by the Wage and Hour Division of the Department of Labor pursuant to an erroneously perceived implicit delegation of authority. The Court noted that Congress had made a specific grant of power to the agency without substantive line-drawing authority, and that the language of the relevant statute precluded administrative construction that would enlarge the delegated power. There are, however, some statutory schemes in which Congress has delegated to agencies the authority to make substantive determinations within circumscribed subject matter areas. Under these circumstances, the judiciary has accorded substantial deference to an agency's interpretations of its authority. See Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 102 S. Ct. 38 (1981); Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973).
\end{itemize}
extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."\textsuperscript{171} This is consistent with the accepted dichotomy between agency rules that are legislative and those that are interpretive.\textsuperscript{172} As the Court explained recently in \textit{Batterton v. Francis},\textsuperscript{173} legislative regulations are issued by agencies when Congress has entrusted them with "primary responsibility for interpreting the statutory term."\textsuperscript{174} "Such rules have the force and effect of law. . . . By way of contrast, a court is not required to give effect to an interpretive regulation."\textsuperscript{175} In the latter instance, the courts may accord agency constructions varying degrees of deference, even substituting judicial judgment for that of the administrative body. Because the exercise of implied funding authority rests on a determination respecting the contours of an agency's delegated power, the agency cannot, in the first instance, determine the propriety of that exercise. Moreover, if Congress has not specifically provided an agency with substantive authority to effectuate a reimbursement program, the agency's rulemaking in the area must be regarded as fundamentally interpretive. Under either perspective, little deference is due the agency determination.


In instances in which courts have deferred to administrative statutory construction, Congress appears to have placed its imprimatur on the agency's interpretation. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381-82 (1969); Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 410-11 (1975); see also Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 102 S. Ct. 38, 45 (1981).

\textsuperscript{172} K. Davis, supra note 160, § 30.10.

\textsuperscript{173} 432 U.S. 416 (1977). In \textit{Batterton}, the Court confirmed the unemployment eligibility standards promulgated by the Secretary of Health, Education & Welfare pursuant to a specific delegation under the Social Security Act. By contrast, in Social Security Bd. v. Nierotko, 327 U.S. 358 (1946), the Court rejected the Social Security Board's construction of the Act that would have excluded backpay from the statutory definition of wages. The Court observed that Congress had not delegated to the Board the determination of what constituted wages.

\textsuperscript{174} \textit{Batterton}, 432 U.S. at 425. The question is not whether substantive power is given but whether substantive power to draw lines is given. For example, if Congress authorizes an agency to make such reimbursements as will enable it to receive all information necessary for decision-making, the agency is provided primary responsibility to decide when and how to compensate participants, and the power is legislative. But, if Congress authorizes an agency to take whatever actions, or make whatever expenditures, are necessary to implement the statute, the agency is not given primary responsibility to decide whether reimbursement is necessary to implement the statute, and the power is therefore interpretive. See also K. Davis, supra note 160, at §§ 7:8, 29.00-7 (2d ed. 1982 Supp.).

Third, resolution of the statutory issue of agency compensation power involves articulation of general concepts, rather than application of rules of law to particular facts or circumstances. The threshold determination of the existence of funding authority is a generic one, the consequences of which extend to a broad range of rulemaking and adjudicatory activities. This type of judgment is also primarily the province of the courts,\textsuperscript{176} and they need not, therefore, accede to agency views.

Other factors relevant to judicial deference to administrative interpretations add little to the analysis. The funding programs were neither established contemporaneously with enactment of the statutory clauses on which they are premised,\textsuperscript{177} nor have they attained the stature of longstanding, continuous, and consistent agency practices that the judiciary has been hesitant to disturb.\textsuperscript{178} Moreover, it is difficult to find de facto ratification of the agency initiatives\textsuperscript{179} in Congress's ambiguous treatment of reimbursement. While courts have acceded to administrative constructions when the agency has a history of accurate interpretation of its power and substantial experience in the administration of its statute,\textsuperscript{180} these factors alone are probably insufficient to bind the judiciary in the novel area of participant compensation.

Unless a court concludes that Congress intended that an agency have authority to decide whether participant funding was within its substantive grant of power, the agency's determination cannot command judicial deference. The agency interpretations may warrant even less consideration than those of the Comptroller General, to whom Congress has explicitly granted a measure of interpretive authority. While the administrative position on reimbursement should not be ignored, it is only one piece of informed input among many that courts may consult in analyzing agency power to compensate.\textsuperscript{181}

\begin{itemize}
  \item \textsuperscript{176} K. Davis, supra note 160, at § 30.11.
  \item \textsuperscript{181} Of course, enactment of the Bumpers Amendment in most of the forms proposed to date would require that courts accord even less deference to an agency's interpretation of its own implied reimbursement authority. See generally O'Reilly, Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment, 49 U. Cin. L. Rev. 739 (1980); Woodward & Levin, In Defense of Deference: Judicial Review of Agency Action, 31 Ad. L. Rev. 329 (1979).
\end{itemize}
3. Congressional Expression. With little persuasive judicial precedent and few authoritative sources of statutory construction, courts understandably must ascertain whether anything can be gleaned from the legislative activity relating to participant funding. Congress has shown considerable interest in agency reimbursement and has spoken to the issue in substantive and appropriations enactments, in committee reports and floor debates, and in legislative proposals. The inferences to be drawn from these sources vary, because Congress has not given clear and comprehensive consideration to compensation.

The interpretive task of the courts, bridging legislative prerogative and judicial decision, is difficult. It should not be complicated, however, by confusing the roles of court, legislature, and administrative agency. Chief Judge Kaufman, in the Greene County concurring opinion, urged that "[t]he decision whether to expend public funds to advance an essentially private point of view by its very nature is political, and in a democracy, more appropriately made by the elected representatives of the people" and added that selection among potential applicants for reimbursement presents "choices [that] are particularly unamenable to judicial structuring." These admonitions are misplaced. The court's function in the compensation controversy involves neither the usurpation of legislative prerogative nor the administrative exercise of distributional choice. The judicial task is to make a threshold determination about the existence of agency funding authority by performing the traditional duty of statutory interpretation.

In pursuing this statutory analysis, judges have indicated that Congress's failure to adopt measures granting all agencies reimbursement power demonstrates that such authority does not exist absent specific legislative directive. However, the Supreme Court has long held that reliable conclusions as to the intent of Congress cannot be drawn from its failure to enact legislation. In the particular context of the compensation controversy, proposals providing for funding on a government-wide basis may have been introduced and considered to eliminate doubt, to afford explicit guidance for the institution of reimbursement programs, to minimize duplication through uniform-

182. See supra notes 67–97 and accompanying text.
183. Greene County Planning Bd. v. FPC, 559 F.2d 1227, 1240 (2d Cir. 1976), cert. denied, 434 U.S. 1086 (1978).
184. See id. at 1241, 1243 n.6 (Lumbard, J., dissenting) ("It would be the administrative agency, and not the court, which in the first instance would determine whether intervenors make a substantial enough contribution to the administrative process to merit a fee award.").
Public Funds

ity, to encourage more agencies to initiate funding efforts\textsuperscript{187} or for any number of other reasons.\textsuperscript{188}

The more troubling question is why Congress would have specifically empowered a few agencies to compensate if it believed that every agency already possessed funding authority.\textsuperscript{189} An answer is provided in \textit{National Petroleum Refiners Ass'n v. FTC},\textsuperscript{190} in which the FTC sought broadly to exercise substantive rulemaking power specifically granted in some, but not all, of the statutes administered by the Commission. The District of Columbia Circuit held that the FTC had broad rulemaking authority. It speculated that Congress may have enacted legislation providing the specific grants of rule-making power out of "uncertainty, understandable caution, and a desire to avoid litigation."\textsuperscript{191} Because all of the specific reimbursement authorizations, except that of the State Department, were included in newly passed agency-specific measures for regulating particular substantive areas,\textsuperscript{192} it could be inferred that enactment of these prescriptions was simply a matter of legislative convenience. Congress also may have deemed compensated public participation so indispensable to accomplishment of particular agencies' mandates as to obviate the need for its specific provision.\textsuperscript{193}

Thus, it is difficult, if not impossible, to draw defensible inferences from legislative failure to adopt general funding proposals and congressional provision for reimbursement by a few agencies. Congress's rejection of substantive measures, both authorizing and prohibiting participant compensation by all agencies, as well as its specific authorization of funding by some agencies and its contrary directives in the appropriations process to others, indicates that the legislature has not spoken definitively to the issue of a general administrative power of participant reimbursement.

Analysis of agency funding authority must therefore focus on particular administrative bodies. Even here, Congress has not unequivocally addressed the fundamental question whether specific agencies possess power to compen-


\textsuperscript{188} For example, the congressional activity may have been a response to the Comptroller General's recommendation that legislative guidance on funding be provided the agencies. See Letter from R.F. Keller to NRC, supra note 54. Some of these reasons are articulated by Judge Murnaghan in the dissenting opinion in \textit{Goyan}, 664 F.2d at 1227.

\textsuperscript{189} The difficulty is raised only in \textit{Goyan} and not addressed very explicitly there. See \textit{Pacific Legal Found. v. Goyan}, 664 F.2d 1221, 1225-26 (4th Cir. 1981).

\textsuperscript{190} 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

\textsuperscript{191} Id. at 696. See also \textit{In re Permanent Surface Mining Regulation Litigation}, 653 F.2d 514, 523-24 (D.C. Cir. 1981).

\textsuperscript{192} These are narrow measures, such as the Toxic Substances Control Act or the Magnuson-Moss legislation, as opposed to generic regulatory reform legislation. Compare supra notes 69 & 70 with S. 1080, 97th Cong., 1st Sess. (1981).

\textsuperscript{193} See \textit{Pacific Legal Found. v. Goyan}, 664 F.2d 1221, 1229 (4th Cir. 1981) (Murnaghan, J., dissenting). Judge Murnaghan criticizes the majority's implicit reliance on the maxim expressio unius est exclusio alterius and makes a strong policy argument for legislating by implication. It may also be argued that if Congress believed agencies lack authority, it would have been unnecessary to instruct them not to use appropriated money for funding.
sate as a component of their delegated authority. Where the legislature has sought to bar participant reimbursement, it has always relied upon the appropriations process. When Congress indicates in the body of an appropriations statute that appropriated funds are not to be used for certain purposes, agencies are bound by the legislative restriction although it violates Congress's own rules against effecting substantive change in existing legislation through appropriations measures. The judiciary has honored the constraints imposed in fiscal statutes even when they contravene programs specifically authorized in substantive legislation; thus, there can be little question of the effect of these limitations on activity undertaken pursuant to powers that are less specific.

The value to be assigned congressional expression in legislative history, however, can be problematic. Committee reports and floor debates that accompany substantive measures—traditional sources for statutory construction—command judicial attention, although they do not have the prescriptive character of the enactments themselves. Congress, however, has instructed a

---

194. All of the statutory prohibitions simply state, without articulating any rationale, that no funds appropriated are to be spent on participant reimbursement. Where reasons for the congressional action are provided in the accompanying legislative history, a lack of agency power to compensate is generally not one of those expressly articulated. Even when reimbursement authority is explicitly mentioned, other considerations are as well, so that it is simply not possible to attribute the legislative action exclusively to Congress's view on the issue of compensation power. The proscription imposed upon reimbursement in the appropriations act governing HUD and related agencies appears more than any other prohibition to have been based on congressional belief that the agencies lacked authority. See supra note 82 and accompanying text. The issue of agency power, however, was only one of several mentioned during the debate on the Senate floor in which the amendment proscribing compensation was adopted. See 126 Cong. Rec. 13,084-86 (1980).

195. According to its own rules, Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws, including revision of expenditure authorization. In general, the doctrine disfavoring repeals by implications is said to apply "with full vigor" when the subsequent law is an appropriations measure. Where Congress chooses to do so, however, we are bound to follow Congress's last word on the matter even in an appropriations law.

City of Los Angeles v. Adams, 556 F.2d 40, 48-49 (D.C. Cir. 1977) (emphasis added) (citations omitted); accord United States v. Dickerson, 310 U.S. 554 (1940); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir.), cert. denied, 441 U.S. 952 (1979); Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), cert. denied 448 U.S. 907 (1980). See generally Fisher, The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices, 29 Cath. U.L. Rev. 51, 86-87 (1979), and cases cited therein. Although rule 16.4 of the Standing Rules of the Senate provides that no amendment that proposes general legislation shall be attached to any general appropriation bill, and the House has a similar provision in House rule XXI (2) (both are reproduced in City of Los Angeles v. Adams, 556 F.2d 40, 48 n.18 (D.C. Cir. 1977)), Congress has, since the nineteenth century, followed the general practice of using appropriations measures to set policy. See Fisher, supra, at 85. Moreover, Congress has for many years relied upon the funding process to instruct agencies that they are not to use appropriated money for purposes authorized by substantive statutes. See the statutory provision cited in the classic case of United States v. Dickerson, 310 U.S. 554 (1940). But see Tennessee Valley Auth. v. Hill, 437 U.S. 153, 190 (1978) ("When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden."). The legislature has twice used appropriations measures to prescribe expenditure of funds for participant compensation, after specifically empowering agencies to spend for such purposes, see supra notes 70 & 82 (EPA) and 74 & 75 (FERC) and accompanying text.
number of agencies in legislative materials that attend appropriations acts that they are not to pay citizen participants. These directives are entitled to considerably less weight than those that accompany substantive statutes. Indeed, the Comptroller General "has frequently expressed the view that expressions of intent as to spending, contained . . . in appropriations committee reports, are not legally binding" unless they also appear in actual legislation, and in particular has advised agencies that they can compensate public participants despite restrictions included in these reports. The Supreme Court itself has discounted, albeit with qualifications, the value of these statements of appropriations committees. The weight assigned should depend on the clarity and specificity with which the congressional expressions address the scope of agency reimbursement powers—as contrasted with assertions that speak more generally to the use of appropriated money—and the extent to which they would nullify the letter or spirit of existing legislation. Thus far, proscriptions upon participant compensation imposed in the appropriations process have not spoken in terms of agency authority and, therefore, should be accorded little weight against a finding that funding power is consistent with agency function and substantive legislative mandate.

Absent specific statutory directive, both general and agency-focused congressional expressions do not provide dispositive guidance for courts. The legislative materials are open to multiple interpretations, and, like the Comptroller General's opinions and the agency constructions, are elements of limited value among all of the factors available for consideration. Rather than engage in overly mechanical statutory analysis that draws on diffuse, ambiguous, and even contradictory legislative sources, it is preferable to recognize the validity of the general implied powers doctrine as applied to the specific reimbursement concept and inquire whether participant funding is consistent with agency statutory mandates. Where citizen compensation serves to improve the quality of administrative decisionmaking and is in harmony with the congressionally defined character and operation of an administrative body, the existence of reimbursement authority should be recognized.

IV. The Reimbursement Experience

Perhaps the most persuasive reason for finding compensated public participation inherently consistent with administrative mandate is the perform-

---

197. Decision of the Comptroller General, supra note 60, at 5–6.
199. These factors are drawn from recent decisions treating the specific doctrine of repeal by implication. See Tennessee Valley Auth. v. Hill, 437 U.S. 153, 190–92 (1978); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979), cert. denied, 441 U.S. 952 (1979). For further discussion of this doctrine, see Fisher, supra note 195, at 86–87. The factors also are employed in cases in which courts undertake general statutory interpretation. See, e.g., National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).
ance of reimbursement programs to date. With approximately ten federal agencies exercising specific or implied authority to fund public involvement in administrative proceedings, the potential for properly conceived and executed compensation programs to enhance the administrative process is no longer mere speculation. The documented experience of these agencies with the reimbursement concept illustrates a variety of ways in which the funded participant can contribute to high quality and cost-effective decisionmaking. This experience should not only persuade Congress to eliminate appropriations restraints and to sanction a broader range of programs but also convince courts that the reimbursement initiatives instituted by agencies themselves are legitimate instruments of administrative function.

Rigorous evaluation of the effect that funded participation has had on agency decisionmaking is difficult, and not surprisingly a comprehensive impact study has yet to be undertaken. Problems of definition and


201. Even in the FTC study undertaken by Professor Boyer, supra note 200, the efficacy of compensation was evaluated comprehensively for only one proceeding. Although several intra-agency analyses have been performed, either on an agency's own initiative or at the behest of Congress, see, e.g., Department of Transportation Demonstration Program to Provide Financial Assistance to Participants in Administrative Proceedings: National Highway Traffic Safety Administration's Evaluations and Recommendations (1977) [hereinafter cited as NHTSA Study] (on file in the offices of the Columbia Law Review); Robards, Civil Aeronautics Board Compensated Public Participation Program Evaluation (Sept. 15, 1980) [hereinafter cited as CAB Study] (on file in the offices of the Columbia Law Review), these were apparently intended to convince Congress of the value of compensated involvement and are not objective studies. A few extra-agency studies of specific proceedings have been undertaken. See, e.g., Noble, Evaluation of Energy Policy Task Force Role in DOE Hearings (May 1979) (unpublished paper prepared for Professor Roy Schotland, Georgetown University Law Center) (on file in the offices of the Columbia Law Review); Stellato & Wright, An Evaluation of Agency Programs for the Reimbursement of Participants in Rulemaking Proceedings (May 1981) (same). There is also much congressional testimony from both government and private-sector proponents and opponents of reimbursed participation. But, in many administrative proceedings in which funded activity has occurred no formal evaluation appears to have been conducted.

202. Defining the concept of efficacy, for example, presents numerous difficulties. One criterion might be the notion of "winning," the focus being on how closely the decision adopted by the agency resembled the position of those reimbursed. Yet, even this "seemingly straightforward inquiry presents some practical difficulties," such as ascertaining precisely the positions of paid participants and whether those positions were assumed for tactical reasons. See B. Boyer, supra note 200, at 133-34. A second, more moderate approach and the one employed in this Article, is to ask whether the funded citizen involvement improved the quality of agency decisionmaking. For example, did the contribution force the decisionmakers to examine the issues presented in a constructive manner, even if the input provided was ultimately rejected? A third approach might be to ask whether the compensated participation was of high quality, even if it had no effect on the substantive determination. "This approach, however, moves the inquiry even farther away from basically objective measures to subjective assessment of the quality of representation and the substantive validity of the positions advocated." Id. at 136.
measurement,\textsuperscript{203} as well as financial constraints,\textsuperscript{204} have impeded efforts to analyze the performance of reimbursement programs and to gauge their efficacy against alternatives. Nevertheless, both objective data and opinions of knowledgeable observers\textsuperscript{205} suggest that compensated involvement has had positive, identifiable impact on the decisional process. While the pilot programs have revealed inefficiencies and operational difficulties, many problems have proven tractable and those that seem to inhere in the funding mechanism do not eclipse the beneficial effects of reimbursement on decisionmaking.

A. The Benefits of Participant Reimbursement

The salutary effects of funded involvement have been manifested in successive phases of the decisional process, where compensated participants have defined and sharpened the issues, interests, and options with which the agencies must contend, supplied materials and insights that otherwise might not have reached the agencies, assisted the agencies in evaluating the information and arguments presented, and contributed to the reasoned and confident formulation of administrative determinations.

1. Setting the Decisional Framework. Officials in a number of agencies have commented broadly on the enhanced perspectives provided by funded participants. One agency found that its financial assistance program had “provid[ed] decisionmakers with a wider understanding of the social, economic, environmental, political, and intellectual interests involved in their

\textsuperscript{203} “[E]ven a perfect match between [a funded] group’s position and the final [decision] would not necessarily mean that the group’s efforts had caused the agency to adopt that approach.” B. Boyer, supra note 200, at 134. For example, the ultimate administrative determination might be attributable to the advocacy of other participants or to factors unrelated to the record made, such as the “policy preferences of the individual [decisionmakers] and the general political climate of the times.” Id. at 134-35. For further discussion of the difficulties entailed in measuring the cause-effect relationship, see id. at 134-36; Rosenbaum, supra note 200, at 46-47.

\textsuperscript{204} There appear to be no reliable figures on cost. Professor Boyer estimated that the cost of his study “ran well into six figures” but was unable to separate the expense of assessing impacts from the cost of analyzing program administration. Telephone Interviews with Barry B. Boyer (Nov. 24, 1981) and Michael Bowers of the Administrative Conference of the United States (Dec. 9, 1981). By contrast, the person who evaluated the CAB program estimated that the study cost only $700. Telephone interview with Glen Robards, Jr., Presidential Management Intern, CAB Dec. 1, 1981. The CAB study, however, did not approach the breadth and complexity of Professor Boyer’s analysis of the FTC program. For discussion of other obstacles to rigorous evaluation of participant funding programs, see Rosenbaum, supra note 200; Rosener, supra note 200, at 458-59.

\textsuperscript{205} In drawing the conclusions reached in this Article the author surveyed the experiences of the ten agencies that have engaged in participant funding. The agencies have reimbursed citizen participants in approximately 100 proceedings to perform a broad range of tasks. The available studies on participant funding, particularly those that were deemed not to be completely trustworthy, were supplemented with interviews of persons involved in the agency proceedings—presiding officers, agency staff, reimbursed participants, and regulated parties—keeping in mind Professor Boyer’s observations that the “opinions of informed observers may be the best available information in this area,” B. Boyer, supra note 200, at 133, and that interviews generally are more valuable than examination of the record. Telephone interview with Barry B. Boyer, Nov. 24, 1981. An attempt also was made to assess funded involvement in proceedings that had not been evaluated, subject to resource constraints. Some of the general conclusions drawn throughout this section reflect confidential material, though all of the specific information may be gleaned from the cited sources.
decisions," 206 while the head of the FTC declared that citizen reimbursement "brought to the Commission table diverse, unique, and important perspectives and interests which enriched [the Commission's] deliberations and contributed substantially to the final shape of the [pending] rule." 207 Examples of interests whose involvement was made possible by public funding include a trade association that provided otherwise unavailable perspectives in FTC mobile home hearings, 208 and the National Council of Senior Citizens, which offered the views and experiences of its members in Commission proceedings on hearing aid marketing and regulation. 209 By thus enabling decisionmakers to hear directly from a greater number of affected interests, participant funding has afforded agencies greater appreciation of the consequences of their choices.

Reimbursed entities have also provided agencies with fresh legal insights, both substantive and procedural, that have affected ultimate decisions. The contribution of a compensated participant gave content to a statutory reasonableness standard and guided HUD in setting utility fee schedules for occupants of public housing. 210 In Department of Transportation hearings on fuel economy standards, a funded group suggested that the agency exercise its subpoena power to insure receipt of important information from automobile manufacturers. 211 Moreover, through both legal and factual argument, compensated parties have focused issues and sharpened analysis, thus improving the decisional process. 212

206. NHTSA Study, supra note 201, at 1.
207. S. 104 Hearings, supra note 94, at 197 (statement of FTC Chairman Collier). Chairman Collier's successor has made similar comments: "The decisionmaking process was enormously enriched by the diversity of views that could never have been obtained without Magnuson-Moss funding." Id. (statement of FTC Chairman Pertschuk); see also Regulatory Reform Legislation: Hearings on S. 262, S. 755, S. 455, & S. 93 Before the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess. pt. 1, at 378 (1979) (statement of FTC Chairman Pertschuk) [hereinafter cited as S. 262 Hearings]; 1 C.F.R. § 305.80-1 (1981) (Administrative Conference recommendation that the FTC reimbursement program be continued without substantial modification).
210. See S. 104 Hearings, supra note 94, at 169 (statement of Mass. Lieutenant Governor Thomas O'Neill III). The party was able to persuade HUD that the Department's formulas would impose an excessive burden on public housing tenants, and as a result, HUD increased utility charges by only five percent as opposed to the thirty-five percent increase originally contemplated.
212. [T]here's not been an occasion in which they didn't sharpen the analysis ... [T]hey did confuse me with the facts, which was a good thing. And they confused me with analysis. But out of that confusion, out of that conflict, out of this adversary system it seems we get more informed decisionmaking.
S. 1020 Hearings, supra note 206, at 14-15 (statement of FTC Commissioner Pitofsky); see also id. at 7 (statement of FTC Chairman Pertschuk).
2. *Supplying Information.* Financially assisted participants have provided agencies with information that had not previously reached them. For example, at the urging of a reimbursed group the EPA included an exemption in its regulation governing polychlorinated biphenyls (PCB's) for the chemical's use in microscopy. The agency had not previously been aware that PCB's were employed in this manner.\(^{213}\) The same funded group, participating in proceedings on materials that include asbestos, informed the CPSC of an extremely hazardous, asbestos-containing product commercially available to artists.\(^{214}\) More generally, agency officials have testified that compensated participants "have developed information, proposed evidence and conducted surveys . . . which have added materially to the quality of the [administrative records],"\(^{215}\) and have assisted decisionmakers in more effectively managing those records.\(^{216}\)

3. *Suggesting Alternative Methodology and Analysis.* In a number of instances, reimbursed parties have proposed superior methods of testing and evaluation or have exposed deficiencies in the reasoning of agencies or other entities. A funded participant in the NHTSA proceeding involving use of vehicle child restraints suggested a testing technique not considered by the agency staff.\(^{217}\) A compensated individual challenged the validity of scientific studies submitted to the FDA in support of a petition for approval of the food additive aspartame. The Board of Public Inquiry serving as the initial agency decisionmaker agreed that the submitted data did not eliminate the possibility that the additive caused tumors in laboratory animals, and that the evidence


\(^{214}\) Memorandum: Funding Under 1980 Public Participation Program (not including § 7) 2 (1980) [hereinafter cited as CPSC Study] (on file in the offices of the Columbia Law Review). But see Stellato & Wright, supra note 201, at 21 ("[p]erhaps the only real reliance on [the compensated group's] information by CPSC [was] exhibited by the placement of 'kilns' on the list of products involved in the CPSC order for information").

Novel input also appears to have been generated in the FTC's food advertising rulemaking. Staff attorneys in that proceeding observed that a funded entity "submitted an impressive written analysis of the rule's energy and calorie sections presenting evidence ... not considered by the staff." H.R. 3361 Hearings, supra note 93, at 500 (statement of FTC Chairman Collier); cf. 1 C.F.R. § 305.79-5 (1981) (reimbursement can broaden sources of information presented in proceedings). See generally 40 Fed. Reg. 23,086 (1975); 43 Fed. Reg. 11,834 (1978).

\(^{215}\) S. 270 Hearings, supra note 18, at 7 (statement of James DeLong, Assistant Director, FTC Bureau of Consumer Protection). In interviews with Professor Boyer, the FTC "Commissioners pointed out some of the benefits they saw from the public participation program: it ... gave the Commissioners more confidence that they were deciding on the basis of a complete record." B. Boyer, supra note 200, at 144; see also S. 104 Hearings, supra note 94, at 177, 197 (statements of NHTSA Administrator Claybrook).

\(^{216}\) See Hearings on S. 1020, supra note 208, at 28 (statement of FTC Commissioner Clanton); id. at 7 (statement of FTC Chairman Pertshuk); S. 104 Hearings, supra note 94, at 197 (same); Hearings on S. 262, supra note 207, at 401 (same).

suggested that aspartame might induce tumors. 218 A reimbursed participant in Department of Energy hearings on heating oil deregulation provided the most accurate model depicting refinery overcharges, 219 improved on agency measurement techniques by employing alternative base data, 220 and persuaded the decisionmaker that a Justice Department analysis suggesting the existence of industry competition was erroneous. 221

4. Proposing Courses of Action and Facilitating Decisions. Funded entities have also suggested alternative, less onerous, and occasionally novel, ways to achieve administrative objectives. For example, at the urging of compensated participants, the CPSC decided to devise mandatory safety standards for unvented gas space heaters, rather than ban the devices as initially contemplated. 222 In FTC proceedings on consumer protection in the purchase of used cars, the agency staff had originally proposed a very detailed set of disclosures. A reimbursed group, however, conducted a survey that demonstrated consumer preference for simple disclosures, and the staff revised its recommendations to incorporate the group’s suggestions. 223 An unusual, but effective course of action was proposed by a funded individual in CPSC hearings on home insulation materials. The participant, who had become ill after urea-formaldehyde foam was installed in his home, reported that physicians were initially unable to diagnose his condition and urged that the Commission bring appropriate diagnostic information to the attention of the medical community. 224 Acting on this advice, the agency staff contacted the Journal of the American Medical Association, which subsequently published an article on the formaldehyde-associated disorder. 225

---

218. See 46 Fed. Reg. 38,285, 38,286 (1981). For documentation of the participant funding, see Smith, Preliminary Assessment of the FDA’s Pilot Public Reimbursement Program § 5 (1980) [hereinafter cited as FDA Study] (on file in the offices of the Columbia Law Review). The FDA Commissioner who was the final decisionmaker observed that in the “hearing before the Public Board of Inquiry, the first of its kind to be convened, the scientific issues presented ... were intellectually complex and carried wide ranging public health ramifications” and that the “Board performed admirably in maintaining a judicial decorum and in crystalizing its views of the issues in its Initial Decision.” Id. at 38,289. Nonetheless, the Commissioner disagreed with the Board in what can be fairly characterized as a “close” decision.


220. OHA Decision, supra note 219, at 81. In the NHTSA proceeding on fuel economy standards, a reimbursed participant used “different input assumptions” to introduce “important challenges to the assumptions made by the Model” being employed. NHTSA Study, supra note 201, at 11.

221. OHA Decision, supra note 219, at 126. OHA also relied upon the policy reasons enunciated by a witness for the compensated organization in deciding that “anti-trust remedies [were] not likely to be successful in resolving competitive problems in the refining industry.” Id. at 132.


224. CPSC Study, supra note 214, at 1. As a result of the witness’s testimony, CPSC “staff is preparing general information on formaldehyde and UF foam for distribution to all state health departments.” Id.

Even where the input of compensated parties has not altered the agency's views or contemplated course of action, it has fostered improved decision-making. Comments that have been "well reasoned and favorable to the agency's position" have given the agency added assurance of its propriety and lent support to the agency approach. Contributions that have challenged the administrative perspective have kept the agencies honest, requiring reasoned responses, forcing staff to do their homework, and preventing decision-makers from accommodating regulated interests too readily. While the enumerated benefits are not unique to reimbursed participation—they also accrue from the unfunded involvement of interested parties—compensation has drawn more interests into the administrative forum, especially those formerly excluded, and has enhanced the quality of agency decisionmaking.

B. The Identified Deficiencies

There have also been negative experiences with participant reimbursement. Understandably, less documentation of this aspect of funding exists, because agencies, seeking to secure continued congressional support, have no interest in emphasizing program shortfalls. Moreover, only a small number of extra-agency analyses are available, and critics have focused upon deficiencies in the administration of programs, rather than substantive inadequacies. Nevertheless, there is evidence indicating that some compensated participants have made minimal contributions or have provided misleading input, so

226. NHTSA Study, supra note 201, at 2.

227. See the testimony of FTC Chairman Pertschuk and NHTSA Administrator Claybrook in S. 104 Hearings, supra note 94, at 174–200.

228. See, e.g., NRC Report, supra note 28; Public Participation Study, supra note 17; Gelhorn, supra note 6; Cramton, supra note 8; Note, supra note 8; S. Rep. No. 863, 94th Cong., 2d Sess. (1976).

229. The positive contributions to decisionmaking made by reimbursed participants can have ancillary benefits for the decisional process as well. For example, efficacious funded activity "may save the agency from serious substantive error and from serious delay," thus yielding concomitant savings in time, money, and effort. See NRC Report, supra note 28, app. F at 7 (statement of Malcolm Mason), reprinted in Chambers, Increasing Citizen Participation in Administrative Proceedings: Can Federal Financing Bridge the Costs Barrier?, 30 Case W. Res. L. Rev. 33, 67 (1979); S. 104 Hearings, supra note 94, at 189 (statement of NHTSA Administrator Claybrook); cf. S. 2715 Hearings, supra note 94, at 18, 122 (statements of United States District Judge Richey & EPA Administrator Ruckelshaus) (reimbursement would expedite administrative process by reducing number of appeals taken from agency action); S. 270 Hearings, supra note 18, at 90 (statement of Anthony Roisman) (reimbursement would expedite proceedings by providing citizens with resources to present affirmative case rather than having to rely upon procedural devices such as discovery and cross-examination).


231. It seems fair to surmise that nothing of consequence occurred in a number of proceedings, because compensated involvement in them was deemed insufficiently worthwhile to warrant inclusion in agency self-evaluations generally prepared as advocacy documents. Indeed, NHTSA apparently could find so little efficacious funded involvement in its proceedings that the administration neglected to submit a report on its program as mandated by H.R. Rep. No. 1329, 95th Cong., 2d Sess. 9–10 (1978).
that reimbursement has not invariably improved the quality of agency decisionmaking, and that funding has not always brought previously uninvolved interests into the administrative forum.232

1. Duplicative and Flawed Input. The charges most frequently leveled at compensated involvement are that the submissions of some funded participants have been redundant or of inferior quality. Reimbursed parties have offered information, methodologies, or arguments supplied by other entities or generated by an agency's own staff. NHTSA probably would have learned of all the problems widely discussed in a public meeting on truck safety, save one, without funding a single participant,233 and CAB staff contended that an economic assessment performed by a compensated expert in the International Air Transport Association hearing added nothing to the analysis provided by the agency's own economic witnesses.234 Moreover, reimbursed parties have often adopted positions similar to those of the agencies.235 Compensated entities sometimes have not been good sources of original scientific or technical data236 and have occasionally provided inaccurate technical input. The NHTSA observed that funded participants in its fuel economy standards initiative failed to present extensive facts documenting their opinions237 and that a reimbursed organization's analysis of the comparative effectiveness of different types of automobile restraints was "demonstrably incorrect in major respects."238 Surveys conducted by two compensated parties in an FTC rulemaking were found to be deficient239 and the Department of Energy

232. Analysis of the bad experiences does not depreciate the merits of the reimbursement enterprise, and indeed most of the difficulties encountered could reasonably have been anticipated. It is important, however, to identify those problems that are attributable to inexperience with an untested concept and those that are the fixed costs of what may otherwise be a profitable undertaking.
233. Stellato & Wright, supra note 201, at 27.
235. See, e.g., S. 104 Hearings, supra note 94, at 158 (statement of Senator Simpson); FTC Oversight Hearings, supra note 230, at 277 (statement of Jeffrey Joseph).
236. "[C]onsumer groups, often in an adversary posture toward industry, tend to have the least experience of all. Though they may appeal to competing elements within industry for help, they frequently are dependent upon the agency and outside experts for information." Breyer, Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform, 92 Harv. L. Rev. 549, 572 (1979); see also FTC Oversight Hearings, supra note 230, at 155 (statement of Senator Danforth); S. 104 Hearings, supra note 94, at 159 (statement of Senator Simpson). The mere fact that entities lack substantive expertise, however, does not necessarily mean that they will be ineffective. Professor Boyer and FTC Chairman Pertschuk have praised the funded participation of the Americans for Democratic Action in the FTC ophthalmic goods and funeral practices rulemakings. See B. Boyer, supra note 200, at 142; S. 1020 Hearings, supra note 208, at 6-7. See generally American Optometric Ass'n v. FTC, 626 F.2d 896 (D.C. Cir. 1980); 40 Fed. Reg. 39,901 (1975); 42 Fed. Reg. 41,651 (1977).
237. NHTSA Study, supra note 201, at 11.
238. Id. at 13. Nevertheless, NHTSA observed that the "analysis provided the agency with the opportunity to rebut [sic] decisively the position of those opposed to air bags." Id.
concluded that one model for heating oil overcharges presented by a funded
group was significantly flawed.240

2. Failure to Expand the Participant Base. Reimbursement programs
have been criticized as well for failing to achieve their full pluralistic promise.
Government compensation has not always brought new voices to the deci­
sional process. Some support has been paid to entities that had participated in
prior proceedings without assistance.241 Little funding has reached grassroots
groups and individuals,242 and a considerable amount of money has been
awarded to a small number of recipients, often involved in multiple proceed­
ings before the same agency.243

This information raises questions that go to the essence of the compensa­
tion rationale. Concentration of funding in a few participants jeopardizes the
desired appearance of administrative openness and sacrifices the democratic
ideal underlying the reimbursement concept for perceived technical compe­
tence.244 Compensating parties that can pay their own way245 violates both
the spirit of the funding idea and the letter of the law governing agency
reimbursement.

240. OHA Decision, supra note 219, at 83.
While there is no indication that erroneous data submitted by funded participants has been
relied upon in reaching a final decision, at the very least nominal or negative contributions impose
delay on the administrative proceedings. Indeed, a principal objection to institution of the
reimbursement concept has been that compensated participants will cause delay. See, e.g., S. 270
Hearings, supra note 18, at 113-14 (statement of William Cuddy); H.R. 3361 Hearings, supra
note 93, at 630-31 (statement of George Gleason). Even where the participation of funded parties
is ostensibly efficacious, that participation—by “multiplying the range of interests that must be
considered, by underscoring the complexity of the issues involved, and by developing a more
complete record of alternatives and competing considerations”—actually “may reduce the extent
to which procedures will effectively control agency discretion in decisionmaking.” Stewart, supra
note 5, at 1777.

241. Examples are the Center for Auto Safety at NHTSA and the Aviation Consumer Action
Project at CAB. See NHTSA Study, supra note 201, at 12; CAB Study, supra note 201, at 3.

242. See B. Boyer, supra note 200, at 125. Professor Boyer also found that a considerable
number of compensated entities were located in Washington, D.C., or California. Id.; see also
FTC Oversight Hearings, supra note 230, at 154 (statement of Senator Danforth).

243. Professor Boyer found that “to some degree, the statistics bear out the contention that
compensation awards have been relatively concentrated in a few applicants” at the FTC. B.
Boyer, supra note 200, at 125; see also FTC Oversight Hearings, supra note 230, at 158-60
(statement of Senator Simpson). There has been some, but considerably less, concentration of
funding at a few other agencies. See, e.g., NHTSA Study, supra note 201, at 4-6. It is often
claimed as well that the entities in which reimbursement has been concentrated have espoused the
agency’s position in the proceeding for which compensation was granted. Professor Boyer
observed that “if the [FTC] compensation program was designed to achieve a balance of pro-rule
and anti-rule witnesses, it seems to have had little effect.” B. Boyer, supra note 200, at 116.
Numerous witnesses before congressional committees have testified that “funds were disbursed in
many instances, to specific individuals or groups in agreement with the [agency’s] position” and
in rare circumstances to regulated interests. S. 104 Hearings, supra note 94, at 280 (statement of
Richard Leighton).

244. An important theme in Professor Boyer’s article is the fundamental tension between
democracy and technocracy. See B. Boyer, supra note 200.

245. Opponents of participant funding have been particularly critical of awards to groups
with extensive membership, who it is said, should have sufficient resources to pay the cost of their
participation. See FTC Oversight Hearings, supra note 230, at 154 (statement of Senator Dan­
forth); S. 104 Hearings, supra note 94, at 280 (statement of Richard Leighton). The critics have
also alleged that certain small groups have been formed exclusively for the purpose of securing
C. The Problems in Perspective

1. The Refinements. It obviously is difficult to choose applicants whose contributions will most improve administrative decisionmaking. There are measures the agencies can take, and have implemented, to improve both the quality and diversity of compensated participation. Duplication can be curtailed by apprising reimbursed entities of the materials that are possessed by the agencies or that have been, or are likely to be, submitted by other parties. Timing participant awards, so that the parties chosen have adequate opportunity to prepare without unduly delaying the proceedings, is a logistical problem that the agencies have tried to solve. Agencies that have not always been sufficiently rigorous in auditing recipients can, and are attempting to, upgrade their oversight. The selection process can be expected to improve as experience with funding programs accumulates. These improvements not only should enhance the quality of compensated contributions but also can broaden the spectrum of viewpoints that participant funding could elicit. As the Administrative Conference, commenting on the FTC compensation effort, has observed, “reimbursement programs are likely to be most public reimbursement monies. See FTC Oversight Hearings, supra note 230, at 155, 161 (statements of Senators Danforth & Simpson). Moreover, it often has been alleged that few of the recipients selected actually represent the public. See S. 104 Hearings, supra note 94, at 157, 214 (statements of Senator Simpson and Ben Blackburn); FTC Oversight Hearings, supra note 230, at 153 (statement of Senator Danforth).

246. The NHTSA meeting on heavy-duty truck safety discussed supra in text accompanying note 233 is illustrative. Many participants were funded to talk about safety problems without being apprised of what other participants might say. It is not surprising, therefore, that considerable duplication occurred. See Stellato & Wright, supra note 201, at 25–28. Duplication of the agency's position may also be a consequence of the structure of the proceedings. The confusion that results when the procedural rules are changed may mislead a funded participant into duplicating the efforts of agency staff. See supra note 234. In certain rulemaking proceedings, the procedures by which substantive regulations are developed may make it “unrealistic to expect that public participation ... [will] produce anything beyond modest expansion or contraction of rule coverage.” B. Boyer, supra note 200, at 135. Also, the agency staff may already have developed an excellent proposal and may only be funding participants to ascertain whether it might be improved. This may well be what happened in the asbestos proceeding discussed supra in note 214 and accompanying text. In the latter situation funding may be ill-advised.

247. NHTSA's experience indicated that “[w]ithout sufficient time to prepare, the contributions of [funded participants] are generally limited by the complexity of the ideas involved in the proceeding.” NHTSA Study, supra note 201, at 3. As to the FTC, see B. Boyer, supra note 200, at 86; see also 1 C.F.R. § 305.79-5 (1981). For thorough exploration of the timing difficulties, see B. Boyer, supra note 200, at 86–88.

248. The time frames for applicant selection included in most regulations are illustrative. See, e.g., 7 C.F.R. § 12.5(b) (1981) (USDA); 21 C.F.R. §§ 10.210(a), 10.215(a), (d), (e), 10.220(a), (c) (1981) (FDA). Some agencies have even made explicit provision for expedited procedures in extraordinary circumstances. See, e.g., id. at § 10.210(a)(1) (FDA).

249. The "financial auditing aspects of the FTC's compensation program appeared to be fairly well established by the middle of 1979." B. Boyer, supra note 200, at 95; accord S. 104 Hearings, supra note 94, at 194 (statement of FTC Chairman Perschuck). The experience of other agencies seems similar, but most acted more expeditiously than the Commission. See generally NHTSA Study, supra note 201, at 6-7; EPA Study, supra note 213. Agency sponsorship of, and participation in, the national symposium on citizen participation mentioned supra in note 200, as well as the substantive content of the papers presented at the conference, indicate that agencies can refine the quality of auditing recipient performance to ensure that promised input has been provided.
valuable in agencies or proceedings where there is a substantial difference between the agency staff and groups seeking reimbursement." Giving funding preference to responsible opponents of agency positions should minimize duplication and make compensated involvement more diverse.

The agencies can also attempt to decrease the concentration of funding grants. The initial experience of some agencies that awarded assistance to a small group of recipients is partially attributable to failure to publicize funding availability. Concentration can be reduced by implementing, as some agencies have, outreach programs to inform potentially qualified parties of


251. The criticisms referred to supra in note 243 notwithstanding, most funded participants have in fact opposed agency positions. Even in the FTC proceedings, in which especially in the early days of the program funded consumer groups seem to have allied with the Commission staff, "the great majority of aid recipients have opposed staff proposals in one way or another." B. Boyer, supra note 200, at 132; see also 1 C.F.R. § 305.80-1 (1981) (FTC); H.R. 3361 Hearings, supra note 93, at 500 (statement of FTC Chairman Collier); S. 104 Hearings, supra note 94, at 176 (statement of FTC Chairman Pertschuk); S.1020 Hearings, supra note 208, at 14 (same). Individuals and groups compensated by other agencies have almost always challenged the perspectives advocated by staff. NHTSA has observed that the "points of view expressed by the funded participants are generally independent of the agency's views, and may conflict with or criticize the positions of the agency and the industry." NHTSA Study, supra note 201, at 2. More specifically, the recipient of the largest sum awarded by the FDA was known to be a vociferous opponent of the perspective of the Bureau of Foods in the aspartame matter, see supra note 218 and accompanying text, and may have been selected for that very reason.

In certain instances, congruity between agency views and those of funded participants may have resulted from bias in the selection process. For example, some evidence suggests that, during the early period of experimentation with funding at the FTC, staff working on the substantive matter for which reimbursement was requested may have influenced the compensation determination. In other agencies as well, officials charged with selecting funding applicants have consulted staff involved in the initiative for which funding was sought, because the staff have often been the best sources of information about the particular proceeding. This contact is not altogether harmless, and indeed some such communication may be necessary. B. Boyer, supra note 200, at 79–81; 1 C.F.R. § 305-79.5 (1981) (FTC). To guard against improper intra-agency influence in the selection process while allowing for some interaction, a few agencies have isolated decisionmakers from staff and have required decisionmakers to secure information about the substantive proceeding from presiding officers. Funding responsibility can be placed in the agency head. See, e.g., 15 C.F.R. § 904 (1981) (NOAA). Alternatively, the presiding officer can serve in a recommendatory capacity with final decisionmaking authority vested in entities such as the Office of General Counsel or a three-person Evaluation Board. See, e.g., 16 C.F.R. § 1.17(d) (1981) (FTC); 21 C.F.R. §§ 10.215–20 (1981) (FDA); cf. 7 C.F.R. §§ 12.2, 12.5 (1981) (head of each USDA component presents analysis to Evaluation Board). The FDA approach was to disqualify Evaluation Board members who were participating in the substantive proceeding. See 21 C.F.R. § 10.220(a) (1981). If necessary, agencies could promulgate rules governing inappropriate contacts, such as those that enforce "separation of functions." See, e.g., 21 C.F.R. § 10.55(c) (1981) (FDA); cf. S. 1020 Hearings, supra note 208, at 13 (statement of FTC Chairman Pertschuk) (FTC staff directed to avoid efforts to intervene improperly in funding decision); see also CAB Study, supra note 201, at 7.

A more extreme approach would be to place responsibility for choosing funding recipients in the hands of a government body outside the agency, but the Administrative Conference has recommended that funding responsibility remain with the agencies. 1 C.F.R. § 305-79.5 (1981) (FTC).

252. As to the FTC, see B. Boyer, supra note 200, at 83–86. A similar situation prevailed at other agencies. For example, CPSC received few applications immediately after the program was instituted, primarily because the Commission failed to publicize the program. Interview with Alan Shakin, Office of General Counsel, CPSC, Feb. 3, 1981.
their eligibility for financial assistance or by de-emphasizing prior administrative advocacy as a participant selection criterion.

2. The Constraints. There are limits, however, to the efficacy and desirability of measures that could be instituted to remedy the perceived deficiencies in compensation programs. The inherent cost of eliciting contributions from entities lacking the expertise and experience of regulated interests or agency staffs is that some of the funded participation will be mediocre or even faulty. It is, moreover, unrealistic to expect that every reimbursed party will offer new insights. The crucial issue is not that there may be inferior input, but its extent and the degree to which it offsets the advantages of compensation. Thus far, experience demonstrates and administrative opinion indicates that the funding experiments have been worthwhile; a realistic attitude towards the reimbursement concept requires acceptance of its attendant functional costs.

Distributing compensation awards among diverse interests is certainly desirable. Where pursuit of that goal conflicts with the need to secure accurate, reliable, comprehensive, and cost-effective input, however, it may be necessary to compromise the ideal of the broadest based participation. Often the pool of qualified potential participants familiar with a particular agency's concerns is small. As Professor Boyer has observed, "if the purpose [of the funding programs] is to produce testimony based on sound research and expert legal representation, then it seems efficient to prefer groups and lawyers who already know the ropes and have demonstrated their competence in prior proceedings." There is economic gain as well as an assurance of

253. As to the FTC, see B. Boyer, supra note 207, at 85. An agency such as the FDA, that attracted few applicants during more than two years of operation despite admirable attempts at publicizing the program, may need to expand efforts or develop new approaches. For helpful suggestions on encouraging participation, see 1 C.F.R. § 305-79.5 (1981) (FTC).

254. See, e.g., 7 C.F.R. § 12.6(d) (1981) (USDA); 42 Fed. Reg. 30,482 (1977) (FTC); see B. Boyer, supra note 200, at 131. Restrictions might also be placed on the amount of the award to any one participant, as Congress has done in FTC proceedings. See 15 U.S.C. § 57a(b)(1)(e) (Supp. IV 1980).

255. Even substantively ineffective participation can be helpful. For example, FTC Commissioner Pitofsky offered the following remarks about compensated participants: "I would say in most instances, their position did not prevail. And yet there's not been an occasion in which they didn't sharpen the analysis . . . at times, their positions may be extreme, but they expose considerations that would not otherwise come to the surface." S. 1020 Hearings, supra note 208, at 13; cf. NHTSA Study, supra note 201, at 13 (existence of funded party's analysis that was "demonstrably incorrect in major respects" provided agency with opportunity to rebut position of those opposed to airbags). And, there may be value in simply having previously unrepresented interests participate in administrative proceedings, enhancing the perception of a democratic process.

256. Perhaps all that can fairly be asked of reimbursed entities is that they effectively present their views to agency decisionmakers. See B. Boyer, supra note 200, at 136. Professor Boyer, in assessing the "quality of representation provided by the compensated groups" at the FTC found that the "compensated consumer groups made a respectable showing," Id. at 143, 145. The remarks of the Administrative Conference were considerably stronger. See 1 C.F.R. § 305.80-1 (1981) (FTC); see also NHTSA Study, supra note 201, at 1 (compensated entities "were able to make a meaningful contribution").

257. See B. Boyer, supra note 200, at 130 & n.300 and sources cited therein.

258. Id. at 129.
quality in selecting experienced applicants, whose start-up and operational costs are generally lower and who can use materials and methods developed in other proceedings.\footnote{259} A balance must be struck between experience and diversity, and such factors as the size of the qualified applicant pool and the technical complexity of the issues will affect the determination of whether to choose the neophyte or the practiced participant.

It may also be necessary to compromise when scrutinizing the fiscal condition of applicants, reviewing the performance of those selected, and assessing the quality of program administration. To maintain the integrity of reimbursement efforts, agencies must enforce standards of financial eligibility,\footnote{260} monitor recipient input,\footnote{261} and analyze program operation. But performance of these tasks is costly. While eligibility criteria can be refined, there are limits to the resources that an agency should devote to examining applicant need and to determining how far an agency should delve into the private financial affairs of funding applicants.\footnote{262} Financial ability tests must eventually become questions of credibility and reasonableness,\footnote{263} and undeserving entities may occasionally secure an award.\footnote{264} Evaluating the substantive contributions of individual compensated parties and the administration of funding programs is both difficult and expensive.\footnote{265} During the initial stages of operation, less rigorous study that still affords a general sense of reimburse-

\footnote{259. Id., citing Galanter, Afterward: Explaining Litigation, 9 Law & Soc'y Rev. 347 (1975), and Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95 (1974). With respect to the FTC, whose proceedings require considerable participant expertise, the Administrative Conference concluded: "[T]he fact that a relatively small number of participants received substantial compensation in several proceedings does not demonstrate a defect in the design or implementation of the program." 1 C.F.R. § 305.80-1(c) (1981).}

\footnote{260. The eligibility formulas used in the funding programs focus on the inability of applicants to finance their participation as well as the substantiality of their proposed contributions. See, e.g., 15 C.F.R. § 904.3(a) (1981) (NOAA); 7 C.F.R. § 21.5(d) (1981) (USDA); 21 C.F.R. § 10.220(c)(3) (1981) (FDA). For comprehensive discussion of the criteria, see Chambers, supra note 229, at 40-44, 49-53; B. Boyer, supra note 200, at 10-73.}

\footnote{261. Agency regulations provide for denial of claims for payment or recovery of money paid where the entity whose application was approved initially "has not provided the representation for which the application was approved." 7 C.F.R. § 12.8(b) (1981) (USDA); accord 21 C.F.R. § 10.280(c) (1981) (FDA). But, it is not clear how agencies would determine that contributions were not as promised. Even if agency officials could objectively gauge substandard performance, they may be reluctant to commit agency resources to litigation over claim denial or payment recovery.}

\footnote{262. "Conceptually, applying the financial inability standard involves two related inquiries—does the applicant have enough resources to participate now, and does it have workable ways of raising additional money—that are likely to be both sensitive and beyond the expertise of an agency like the FTC." B. Boyer, supra note 200, at 65. For further discussion of the problem of governmental intrusion, see id. at 65-68, 70-73; 1 C.F.R. § 305-79.5 (1981) (FTC).}

\footnote{263. See B. Boyer, supra note 200, at 108. "Considering these many problems," Professor Boyer concluded, "the FTC was reasonable in according a relatively minor role to the financial inability standard, and in accepting at face value applicants' assertions of financial need." Id. "Other agencies operating direct funding programs appear to have adopted similar approaches." Id.}

\footnote{264. Critics of funding often cite Consumers Union, which is allegedly a "$20 million operation." S. 104 Hearings, supra note 94, at 203 (statement of Richard Leighton); S. 270 Hearings, supra note 18, at 9-10 (statement of Senator Thurmond). The FTC has also funded trade associations. B. Boyer, supra note 200, at 102-03.}

\footnote{265. See supra notes 202 & 204.
ment's efficacy may be preferable, so that agency resources more profitably used to fund participants or administer programs will not be dissipated.

3. Operational Costs. An important factor to be considered in examining the legitimacy and desirability of participant compensation is its cost, both in terms of money actually paid recipients and of the administrative demands on agency staff and resources. Experience has demonstrated that the benefits of reimbursement programs have been attained with relatively little strain on agency budget or bureaucracy. The programs have proven inexpensive and easy to administer and have generally been operated in a competent manner, although citizen funding began as, and remains, an experimental idea. Perhaps more significantly, the expenses of administration and financial assistance have been reasonably contained. Start-up costs, attributable to promulgation of rules creating programs and publicity, have been rather low, and can be expected to decline as agencies instituting compensation efforts capitalize on the experience of those that have previously developed programs. Day-to-day administrative expenses have also been reasonable, because the skills and personnel needed to run the efforts already exist within the agencies and because experience brings cost efficiency.

The primary program costs have been, of course, the actual money paid to participants, but here too outlay has been modest. Only the FTC has spent

266. The Administrative Conference, in recommending that the FTC effort continue, observed that even though the Commission "lack[ed] specific statutory guidance and the benefit of other agencies' experience, [and] progressed slowly, through trial and error over a two-year period, ... [the] Commission's present system of administration appears to implement faithfully and efficiently the reimbursement program established by the statute." 1 C.F.R. § 305.79-5 (1981). NHTSA found that its program could "be administered with only minor administrative burdens so long as it is adequately staffed." NHTSA Study, supra note 201, at 3; accord CAB Study, supra note 201, at 1, 7.

267. For example, the CAB estimated that it paid "$38,325 to complete the rulemaking [and] $7,053 to develop a pamphlet explaining the application process." CAB Study, supra note 201, at 6, 9. All of the CAB figures include a "100% overhead factor." Id. at 9. The attorney who developed the CPSC funding regulation stated that the "start-up" effort required a "small amount of resources." Telephone interview with Alan Shakin, Office of General Counsel, CPSC, Dec. 1, 1981. The attorney who developed the NHTSA regulation estimated expenditures to be "$50,000 maximum." Telephone interview with Richard Lorr, Office of General Counsel, DOT, Dec. 1, 1981. Start-up costs appear to be no more than those incurred in commencing other similar programs.


269. The cost of day-to-day administration at the CAB during a nine-month period was approximately $2,600, representing the expense incurred by the Evaluation Committee in processing eight applications submitted in three proceedings. CAB Study, supra note 201, at 9. This does not include approximately $700 spent in evaluating the program staff or salary allocated to the program. Telephone interview with Glen Robards, Jr. (Nov. 24, 1981). The CPSC spent approximately $20,700 to administer its effort during the final year of operation. This included the costs of processing more than fifty applications submitted in three proceedings. Interview with Barbara Rosenfeld, Office of Public Participation, CPSC (Nov. 24, 1981).

270. For example, FDA has relied upon personnel in its Office of Management and Operations to process applications and conduct fiscal audits, skills that the personnel had acquired in processing and auditing grant applications. See generally 21 C.F.R. § 10.280–290 (1981) (FDA); FDA Study, supra note 218, at § 2.
more than $65,000 on compensation during a single year, and most agencies have paid out considerably less than they had originally allocated. The cost of funding specific parties has been comparatively inexpensive, substantially below the market rate for similar private-sector services. Indeed, in many situations, citizen reimbursement appears cheaper than the alternative mechanisms—augmenting agency staff and hiring outside contractors—traditionally employed to procure additional decisional input. Public participants can be paid to provide assistance in substantive fields where the agency does not "want to build up the kind of permanent staff expertise that [it] would have to have to issue intelligent regulations." Because most applicants funded are already involved in, and knowledgeable about, their areas of particular concern and because they are highly motivated, they are also willing and able to charge much less than government contractors.

271. In 1977, NHTSA paid $63,389 in fees and expenses. NHTSA Study, supra note 201, at 6. Most other agencies have expended considerably less. For example, FDA spent approximately $7,300 during a six-month period. See FDA Study, supra note 218, Table II. CPSC spent approximately $25,000 for fees and expenses during the final year that its program was operating. See CPSC Study, supra note 214, at 1. The FTC, however, has paid participants as much as $500,000 for fees and expenses in one year. Telephone interview with Barry Rubin, Office of General Counsel, FTC, Nov. 23, 1981.

272. For example, FDA allocated $250,000 for the initial year and paid only $7,300 in the first half of that period. See FDA Study, supra note 218, at 3 & Table II. Similarly, the CAB spent only $28,400 of the $150,000 appropriated for a one-year demonstration project. See CAB Study, supra note 201, at 1-2. Moreover, some agencies have actually paid less money than was initially awarded recipients. For example, NHTSA awarded $56,000 and "only had to pay $43,000" in 1978. S. 104 Hearings, supra note 94, at 189 (statement of NHTSA Administrator Claybrook); see also NHTSA Study, supra note 201, at 6.

273. Many agencies have paid attorneys according to a "fee scale extrapolated from government lawyers' salaries which [have] sliding maximum limits based on the attorney's years of experience after law school." B. Boyer, supra note 200, at 91. Similarly, many agencies have "pegged" the rate for expert witnesses to salaries paid government employees with comparable experience. On compensation levels in specific funding programs, see 21 C.F.R. § 10.250-.280 (1981) (FDA); 15 C.F.R. § 904.5(c) (1981) (NOAA); 42 Fed. Reg. 30,485 (1977) (FTC).

274. It may also be cheaper than some of the other proposals considered by Congress in the early 1970's to provide increased consumer representation in agency proceedings, such as "the creation of special 'public counsels' in certain areas which affect all citizens ... [or] of an independent 'Public Counsel Corporation,' to provide advocacy on a broad spectrum of issues." S. Rep. No. 94-843, 94th Cong., 2d Sess. 3 (1976). Strengthening existing consumer offices, see S. 104 Hearings, supra note 94, at 279 (statement of Richard Leighton), would probably be less costly, but also less effective. For discussion of these and other less effective alternatives, see NRC Report, supra note 28, at 131-67.

275. Hearings on Department of Transportation and Related Agencies Appropriations for 1980 Before the Subcomm. on Transportation of the House Appropriations Comm., 96th Cong., 1st Sess. pt. 6, at 287 (1979) (statement of Reuben Robertson, CAB Bureau of Consumer Protection Director); cf. H.R. Rep. No. 1164, 95th Cong., 2d Sess. 10 (1978) ("direct utilization of . . . consumer expertise and resources will enable CPSC to 'bootstrap' its staff on the technical matters, which should result in higher quality standards").

276. See S. 104 Hearings, supra note 94, at 188 (statement of NHTSA Administrator Claybrook).

277. For example, a consumer center "received $2,486 to provide information on the hazards related to the presence of asbestos in art materials," a project that staff estimated "would have cost in excess of $25,000" had CPSC "contracted for this work." CPSC Study, supra note 214, at 2.
Against this backdrop of cost efficiency and financial responsibility, even the more compelling charges leveled at participant reimbursement seem less significant. At limited expense, the administrative sector has acquired experience with a promising mechanism for generating information and shaping perspectives and from which it has reaped demonstrable, though not unequivocal, benefit in specific proceedings.

D. Experience, Experiment, and Reimbursement Authority

While participant compensation has demonstrated promise, the concept is not equally beneficial in all administrative contexts. Selection procedures, other operative techniques, resource outlay, and even the advisability of reimbursement itself may vary from agency to agency. Extensive and more rigorous study is needed to review the course of the funding programs, to explore ways of enhancing their effectiveness, and to identify those circumstances in which compensation is likely to be of greatest benefit. Independent, expert evaluation, with defined impact parameters, conducted for a sufficient period, will be needed for definitive assessment of program performance. Pending such comprehensive analysis, and perhaps postponing it until more experience accumulates, the reimbursement experiment should continue.

Because the optimal conditions for funding of participants have yet to be identified, it is logical to explore the compensation concept with a maximum degree of flexibility and opportunity for administrative innovation. Comprehensive legislative guidance is not only improbable and difficult to provide; it also may be unnecessary at this point. Congress should continue specifically authorized reimbursement programs on a selective basis, maintaining those that have improved decisionmaking and have been well administered, and should support institution of programs in agencies that may especially benefit from funded involvement. Congress should refrain from imposing restrictions on participant compensation through the appropriations process.

278. FTC Chairman Collier, in the context of testifying that "funded participation substantially benefits the proceedings," observed that "not all projects have been equally successful," as "might easily have been expected." H.R. 3361 Hearings, supra note 93, at 500-01.

279. In identifying circumstances that might auger well for a successful compensation program, consideration should be accorded to factors such as the type of agency, the type of proceedings, the type of issues presented for resolution, and the type of contribution to be made.

280. See Rosenbaum, supra note 200, at 42.

281. For example, Professor Rosenbaum offers a "rudimentary impact model," which divides the "policy goals for citizen participation into three broad categories: those relating to policy makers, substantive policy decisions themselves and the procedures for making policy," and indicates that "there may also be 'spillovers.'" Id. at 35-36. It bears repeating, however, that the relative efficacy of reimbursed involvement is a function of many variables, and that any analysis must necessarily be polycentric. See Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 394-404 (1978).

282. Reimbursed public involvement in the CPSC "officer" process, though recently eliminated see supra note 90, appears to have offered many advantages, see CPSC Study, supra note 214, and the CAB experiment seems to have been quite promising, see CAB study, supra note 201.

283. See supra notes 82-85 & 90 and accompanying text.
If this guidance were followed, the implied reimbursement principle would afford sufficient flexibility for additional experimentation. Assuming agencies’ existing legislative mandates are broad enough to satisfy the implied-funding rationale, the agencies themselves can best determine whether compensation has the potential to enhance their decisionmaking and if the projected benefits justify diverting agency resources. The collective exercise of administrative discretion probably would result in moderately scaled, diverse programs, supporting participant input of varied content and quality. These programs should facilitate additional testing and refinement of the reimbursement concept without committing the government to any fixed mode.  

So long as the funding efforts are modest and responsibly managed, contribute to the decisional process, and do not interfere with accomplishment of traditional agency responsibilities, Congress and the courts should be receptive to these experiments. Judges should prohibit programs instituted pursuant to implied power only where the compensation effort violates the general tenor of the particular agency’s statutory mandate, either because that mandate has been drawn narrowly by Congress or because the program is so insubstantial or so valueless that it contravenes sound administrative policy. Proscribing agency initiatives on the basis of analogies to fee shifting or ambiguous legislative expressions, however, is unwarranted. Statutory authority and the existing administrative structure are sufficiently expansive to accommodate reimbursement pursuant to implied agency power. The funds earmarked for compensation are spent in the public interest and for the public benefit. The information and experience acquired promise advantages for the individual agencies today and for the functioning of the entire administrative sector in the future.

**CONCLUSION**

Five years of agency experimentation with participant funding have shown the concept to be a valuable and cost-effective means of improving administrative decisionmaking. Unfortunately, that exploration has virtually been ended by judicial interpretation, antiregulatory reaction, budget-cutting, and bureaucratic caution. If Congress and the present Administration have correctly perceived that part of what is wrong with government regulation is agency unresponsiveness to the needs of the American people, their negative approach to the reimbursement concept is ironic. Rather than being eliminated, this promising, inexpensive mechanism for improving administrative decisions by making agencies more responsive should be expanded and refined.

---

284. It would be especially unwise for Congress to adopt legislation expressly proscribing agency reimbursement “unless specifically authorized by law,” like the bill approved by the Senate Governmental Affairs Committee in 1981 and the full Senate in 1982 and by the House Judiciary Committee in 1980. See generally supra notes 95 & 96 and accompanying text.

Of course, such action would eliminate the flexibility needed by agencies to experiment with funding. It also will be less expensive to permit agencies to compensate public participants pursuant to implied authority when the agencies deem funded involvement necessary to the decisional process, rather than to require that individual agencies secure congressional permission every time one of them desires to reimburse participants.