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Carl W. Tobias

*University of Richmond*, [ctobias@richmond.edu](mailto:ctobias@richmond.edu)

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# REVIVING PARTICIPANT COMPENSATION

*Carl Tobias\**

Over the last quarter century, Congress has clearly recognized the importance of expanding public participation in federal administrative agency proceedings. It has expressly required that many agencies solicit citizen input and facilitate active public involvement in administrative processes while commanding governmental officials to consider thoroughly in their decisionmaking the views of all interests that might be affected. Congress has attempted to develop some mechanisms for promoting increased citizen participation in agency processes, but the legislative branch has been relatively unsuccessful in actually enhancing public involvement. Because citizen participants, such as public interest groups or individual consumers, have comparatively few resources for participating in administrative decisionmaking, congressional inability to promote their involvement has effectively rendered hollow the right to participate.<sup>1</sup> These phenomena appear to be most problematic in rulemaking proceedings, perhaps the preeminent procedure for developing administrative policy.

There is, however, one cost-effective measure for facilitating citizen involvement in agency processes with which numerous prior Congresses and several previous administrations have experimented: public participation funding.<sup>2</sup> Participant compensation was instituted during the Republican administrations of Presidents Nixon and Ford, was comprehensively experimented with during the Democratic administration of President Carter, and was applied, albeit more narrowly and in

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\* Professor of Law, University of Montana. B.A. 1968, Duke University; LL.B. 1972, University of Virginia. I wish to express my thanks to Peggy Sanner for her valuable suggestions. Any errors that remain are mine alone.

1. Even as then-Judge Warren Burger recognized the right to participate in administrative proceedings, he acknowledged that the costs of participating would limit the number of participants. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1006 (D.C. Cir. 1966).

2. Funding, compensation, and reimbursement are employed synonymously to mean agency payment of the costs and expenses incurred by members of the public when participating in federal proceedings.

a somewhat altered form, during the Republican administration of President Reagan.<sup>3</sup> Now that the 101st Congress and the Bush administration are confronting the pragmatic realities of governance in the modern administrative state, they should seriously consider this valuable technique for promoting participatory democracy to ascertain whether participant reimbursement warrants revitalization and, if so, how it can be revived most effectively. This article is meant to provoke discussion of participant compensation's worth and to stimulate new, rigorous experimentation with the concept.

The first section of this article briefly recounts the origins and development of citizen reimbursement and describes experimentation with that mechanism. The second part evaluates the benefits and disadvantages of public funding. Because this assessment indicates that the measure is a cost-effective approach for improving agency decisionmaking and for enhancing citizen participation in administrative proceedings, the third section offers suggestions for reinstating participant compensation.

## I. THE BACKGROUND OF PARTICIPANT COMPENSATION

The rise of, and early experimentation with, the participant reimbursement concept require only cursory treatment here.<sup>4</sup> Since the mid-1960s, numerous observers, as diverse as Ralph Nader, business interests, and Chicago School economists, have criticized federal administrative agencies for failing to fulfill their statutorily mandated responsibilities.<sup>5</sup> There are many explanations for agency failure, but a number

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3. The Equal Access to Justice Act and resource pools used in regulatory negotiation are two prominent forms in which the concept was applied during the Reagan administration. Thorough assessment of them, however, is beyond the scope of this article. For a brief treatment of both, see Tobias, *Great Expectations and Mismatched Compensation: Government Sponsored Public Participation in Proceedings of the Consumer Product Safety Commission*, 64 WASH. U.L.Q. 1101, 1106 & n.29, 1165 n.387 (1986); cf. Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986) (more treatment of resource pools); Note, *Applying The Equal Access to Justice Act to Asylum Hearings*, 97 YALE L.J. 1459, 1461-76 (1988) (more treatment of Equal Access to Justice Act).

4. For a more thorough analysis, see Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906, 907-18 (1982); Tobias, *supra* note 3, at 1102-17. For a broader examination of the problems reimbursement was intended to rectify, see Diver, *Pollcymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

5. For a thorough analysis of agency failure, see S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 130-81 (2d ed. 1985).

of the reasons allude to the participatory disparities in administrative processes between regulated entities and the public at large.<sup>6</sup> When agency decisionmakers premise judgments primarily on data and arguments that industry members supply, it should not be surprising that the governmental determinations ultimately reached substantially reflect these entities' viewpoints.<sup>7</sup> An important explanation for the significant discrepancies in participation between regulated interests and the public is the considerable costs of participating in agency proceedings.<sup>8</sup> These considerations led some observers to suggest that, if citizens could improve administrative processes by offering more balanced information and different perspectives, but were prevented from doing so because they lacked the requisite resources, agencies should facilitate their involvement by providing financial assistance.<sup>9</sup> Participant reimbursement was an important mechanism created to ameliorate or remedy these perceived difficulties with modern administrative government.<sup>10</sup>

Approximately two decades ago, the Federal Trade Commission (FTC) and the Administrative Conference of the United States (ACUS) began studying concepts that were the forerunners of the compensation idea. Although ACUS recommended that public participation in agency proceedings be substantially expanded and that poor persons be reimbursed for the costs of their involvement in rulemaking,<sup>11</sup> the ACUS's members ultimately voted against widespread appli-

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6. See Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972); Stewart, *supra* note 4.

7. See Cramton, *supra* note 6, at 529-30; Tobias, *supra* note 4, at 908.

8. 3 SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, S. DOC. NO. 71, 95th Cong., 1st Sess. vii, 17-22 (1977) [hereinafter SENATE STUDY]; see also Gellhorn, *supra* note 6, at 389-98 (cost estimates).

9. See, e.g., SENATE STUDY, *supra* note 8, at 1-22, 91-127; *Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter *S. 270 Hearings*].

10. Reimbursement is only one response, of course, to the perceived difficulties which are only one set of problems with modern administrative governance. For analyses of other difficulties and proposed solutions, see the sources cited *supra* notes 6, 8, & 9, and the papers in *A Symposium on Administrative Law, The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 277 (1987).

11. The first recommendation was entitled *Representation of the Poor in Agency Rulemaking of Direct Consequence to Them*, in 1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS & REP. 1968-70, at 71 (1970) (recommendation no. 5). The second recommendation was entitled *Public Participation in Administrative Proceedings*, in 2 ADMINISTRATIVE

cation of the funding concept.<sup>12</sup> The FTC invoked implied authority to compensate public participants in a 1972 hearing.<sup>13</sup> The FTC premised the action on an opinion of the Comptroller General that it could validly exercise such power.<sup>14</sup> The Comptroller, who is the head of the General Accounting Office, an entity established to serve as Congress's watchdog of the agencies, confirmed in many later decisions that numerous other federal agencies possessed similar authority.<sup>15</sup>

In the 1970s, Congress specifically granted several agencies the power to fund participants.<sup>16</sup> Since the middle of that decade, it has relied on appropriations measures to instruct agencies that they can reimburse participants.<sup>17</sup> During the 1980s, however, Congress more often used those statutes to inform agencies that they were not to compensate.<sup>18</sup> In 1985, the legislature made permanent the Equal Access to Justice Act (EAJA), which permits entities like small businesses that prevail against the government in certain proceedings to recover their fees and expenses.<sup>19</sup>

Between 1972 and approximately 1982, fourteen governmental entities employed express or implied authority to fund citizens who participated in their administrative processes. More than half of these governmental units reimbursed the public in less than four proceedings.<sup>20</sup>

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CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS & REP. 1970-72, at 444 (1972) (Appendix; Recommendation 28) [hereinafter *Admin. Conf. Rec.* 28].

12. See *Admin. Conf. Rec.* 28, *supra* note 11.

13. See *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 1032 (1972); see also Tobias, *supra* note 3, at 1104-05 (more discussion of FTC consideration of funding).

14. See Letter from Elmer B. Staats, Comptroller General, to Miles W. Kirkpatrick, Chairman, FTC (Aug. 10, 1972), reprinted in *Public Participation in Federal Agency Proceedings: Hearings on S. 2715 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 281 (1976).

15. See, e.g., Letter from R. F. Keller, Deputy Comptroller General, to Rep. John E. Moss, Chairman, Oversight and Investigations Subcomm., Comm. on Interstate and Foreign Commerce (May 10, 1976), reprinted in *S. 270 Hearings*, *supra* note 9, pt. 1 at 428; see also Tobias, *supra* note 4, at 912-14 (more discussion of Comptroller's opinions).

16. See 15 U.S.C. § 2056(d)(2) (1976) (Consumer Product Safety Commission); 15 U.S.C. § 57a(h) (1976) (FTC); 15 U.S.C. § 2605(c)(4) (1976) (EPA); 22 U.S.C. § 2692 (Supp. III 1979) (Department of State).

17. See, e.g., H.R. REP. NO. 242, 96th Cong., 1st Sess. 29-30 (1979).

18. See, e.g., Department of the Interior and Related Agencies Appropriations Act of 1981, Pub. L. No. 96-514, 94 Stat. 2957, 2976 (1980); Department of Housing and Urban Development—Independent Agencies Appropriations Act of 1986, Pub. L. No. 99-160, § 410, 99 Stat. 909, 931 (1985).

19. See Pub. L. No. 99-80, 99 Stat. 183 (1985); see also Tobias, *supra* note 3, at 1106 n.29 (more discussion of EAJA and its background).

20. For a thorough discussion and documentation of the funding, see Tobias, *supra* note 3, at 1106-09.

The Consumer Product Safety Commission (CPSC), the FTC, and the National Highway Traffic Safety Administration (NHTSA) ran the most ambitious programs in the federal government; in more than fifteen initiatives, each paid individuals and organizations which were involved.<sup>21</sup> Nearly all agencies ceased compensating participants by 1982 because of adverse judicial decisions involving funding, "antiregulatory reaction, budget-cutting, and bureaucratic caution."<sup>22</sup>

The political perspective of the particular presidential administration in power at the time has affected the frequency of reimbursement. Only a small number of governmental entities compensated members of the public in the Nixon, Ford, and Reagan administrations. The overwhelming majority of reimbursement activity occurred during the years of the Carter administration.<sup>23</sup> Moreover, President Carter was the sole president to endorse the participant funding concept expressly.<sup>24</sup>

The federal courts, in three cases, have considered the question of agency implied authority.<sup>25</sup> The Second Circuit, in a closely divided en banc decision, refused to order that the Federal Power Commission pay expenses intervenors incurred in a licensing proceeding.<sup>26</sup> A District of Columbia district court found that the Agriculture Department possessed implied power to fund a public interest organization which analyzed the economic effects of an agency proposal.<sup>27</sup> Finally, a sharply divided panel of the Fourth Circuit held that "whether there shall be reimbursement for public participation in agency proceedings is a decision for Congress and not the FDA or this court."<sup>28</sup>

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21. The Department of State also funded in more than 15 initiatives, but the proceedings were less complex. For a discussion of these agencies' funding, see Tobias, *supra* note 3, at 1107-08.

22. Tobias, *supra* note 4, at 955; see also Tobias, *supra* note 3, at 1108-09 (discussion of program discontinuation).

23. For a discussion and documentation of the funding, see Tobias, *supra* note 3, at 1106-09.

24. He recognized the "need for public participation funding and [strongly encouraged] each department and agency with the requisite authority to institute a public participation funding program." J. Carter, Memorandum for the Heads of Executive Departments and Agencies from President Carter, May 16, 1979, 1 1979 PUB. PAPERS, at 867 (1980).

25. *Pacific Legal Found. v. Goyan*, 664 F.2d 1221 (4th Cir. 1981); *Greene County Planning Bd. v. FPC*, 559 F.2d 1227, 1237 (2d Cir. 1976) (en banc) (denying petitions for review and remanding to FPC for determination whether FPC should compensate intervenors' expenses under standards approved by Comptroller General, holding that it is for Congress, not Comptroller General, "to set the conditions under which payments, if any, should be made") (June 30, 1977), *cert. denied*, 434 U.S. 1086 (1978); *Chamber of Commerce v. United States Dep't of Agric.*, 459 F. Supp. 216 (D.D.C. 1978). For a thorough analysis of these opinions and of the issue of implied funding authority, see Tobias, *supra* note 4, at 918-39.

26. *Greene County Planning Bd.*, 559 F.2d at 1239.

27. *Chamber of Commerce* at 221.

28. *Pacific Legal Found. v. Goyan*, 664 F.2d 1221, 1227 (4th Cir. 1981).

Although the concept of reimbursed public involvement emerged nearly two decades ago, there has been no comprehensive assessment of its advantages and disadvantages, effectiveness or quality.<sup>29</sup> Five agencies' funding activity was never analyzed.<sup>30</sup> Six governmental units performed self-studies which can be criticized principally because they apparently were prepared as advocacy documents meant to convince Congress that publicly supported citizen activity was worthwhile.<sup>31</sup> Some outside evaluators have examined a small quantity of compensated participation.<sup>32</sup> Moreover, while there is considerable congressional testimony concerning such participation, much of it appears to be motivated by political factors.<sup>33</sup>

In short, numerous governmental entities have sponsored the involvement of some 500 members of the public in nearly 100 agency proceedings. Although a considerable amount of that compensated participation has not been analyzed, a sufficient quantity has been assessed to ascertain whether the reimbursement concept should be revitalized. The benefits and detriments of funded citizen involvement are examined below.

## II. THE ADVANTAGES AND DISADVANTAGES OF PARTICIPANT COMPENSATION

It is neither possible nor necessary to provide a comprehensive assessment of all of the compensated participation that occurred.<sup>34</sup> The overwhelming majority of reimbursed involvement was in proceedings conducted a decade ago, and the memories of those familiar with the funded activity may well be unreliable.<sup>35</sup> There is, however, considerable secondary material that was contemporaneously reduced to writing and remains comparatively accessible.<sup>36</sup> Information from some pri-

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29. This should not be surprising, given the substantial funding activity that occurred and the difficulties entailed in its analysis. For a discussion of prior studies, see Tobias, *supra* note 3, at 1110-12, 1116-17.

30. See *id.* at 1110 n.57. These were the agencies which funded in few proceedings. See *supra* note 20 and accompanying text.

31. Tobias, *supra* note 3, at 1110-11 & nn.59-60.

32. *Id.* at 1111.

33. *Id.* at 1111-12.

34. The sheer magnitude of the task would be overwhelming, given the substantial amount of funding activity.

35. For a discussion of the problems posed by passage of time, see Tobias, *supra* note 3, at 1125-26.

36. This includes the material discussed *supra* notes 31-33 and accompanying text. See also Tobias, *supra* note 3, at 1121-22 (discussion of difficulties entailed in treating that material).

mary sources also exists.<sup>37</sup> These data constitute a sufficiently reliable and representative basis on which to premise conclusions about whether participant compensation was promising enough to warrant revitalization.<sup>38</sup> The question of revitalization implicates issues of economics and politics at least as much as it involves reimbursement's potential, especially in terms of the efficacy and quality of the public involvement promoted.<sup>39</sup>

### A. *Advantages*

Government sponsored citizen participation in administrative proceedings afforded numerous advantages at each stage of decisionmaking.<sup>40</sup> Funded individuals and groups facilitated expeditious, accurate, and equitable agency treatment of questions at issue. They identified and clarified the problems, interests, and alternatives that administrative officials must consider and offered information and points of view that might otherwise have been unavailable. Moreover, they aided decisionmakers in analyzing the input before them and contributed to more defensible policy formulation.

During the early phases of decisional processes, reimbursed participants helped to set the stage for prompt, efficacious decisionmaking. Those who were funded delineated the interests that would be affected by agency determinations and how they would be affected, expansively identified and clearly assessed the issues to be resolved, and denominated a broad spectrum of possible options for administrative consideration.<sup>41</sup> Compensation permitted governmental officials to solicit directly the views of a broader range of affected parties and, thus,

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37. For a discussion of certain problems involved in gleaning information from primary sources, see Tobias, *supra* note 3, at 1122-25.

38. For a discussion of reliability and representativeness in the context of detailed analysis at one agency which yielded the conclusion that funding was sufficiently promising to warrant revitalization, see Tobias, *supra* note 3, at 1118-28, 1162-63.

39. Professor Boyer, who, under the auspices of the ACUS, conducted the most sophisticated analysis of funding, found that reimbursement clearly had sufficient promise to warrant reinstitution and that considerable controversy involving the concept implicated politics and economics. See B. Boyer, *Compensating Public Participants in Administrative Rulemaking: The Federal Trade Commission Experience* (ACUS June 1980) (unpublished manuscript) (copy on file with author) [hereinafter B. Boyer, *Compensating Public Participants*]. The condensed, more accessible version of his study is Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 *Geo. L.J.* 51 (1981).

40. Here I rely, in a general sense and for specific examples, on my earlier work and the primary sources on which it is based, attempting, insofar as possible, to be representative. See Tobias, *supra* note 4, at 941-55.

41. See Tobias, *supra* note 3, at 1157; Tobias, *supra* note 4, at 941-42.



enhanced decisionmakers' understanding of their determinations' actual implications.<sup>42</sup>

After reimbursed persons and entities had helped to establish effective frameworks for administrative decisionmaking, they improved agency processes by submitting novel information, by making new contentions, and by offering different perspectives on issues under consideration.<sup>43</sup> Funded participants provided perceptive points of view on the procedural and substantive aspects of legal questions. For instance, one compensated entity recommended that the Department of Transportation subpoena necessary data from industry members,<sup>44</sup> while another helped flesh out the meaning of a general standard included in the legislation governing the Department of Housing and Urban Development (HUD).<sup>45</sup> Reimbursed participants also supplied administrative decisionmakers with raw information they did not have and which was necessary to reach the most accurate determinations.<sup>46</sup> These officers asserted as well that funded parties developed data, proffered evidence and performed surveys that substantially improved the records compiled in agency proceedings while helping the officials to organize and control the records more effectively.<sup>47</sup>

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42. For example, two FTC chairmen found that funding substantially enriched agency decisionmaking by providing a diversity of perspectives. See *Regulatory Reform: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. pt. 2 at 196-97 (1979) (statement of FTC Chairman Michael Pertschuk) [hereinafter *Regulatory Reform Hearings*].

43. See Tobias, *supra* note 3, at 1157; Tobias, *supra* note 4, at 942-43.

44. See DEPARTMENT OF TRANSPORTATION DEMONSTRATION PROGRAM TO PROVIDE FINANCIAL ASSISTANCE TO PARTICIPANTS IN ADMINISTRATIVE PROCEEDINGS: NHTSA'S EVALUATIONS AND RECOMMENDATIONS 10 (1977) (on file with author) [hereinafter NHTSA STUDY].

45. See *Regulatory Reform Hearings*, *supra* note 42, pt. 2 at 169 (statement of Mass. Lieutenant Governor Thomas O'Neill III). The participant convinced HUD that its calculations of utility charges would unduly burden those living in public housing, and, as a consequence, the agency significantly reduced its figures. *Id.*

46. For instance, a compensated organization "identified an extremely hazardous product, free form asbestos" that CPSC staff did not know was available commercially. The staff in turn forwarded the information to the Commission's product recall branch for investigation. See MEMORANDUM: FUNDING UNDER 1980 PUBLIC PARTICIPATION PROGRAM 4 (1980) (on file with author) [hereinafter CPSC STUDY]. That entity also informed the Environmental Protection Agency (EPA) of polychlorinated biphenyls' application—of which the agency was unaware—in microscopy, and that information led EPA to exclude such use from its rule. See OFFICE OF TOXIC SUBSTANCES, U.S. ENVIRONMENTAL PROTECTION AGENCY, PCB PUBLIC PARTICIPATION PILOT SUMMARY (1978) (on file with author).

47. For assertions that records were improved, see *S. 270 Hearings*, *supra* note 9, pt. 1 at 7 (statement of James De Long, Assistant Director, FTC Bureau of Consumer Protection); *Regulatory Reform Hearings*, *supra* note 42, pt. 2 at 177, 197 (statement of NHTSA Administrator Claybrook); see also *id.* at 197 (statement of FTC Chairman Pertschuk) (helping officials organ-

Government sponsored participants suggested, created, and employed new approaches to testing and assessment. These participants also criticized and enhanced the mechanisms, procedures, and reasoning processes of other parties and administrative staffers. Correspondingly, compensated entities applied novel and improved techniques and methodologies to produce valuable information. For example, in a home heating oil proceeding before the Department of Energy, a funded individual convinced the agency that a Department of Justice assessment of competition among refiners was inaccurate, enhanced the Energy Department's evaluative approaches by applying different information, and developed the preferred model of industry overcharges.<sup>48</sup>

Reimbursed parties helped agencies thoroughly consider alternative courses of action while creating and recommending different, less burdensome, and novel ways of attaining agency purposes. They also persuaded decisionmakers to implement these approaches. For instance, in the FTC's hybrid rulemaking on used cars, Commission staff initially recommended comprehensive disclosure requirements.<sup>49</sup> At the instigation of a compensated organization whose survey indicated that consumers wanted less complex regulations, the FTC altered its proposal to reflect the organization's ideas.<sup>50</sup>

Of course, the federal agencies relied on many additional suggestions of those funded in testing, reaching, and supporting their ultimate determinations.<sup>51</sup> In numerous circumstances when reimbursed entities did not change decisionmakers' perspectives or their proposed approaches, the groups enhanced decisional processes. Cogent input supportive of agencies' ideas afforded assurance that they were correct and bolstered administrative resolve to resist criticism, especially from industry representatives which otherwise might have been accommodated too greatly.<sup>52</sup> Compensated participants who questioned agency view-

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ize and control records).

48. See DEPARTMENT OF ENERGY, OFFICE OF HEARINGS AND APPEALS, DECISION AND RECOMMENDATIONS NO. 2, [HOME] HEATING OIL 81, 84, 126 (Nov. 29, 1978) (on file with author). Similarly, a funded party's challenges to data tendered by a drug company seeking FDA approval of aspartame supported in part the Board of Public Inquiry's recommendation that there be additional testing related to cancer before approval. See 46 Fed. Reg. 38,285-86 (1981).

49. See *Regulatory Reform Hearings*, *supra* note 42, pt. 2 at 227-28 (statement of Nancy Drabble).

50. *Id.* at 228. See generally 46 Fed. Reg. 41,328 (1981). One person funded to speak at a CPSC hearing offered similar valuable suggestions for alternative courses of action that were implemented by the staff. See Tobias, *supra* note 3, at 1149-50.

51. For more examples, see Tobias, *supra* note 3, at 1128-56; Tobias, *supra* note 4, at 941-45.

52. See NHTSA STUDY, *supra* note 44, at 2; *cf.* Tobias, *supra* note 3, at 1102-03 (discussion

points demanded rational answers while requiring agency staffers to do their homework and keeping administrative officials honest.<sup>53</sup> Some have even contended that funded input which lacks substantive efficacy may be beneficial. For instance, one FTC commissioner provided these observations on reimbursed parties: "[I]n 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 which would not otherwise come to the surface."<sup>54</sup>

The efficacy of compensated involvement cannot be separated completely from its quality, that is, how good the government sponsored activity was. It appears that funded participation was of respectable quality. Professor Boyer, who thoroughly analyzed reimbursed organizations' representation in many FTC hybrid rulemakings, found that the entities made respectable showings.<sup>55</sup> The conclusions of the ACUS, under whose auspices he conducted the study, were much stronger:

[R]eimbursed participants in the Commission's proceedings have provided a variety of viewpoints and information on relevant issues that would not otherwise have been presented . . . [,] developed empirical data which was useful to the Commission; effectively cross-examined witnesses presented by other parties and by staff, and presented expert testimony.<sup>56</sup>

Moreover, the NHTSA stated that compensated groups "were able to make a meaningful contribution."<sup>57</sup> Most of the funded input was substantively correct. Reimbursed individuals offered pertinent, substantiated information, contentions and viewpoints that had not been provided. Consequently, they necessarily delineated, and instigated examination of, issues that would not have been considered. Compen-

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of agency bias toward regulated interests).

53. See *Regulatory Reform Hearings*, *supra* note 42, pt. 2 at 174-200 (testimony of FTC Chairman Pertschuk and NHTSA Administrator Claybrook).

54. *Authorizations for the FTC: Hearings on S. 1020 Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 14-15 (1979) (statement of Commissioner Pitofsky); *cf.* NHTSA STUDY, *supra* note 44, at 13 (demonstrably inaccurate funded input enabled agency to rebut views of airbag critics). Of course, compensated contributions that improve decisionmaking can afford ancillary advantages, such as saving agency resources and time. See Tobias, *supra* note 4, at 945 n.229.

55. See B. Boyer, *Compensating Public Participants*, *supra* note 39, at 145.

56. 1 C.F.R. § 305.80-81 (1988).

57. NHTSA STUDY, *supra* note 44, at 1.

sated groups lucidly and effectively explained and supported their perspectives, questioned and required justifications for views with which they disagreed, and vigorously and equitably discussed the concepts adduced.

Public funding afforded several advantages that pertain less closely to administrative decisionmaking. Reimbursement promoted the involvement of individuals and entities, such as grass roots citizens' organizations and trade associations, which previously had been unable to participate or had little involvement in agency proceedings. Compensation also helped to remedy imbalances in information and viewpoints that decisionmakers received, while it enabled members of the public to participate more on a par with regulated interests.<sup>58</sup>

### B. *Disadvantages*

Participant funding had a number of detrimental implications, however. Considerable evidence suggests that certain reimbursed parties had little or no effect on agency determinations, provided inaccurate or mediocre input, or posed problems related less directly to decisional processes. These difficulties deserve more cursory examination than the benefits of participant compensation for several reasons. Considerably more funded activity was relatively efficacious and of comparatively high quality than was not, while practically all of the involvement afforded some benefit more removed from decisionmaking.<sup>59</sup> Moreover, reimbursement permitted the public to make contributions whose quality was similar to input of other parties or mechanisms for promoting citizen participation or enhancing agency decisions.<sup>60</sup> Furthermore, there were apparently fewer disadvantages than benefits as an absolute matter, although this is extremely controversial and very difficult to gauge.<sup>61</sup>

Certain compensated submissions were erroneous or unsubstanti-

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58. For more discussion of the ideas in this paragraph, see Tobias, *supra* note 3, at 1158; Tobias, *supra* note 4, at 945, 950-51.

59. I premise these propositions, on a government-wide basis, upon Tobias, *supra* note 4, at 941-55. See also Tobias, *supra* note 3, at 1158-59 (funded participation's relative and comparative value at CPSC).

60. Funding enabled the public to have more beneficial, and fewer detrimental, impacts on decisional processes, and more advantageous, and fewer adverse, effects more removed from decisionmaking than these other parties and measures. See Tobias, *supra* note 3, at 1159.

61. These are estimates based on prior work, especially Professor Boyer's and mine. For a look at one agency, see Tobias, *supra* note 3, at 1158-59. One complication is that there is relatively little documentation of funding's negative aspects. See Tobias, *supra* note 4, at 945.

ated, while additional contributions replicated the input of other participants or were of average or poor quality. Several agencies considered evaluations, surveys, or models tendered by funded organizations to be flawed in important ways,<sup>62</sup> which had the concomitant detrimental implication of delaying proceedings' resolution.<sup>63</sup> Another substantial criticism of reimbursed participants was that they supplied data, relied on testing techniques or made contentions that additional parties or the agency staff provided while subscribing to proposals or views already formulated by the agencies. For example, I found that compensated individuals submitted considerable duplicative information and arguments in several of the ten CPSC proceedings in which they were involved.<sup>64</sup>

Some funded activity was of average or inferior quality.<sup>65</sup> Certain reimbursed participants were unable to present their ideas clearly or to advocate their positions persuasively. Other compensated individuals failed to prepare, were disorganized, naive, or impractical, or were so aggressive and uncompromising that they lacked effectiveness.

Public funding did not always foster participation by those who had previously been involved minimally in agency proceedings, reduce imbalanced participation, or expand the perspectives received by agencies.<sup>66</sup> Considerable reimbursement went to individuals and groups that had contributed to earlier agency initiatives without government payment. Correspondingly, much funding was paid to a comparatively small group of applicants. Many of these applicants participated in several matters at a single agency. A few of these applicants were compensated even after they had previously received reimbursement for providing deficient input.

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62. The agencies were DOE, FTC, and NHTSA. For discussion of the flawed input, see Tobias, *supra* note 4, at 946-47.

63. Delay was one of the major criticisms leveled at the funding concept. See, e.g., *S. 270 Hearings*, *supra* note 9, at 113-14 (statement of William Cuddy).

64. See Tobias, *supra* note 3, at 1134-35, 1146-52. For additional examples of the submission of duplicative input at other agencies and the contention that funded citizens were not particularly helpful in generating original technical or scientific information, see Tobias, *supra* note 4, at 946.

65. For specific examples of the phenomena discussed in this paragraph, see Tobias, *supra* note 3, at 1128-56.

66. For more discussion and specific examples of some of the phenomena discussed in this paragraph, see Tobias, *supra* note 4, at 947.

### C. *Cost-Effectiveness*

A highly controversial, but perhaps paramount, question that must be asked about government-sponsored public participation is whether it was cost-effective. The attempt to answer this question implicates issues of efficacy and quality and the disadvantages examined above, as well as questions of the expenses entailed in participant funding.

#### 1. Prospects For Improvement

As seen already, compensated involvement had numerous advantageous impacts that were manifested at each phase of agency decision-making, and the quality of most reimbursed activity was respectable. Funded participation was comparatively efficacious and of relatively high quality. Moreover, government compensation allowed the public to provide input of a quality similar to other contributors or measures for enhancing non-commercial involvement or for improving agency decisions. Thus, while the benefits appear to outweigh the detriments, a significant question that remains is whether the disadvantages observed can be remedied or ameliorated.<sup>67</sup>

It now seems that numerous problems can be rectified or their magnitude reduced. Many of the disadvantages encountered can be ascribed fairly to agency experimentation with a comparatively novel concept for facilitating citizen participation in administrative proceedings. At the time government reimbursement was effectively discontinued, most agencies were taking steps to enhance, or had substantially improved, the quality of funding program administration.<sup>68</sup> These refinements assumed a number of forms. By the early 1980s, numerous agencies were exhibiting more sophistication and selectivity in choosing recipients of compensation. Several agencies appeared to scrutinize more closely the performance of those reimbursed, while others denied applications submitted by persons whose prior input had been inadequate.<sup>69</sup> A few agencies instituted outreach efforts to notify prospective

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67. I merely am saying that because the benefits seem greater than the disadvantages, it makes sense to see whether the disadvantages can be remedied or reduced.

68. Program operation was the major focus of funding's critics, Tobias, *supra* note 4, at 945, and numerous difficulties were encountered in running the new programs. *See id.* at 947; *see also* B. Boyer, *Compensating Public Participants*, *supra* note 39 (thorough assessment of program administration).

69. *See* B. Boyer, *Compensating Public Participants*, *supra* note 39, at 95 (by mid-1979, financial auditing aspects of FTC's program seemed relatively well established); *see also* Tobias, *supra* note 4, at 948 n.249 (more discussion of other agencies' efforts).

participants that they might be eligible for funding.<sup>70</sup> Some agencies attempted to time compensation grants in ways that would enable those selected to prepare for participation and, thus, not delay substantive administrative decisionmaking.<sup>71</sup>

It is important to understand, however, that there may be certain limitations on such refinements. Intrinsic to soliciting input from those with less experience than industry or the agency is that some contributions will lack validity or be duplicative.<sup>72</sup> Concomitantly, the relatively small number of potential applicants with the requisite expertise to participate effectively at specific agencies may restrict efforts to expand the participant base.<sup>73</sup>

## 2. Actual Costs

The actual expense of public funding may be compelling for a cost-conscious Congress and administration, given the substantial budget deficits.<sup>74</sup> The amount spent on administering reimbursement programs and on payments to participants appears to have been reasonable. Only a single agency expended more than \$65,000 in one year, while numerous agencies actually spent much less than they initially earmarked for reimbursement.<sup>75</sup>

Considerable evidence suggests that the cost of compensating par-

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70. See, e.g., B. Boyer, *Compensating Public Participants*, *supra* note 39, at 85 (discussing FTC); see also 1 C.F.R. § 305.79-5 (1981) (ACUS recommendations for facilitating funded participation by the FTC).

71. Some agencies' failure to do so had given funded parties too little time to prepare or had led them to provide duplicative input because they lacked awareness of others' submissions. For more discussion of these problems and agency efforts to treat them, see Tobias, *supra* note 4, at 948-49.

72. It is impractical to expect all funded entities to provide brilliant new insight that improves every agency decision or to expect that "lay" consumers will have the expertise of an engineer who has been working in the relevant industry for 20 years. See Tobias, *supra* note 4, at 950.

73. It may be preferable, for instance, to award funding to those who have demonstrated their proficiency in prior proceedings. See B. Boyer, *Compensating Public Participants*, *supra* note 39, at 129. Cost and other practical problems also may require compromise in other areas, such as evaluating applicants' fiscal condition or recipients' funded input. See Tobias, *supra* note 4, at 951. In short, some of the difficulties discussed in this subsection may be ascribed to nascent experimentation with a novel procedure while others may be "fixed" costs of an otherwise valuable endeavor. See *id.* at 946 n.232.

74. For estimates of program institution and daily operation costs at several agencies, see Tobias, *supra* note 4, at 952 nn.267 & 269. These estimates are from 1981.

75. The FTC was the sole agency to spend more than \$65,000 annually, while most spent much less. See Tobias, *supra* note 4, at 952-53 & nn.271 & 272. The FDA spent \$7,300 of \$250,000 allocated for one year, while CPSC spent \$28,400 of \$150,000. See *id.* at 953 n.272. Some agencies even paid out less than they awarded applicants initially. See *id.*

ticular participants was comparatively small in several respects. Numerous agencies paid lawyers and technical experts at levels significantly less than market value for identical services in the private sector.<sup>76</sup> Funding also was cheaper than the other options typically used to secure greater extra-agency input.<sup>77</sup> Reimbursed parties inexpensively augmented the efforts of staff, enabling the agencies to draw on outside experience in areas where they did not wish to develop costly internal expertise.<sup>78</sup> Correspondingly, compensated participants were cheaper than external contractors, because they often had considerable experience in their fields of interest, were strongly motivated, or were willing or able to work for less money.<sup>79</sup>

#### D. Summary

In short, funded involvement had numerous advantageous impacts throughout decisionmaking processes, afforded many benefits more removed from agency decisions, and was of respectable quality. Reimbursed activity also had some deleterious effects on decisionmaking, lacked quality, and imposed disadvantages related less closely to decisional processes. Most of these detrimental aspects, however, can be rectified or are amenable to amelioration. Moreover, participant compensation was cheap generally and was inexpensive in contrast to other measures for securing decisional data. Participant funding, therefore, seems to be sufficiently cost-effective and valuable to deserve revitalization and ongoing experimentation in properly delineated circumstances.

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76. See B. Boyer, *Compensating Public Participants*, *supra* note 39, at 91 (discussing fee scale for lawyers); 42 Fed. Reg. 30,485 (1977) (FTC) (pegging experts' fees to salaries of government employees having similar experience).

77. These options are augmentation of agency staff and hiring external governmental contractors.

78. See *Department of Transportation and Related Agencies Appropriations for 1980: Hearings 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); H.R. REP. NO. 1164, 95th Cong., 2d Sess. 10 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 9434, 9440 (funded participation less expensive than staff augmentation; direct use of consumer resources and expertise would permit CPSC to bootstrap agency staff on technical issues which should yield better standards).

79. For instance, CPSC staff said that a compensated entity's expenditures in completing a study were one-tenth what a contractor would have charged. See *CPSC STUDY*, *supra* note 46, at 2; see also *Regulatory Reform Hearings*, *supra* note 42, at 188 (statement of NHTSA Administrator Claybrook) (funded parties' experience, cost-effectiveness, and motivation); Tobias, *supra* note 3, at 1158 n.368 (CPSC program cheap because industry representatives donated services and technical experts were paid less than usual rates).



### III. SUGGESTIONS FOR REVITALIZATION AND CONTINUED EXPERIMENTATION

Congress, the Bush administration, and the administrative agencies ought to revitalize participant reimbursement and should experiment with the concept in appropriately tailored situations. Much has changed since the heady, early days when there was widespread implementation of the compensation concept. Astronomical budget deficits have restricted even the most vital governmental programs. Many members of the electorate have indicated their preference for a more limited federal role. Moreover, deregulation has enjoyed considerable, albeit declining, popularity. Nevertheless, several factors have remained constant, and perhaps have become more compelling, over that period, especially agency need for the highest quality, best balanced input in order to make the most well-informed decisions on issues affecting the lives of millions of Americans. It is this need that government funding fulfills.

This is not a call for the wholesale imposition of stringent regulatory controls.<sup>80</sup> It also is not a plea for government-wide institution of reimbursement programs. Indeed, a considerably more circumscribed approach was indicated by the half-decade of rigorous experimentation with participant compensation. That experience illustrated that the funding endeavors were insufficiently successful to warrant broad-scale revitalization but that the efforts were effective enough to support experimentation in carefully chosen contexts. Moreover, the five years of relatively intensive work with the reimbursement concept afford much instructive guidance for reviving compensation.<sup>81</sup>

There should be selective experimentation at an adequate number of agencies, over sufficient time, in enough contexts to afford diversity, representativeness, and a fair test of funding's workability. Because the benefits and disadvantages of participant reimbursement vary significantly in specific situations, and because there were substantial discrepancies among agencies in compensation program administration, funding should be tried in a healthy mix of circumstances. For example,

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80. Although the topic is beyond the scope of this article, selective "reregulation" may now be advisable. See Tobias, *The Deregulation Dilemma*, *The Christian Science Monitor*, Feb. 13, 1989, at 18; see also *Regulation Symposium (Part I)*, 45 WASH. & LEE L. REV. 1245 (1988), *Regulation Symposium (Part II)*, 46 WASH. & LEE L. REV. 1 (1989).

81. This time span, from about 1976 to 1981, roughly parallels the Carter administration, during which the overwhelming majority of reimbursed activity occurred. See *supra* notes 23-24 and accompanying text.

experimentation might proceed in agencies and in contexts in which prior experience was successful, appeared to hold promise or in which no funding occurred.<sup>82</sup>

Agencies that might contemplate the reinstatement of compensation should systematically consider that possibility. They ought to study previous experience with reimbursement and ascertain how funding can yield the greatest number of benefits.<sup>83</sup> The governmental units should establish compensation efforts that are modest in scope; that maximize opportunities for innovation, refinement, and tinkering; and that are attentive to the specifics of program operation.<sup>84</sup> In performing the particular task of designating reimbursement recipients, agencies ought to remember that decisionmaking is more likely to be improved when: 1) the government is very receptive to, and has considerable need for, citizen input; and 2) those funded are especially able to fulfill that need.<sup>85</sup> Moreover, agencies must be sure that they have adequate resources to operate the reimbursement programs efficiently and to enable compensated parties to participate meaningfully.<sup>86</sup> Governmental entities that do not have adequate resources or express funding power may want to petition Congress for both.<sup>87</sup>

Congress should be receptive to these requests. It ought to afford the requisite money in appropriations legislation. Congress also should explicitly provide for compensation in substantive statutes after assessing previous experimentation and designating appropriate circumstances for future work. Should the legislative branch fail to prescribe agency reimbursement specifically in authorizing statutes, Congress

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82. The funding experiences of CPSC, FDA, and NHTSA were relatively successful, while FDA's program was particularly well run. Compensation also should be tried at new agencies and in novel situations.

83. Agencies can learn much from prior experimentation; however, so much time has passed since funding's effective discontinuation that comparatively little collective expertise remains at most agencies.

84. The most helpful work on agency program operation remains B. Boyer, *Compensating Public Participants*, *supra* note 39.

85. I found agency receptivity and need and participants' ability to be the parameters most important to effective participation. For an analysis of these parameters and others, see Tobias, *supra* note 3, at 1159-60.

86. If agencies do not award applicants adequate funding, this failure can jeopardize the efficacy and quality of participation. See Tobias, *supra* note 3, at 1160-61. When agencies have insufficient resources for program operation, the quality of applicant selection and recipient evaluation can suffer.

87. I have argued that agency implied power is sufficiently capacious to support funding. See Tobias, *supra* note 4. Agencies, of course, will be more comfortable operating specifically authorized programs.

ought to eliminate proscriptions in appropriations measures.

If Congress decides not to grant agencies specific compensation power, the governmental units themselves may wish to rely on implied authority to establish modest reimbursement programs. As long as these endeavors are moderately scaled, effectively administered, and benefit the agencies, the legislature ought to promote the experiments or at least let them proceed.<sup>88</sup> Correspondingly, the federal judiciary should invalidate programs created pursuant to implied authority only when the agencies clearly are acting beyond the scope of their power.<sup>89</sup>

The participation that is funded should be evaluated rigorously.<sup>90</sup> There should be close scrutiny of a considerable amount of compensated activity or a representative sample over enough time to provide statistical validity.<sup>91</sup> Those conducting studies ought to be independent of the agencies undergoing assessment but have considerable familiarity with their processes and the reimbursement concept.<sup>92</sup> Prime candidates for this responsibility are the General Accounting Office and the ACUS. Once evaluators have analyzed the funded involvement that occurs, they ought to try to reach more conclusive determinations about its advantages and disadvantages.

### CONCLUSION

During the half-decade in which the federal government actively experimented with participant compensation, the citizen involvement supported had many salutary effects throughout administrative agency decisional processes. It also afforded numerous benefits related less directly to decisionmaking and was of respectable quality. Perhaps most significant for a budget-conscious Congress and administration, public reimbursement apparently was cost-effective. Congress and the Bush administration should now reinstitute participant funding in those agencies and administrative proceedings in which it is likely to prove

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88. Of course, Congress can provide most efficiently for funding's revitalization, because it can analyze systematically earlier experimentation and designate proper situations for future work. Congress at least should eliminate proscriptions imposed on some agencies in appropriations statutes. Correspondingly, if Congress does not wish to appropriate money specifically for funding, it might let agencies draw on their general appropriations in light of agencies' views of funding's worth relative to other initiatives.

89. For an analysis of agency implied funding authority, see Tobias, *supra* note 4.

90. For a discussion of rigorous evaluation, see Tobias, *supra* note 3, at 1118-28, 1164.

91. For discussions of what to analyze, representativeness, and statistical validity, see Tobias, *supra* note 3, at 1118-20, 1121-25, 1127-28.

92. For a more comprehensive discussion of by whom, as well as how, when, and where, these studies should be conducted, see Tobias, *supra* note 3, at 1120-21, 1125-28, 1164.

most beneficial while providing for rigorous future experimentation with the compensation concept.