Problems of Intervention in Public Law Litigation: A Symposium

FOREWORD

An increasing number of lawsuits seek more than a reordering of relations or re-allocation of wealth between only the parties in court. Instead, these lawsuits seek to enforce basic constitutional and statutory policies by re-ordering social institutions and practices that affect a substantial part of the general public. Professor Abram Chayes of Harvard University has dubbed such suits "public law litigation,"[1] and has seen in their ascendancy the emergence of a new model of civil procedure and judicial behavior. This model features pluralistic coalitions of litigants and detailed judicial involvement in the conduct of litigation and administration of remedies that contrast sharply with the archetypal bi-polar resolution of disputes between discrete plaintiffs and defendants by the passive judges of the common law. While the procedural novelty of the phenomenon has been disputed,[2] it is certain that never before has public law litigation approached typicality in the business of our courts.

The accompanying metamorphosis of civil procedure is incomplete, and scholarly analysis of it has barely begun. The greatest attention has been paid to the immediate practical consequences of the successful prosecution of public law litigation, that is, the framing and enforcing of remedies. But other problems demand fuller consideration. One of these is the focus of this symposium: whether the potentially broad social impact of public law litigation warrants revision of the conventional rules of intervention in such litigation. This problem ultimately touches upon a range of related issues concerning the access of non-parties to public law litigation, the preclusive effect such litigation ought properly to have on non-parties, questions of standing, the use of class actions, the role of *amici curiae,* and the scope and justification for policies of stare decisis and res judicata.

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[1] Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

[2] *See* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

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This symposium was sponsored by the Section of Civil Procedure of the Association of American Law Schools at the Association's 1980 annual meeting in Phoenix, Arizona. The proceedings occurred on January 4, 1980, under the rubric of "Intervention in Public Law Litigation," and consisted of a series of four papers, critical commentary and panel discussion of comments from the floor. These proceedings are published here in revised and edited form. They reflect diverse concerns and beliefs, from the very definition of "public law litigation" or a "public action" to the propriety of any special procedural accommodations for such litigation.

Professor Neil H. Cogan of Southern Methodist University addresses the definitional question in the opening paper. He calls attention to the legislative aspects of judicial decisionmaking in public actions, and suggests that the goal of procedural reform should be to serve democratic values by fostering increased public participation in such actions.

Professor Emma Coleman Jones of the University of California at Davis criticizes the shortcomings of existing procedures for participation by non-parties. Professor Jones' paper places particular emphasis on her extensive research into problems of intervention in affirmative action lawsuits.

United States District Court Judge Jack B. Weinstein of the Eastern District of New York provides an insightful glimpse into the panoply of techniques available to a federal trial judge seeking to expand trial participation.

Finally, my paper canvasses recent developments affecting the role of the federal government as advisor and participant in public law actions.

Professor Jack H. Friedenthal of Stanford University responded extemporaneously to these papers in his capacity as the panel's critic-at-large. He presents here a slightly expanded version of his informal remarks. Troubled by the scope and size of many public actions, Professor Friedenthal calls for greater consideration of the rights and legitimate expectations of the original parties to the suit.

A panel discussion in which all the speakers participated concludes this symposium; we present here those excerpts that seemed most helpful in sharpening the points raised in the papers. The papers, commentary and follow-up discussion will likely raise more questions than they answer. At this embryonic stage of academic inquiry into public law litigation, however,

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these questions need to be asked and debated. Our hope is that we have at least clarified some of the most important issues and, in so doing, have facilitated future analysis and comment.

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