



**The Role and Practice of Legislative Hearings in Democracies:
Examples from Germany and the United States**

**Presentations in Shanghai and Beijing, China
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INTRODUCTION

From November 28 to December 6, 2000, as part of the ongoing efforts of the National Democratic Institute for International Affairs (NDI) to learn about Chinese political developments and to provide materials and information to interested partners on democratic processes and practices in other countries, NDI participated in two seminars on public legislative hearings in Beijing and Shanghai. The Beijing activity was NDI's second with the Center for the Study of People's Congress and Foreign Legislatures at Peking University Law School. The Shanghai seminar was conducted in partnership with the Administrative Law Institute of the Shanghai municipal government's Legal Affairs Department (with unofficial support from East China University of Politics and Law).

Few Chinese, even among progressive intellectuals, believe that China is ready for the cornerstones of a democratic political system: universal suffrage, competitive politics and participatory elections. There is, however, a growing belief among both elites and the public at large that citizens should have a say in government decisions and that government should be accountable. This pressure is felt most strongly at the local and regional levels, the front lines of social change, and the levels most eager to experiment with new social and political practices.

In March 2000, the National People's Congress passed a new Law on Legislation, which serves two main functions: it (a) provides a legal basis for existing practices that had previously not been codified, and (b) provides a framework for bringing national and regional law into agreement. While the law is vague in many areas, it is being widely interpreted by the Institute's Chinese partners and others to allow public legislative hearings. During this year, in fact, hearings have been organized in Anhui and Zhejiang provinces and at the municipal level in Shenzhen (Guangdong province) and Shijiazhuang (Hebei province). These follow a pilot hearing held last year (before the new law's passage) in Guangdong province, the first public legislative hearing in China.

The new law, however, gives no specific information on when or how legislatures should conduct hearings, it only mentions them as an option that is now available. NDI's Chinese partners and seminar participants had numerous questions, general and specific, directed both to the international panelists and among themselves, on these and other details. In addition to the full transcripts of the presentations, this document includes a transcript of the seminars' question-and-answer sessions that provides a sense of the participants' particular concerns and interests.

NDI facilitated the participation of two main international experts – Leon Billings and Rudolf Kabel – to present their own experiences regarding hearings and other forms of citizen participation in democratic politics in order to answer some of the questions raised by this sudden interest in China to conduct hearings. While public hearings are used by various legislatures around the world, they are most integrated into the legislative process in the United States and Germany. Although documents explain the rules and procedures of hearings, NDI sought to provide the Chinese participants with candid, first-hand accounts of the context and functioning of this aspect of the democratic political process. Moreover, there are not many written sources of information on the role of hearings or their proceedings in the German Bundestag, so Dr. Kabel provides a particularly useful resource here.

Dr. Rudolf Kabel was the Secretary General of the German Federal Parliament (Bundestag) from 1991 to 1998. Prior to that, Dr. Kabel was the Chief of Staff of the Christian - Democratic Party Group in the Bundestag for over ten years. He has worked for the Federal Chancellor, the "Council of Elders" of the Bundestag, the President (Speaker) of the Bundestag, and the Federal Minister for Expelled Persons and Refugees. He has also served as legal advisor to the Armed Forces and as Secretary of the Defense Committee of the Bundestag.

The Honorable Leon Billings is a Member of the State of Maryland's legislature, serving since January 1991 in the House of Delegates. In addition, he is President of Leon G. Billings Inc., a government relations consulting firm which designs public policy strategies on issues pending before the Congress and advises clients on political matters and a broad range of environmental, energy, health and safety legislation. Previously, Mr. Billings served as Chief of Staff to Edmund Muskie when Mr. Muskie was the U.S. Secretary of State and when he was a United States Senator.

In Shanghai, Mr. Glenn Cowan joined the panel of international experts. Mr. Cowan is the Washington Director of Public Strategies, an Austin, Texas based public affairs firm. Formerly, Mr. Cowan was Regional Director for Asia Programs at the National Democratic Institute for International Affairs (NDI). Since 1983, he has participated in more than 60 NDI programs worldwide on domestic election monitoring, parallel vote tabulation, political party development and participatory local governance. Prior to joining NDI, Mr. Cowan directed a leading Washington-based political consulting firm and has previously served as an elected local official in the United States and held leadership positions in the Democratic Party.

Transcript of lecture by Dr. Rudolf Kabel

LEGISLATIVE HEARINGS IN GERMANY

In the Federal Republic of Germany, hearings are organized to take the opinions of organizations or persons as well as the special knowledge of experts into consideration in the decision-making process. Hearings are organized not only by parliamentary committees but also by the government administration. Hearings are organized primarily as an aspect of the legislative process but also can be used to gather information to strengthen the basis of other political decisions.

Hearings in the legislative process can take place in one or both of the following stages: when the government administration is preparing and drafting proposed legislation, and when the parliament is considering whether to pass legislation. Hearings that are outside of the legislative process (hearings for the purpose of obtaining information about an issue and for preparing for decisions other than bill passage) are held only by the committees of the Parliament. These hearings are not organized by the government or other authorities.

First, I will describe the hearings held in the legislative process step by step. I will then proceed to discuss hearings outside of the legislative process. In order to understand all types of hearings by Parliament and the government, one must realize that associations of interests play a very important role in Germany. Therefore, before describing the hearings, I will give a brief introduction to associations, as they are an integral part of our hearings process.

Associations

In our society, like in every society, the thoughts, feelings, interests and opinions of people are diverse. These differences are reflected in our multi-party system as each party pursues different programs and aims. Yet, this is not the only way to organize competing views and opinions.

In the Federal Republic of Germany there are numerous associations (ranging from formal to informal) that represent various interests or pursue various aims, either in the economic or cultural fields. In the economic field, there are very large associations of common interest, like the association of steel industries, or smaller interests, such as the association of fire houses. There are many associations that also represent the common professional interests of their members, such as large trade unions like the teachers' union. Other associations do not pursue the special interests of their members but rather more common interests or values—for example, there is an association for protecting the rights of children or for protecting our woods and landscape.

The right to set up associations and the right of those associations to engage in their activities are enshrined in our constitution. Many of these associations take extensive advantage of this right by utilizing public relations to further their goals. They obtain offices or even whole office buildings in the capital. Associations invite expert lecturers, arrange press meetings and

plan receptions. They edit publications to present their aims and arguments. If these associations are not big enough to do this by themselves, they can engage an expert or a public relations bureau to handle many of these matters for them.

Associations also try to establish and to maintain contact with members of the government and Parliament to solicit their sympathy and approval for their interests, goals or ideals. They are free to do so, and the members of Parliament are also free to have these contacts. Members of Parliament are even free to engage themselves in these associations of interests, perhaps professionally, through membership on a board of an association, or by a contract for consultancy, representation or similar services. But by the rules of procedure, they have to publish their engagement in an association in the official handbook of the Bundestag or they have to inform the president of the Bundestag. If the subject to be debated in a committee is connected to the interests of the member in this respect, he must abstain from the deliberations. So according to the rules of procedure, these contacts between the members of Parliament and the interest groups should not be avoided or forbidden, but they should be made transparent.

According to the rules of procedure, all associations that wish to be invited to a hearing in the Bundestag must be recorded on a master list of associations kept by the Bundestag. Every association that requests to be entered onto the list has to be allowed to do so. The associations must furnish the following information:

- Name of the association,
- Composition of the board of management and the board of directors,
- Sphere of interests of the association,
- Number of members,
- Names of the association's representatives,
- Address of its office at the seat of the Bundestag and of the Federal Government.

The latest edition of this list recognizes about 1,691 legally registered associations. This list can be used by all members of Parliament or by the committees and the government to find out who could or should be invited to a hearing.

Hearings in the legislative process

In the legislative process there are two opportunities to hold a hearing: in preparing and drafting a bill by the government, or in deliberating the bill in the committees of the Parliament.

Hearings in the Federal Government

When a bill is to be prepared and drafted by the government, the respective ministry responsible for this special sector of politics must undertake this task. For this the ministry responsible may inform representatives of associations about the planned bill and request their opinions. The decision to do so or not rests with the ministry.

Typically, the minister or a high-ranking civil servant writes to an expert or an association who has special information or interests affected by the contents of the bill. He gives

information about the bill and sends a first draft to the expert or association, asking for their opinions, recommendations or objections. The expert or association answers by letter as well. Often representatives of the ministry, or the minister himself, meet for an exchange of views and discussion.

But these contacts and meetings are not public or formal hearings like those organized later in the Parliament. They are just internal mutual exchanges of information and opinions between the government and the administration on one side and associations and experts on the other side.

This gives the federal government an opportunity, prior to the public and parliamentary deliberations, to inform itself about the opinion of an association's interest in a bill and take its substantive proposal into consideration. The association has the opportunity to make proposals and state its opinions at a very early stage in the preparation of the bill.

The government is not committed to publish this contact with the association or to report on it when introducing the bill in the Parliament. The Rules of Procedure of the federal government contain only a few regulations pertaining to the ministry on this matter. For bills of greater political significance, the ministry has to ask the federal chancellor for approval. Only associations of federal importance can be included, an association of only local or regional importance cannot. After having sent a first draft of a bill to an association, the ministry has to send a copy to each parliamentary group in the Bundestag. This rule arose, because, during the early preparation stage of the bill, a public discussion about the problem could have already been raised, with the associations playing a key role in this discussion. The members of Parliament, who also wanted to participate in this discussion, felt discriminated against when representatives of the associations received a first draft of the legislative bill and they did not. This consideration led to the amending of the rules and procedures of the federal government.

After the draft bill is finished, the ministry presents the bill to the whole government for a decision to introduce it in the Bundestag. Most bills adopted by the Bundestag are originally introduced by the government as a result of the construction of the German constitution. As you know, a majority in the Bundestag elects the federal chancellor and thus the federal government. Thus this majority and the government cooperate very closely in the legislative process. Therefore, bills sponsored by the majority members in Parliament are prepared by the government administration. As most of government bills are prepared and drafted with the inclusion of associations' opinions, for the most part, all important bills adopted by the Bundestag have already gone through a process of receiving input from associations before parliamentary deliberations begin. Bills can also be introduced by minority party groups of the Parliament. Those bills are, for the most part, rejected by the majority. While no hearings are held on these bills before introducing them in the Parliament, minority leaders party groups occasionally invite experts to their internal deliberations to get better and more specific information.

Hearings in the Parliament

In the Bundestag, a bill is referred by the plenary to the committees for detailed deliberation. Often several bills concerning the same subject have been introduced in the Parliament and they are jointly referred to the committees. One committee oversees the process and has to submit to the Bundestag a report of all the committee deliberations and a proposal as to whether, and if so, with what amendments, the bill should be adopted. If several bills are referred to a committee, a combined report on all bills is made and submitted to the plenary. The other committees participating in the deliberations (“committees asked for opinion”) have to forward their comments and proposals for amendments to the committee responsible. During the parliamentary deliberation on bills, hearings of associations and experts take place in the committees.

Who decides in the committee if a hearing is held or not? The rules make a distinction between a responsible committee and a committee that is merely asked for an opinion. In a responsible committee a hearing is held not only by a decision of the majority, but also without the consent of the majority if a quarter of the committee members demand it. In practice the spokesmen of parliamentary groups of the committee meet and negotiate whether a hearing should be held or not. In most cases, they agree about the hearing.

Who decides about the number and names of the associations to be heard in a hearing? Parliamentary groups nominate the associations to be included. Rule 70 of Section 2 states: “Where a hearing is demanded by a minority of the committee members...the persons named by that minority must be heard. If the committee decides to limit the number of persons to be heard, the minority may only name a proportion of the total number of persons to be heard that corresponds to its relative strength in the committee.” In practice the spokesmen of the parliamentary groups usually agree about this. Often the members of the committee have contacts with experts and associations dealing with the field of politics that the committee is working on, and thus they know the names of people and associations to be called. Of course, they prefer to invite experts or associations whose opinions they know and already agree with. But as different members of the committee have different opinions, different opinions will also be presented in the hearings.

The expenses of invited experts can be reimbursed on the condition that the president of the Bundestag has approved the invitation and the reimbursement of the expected costs. There is a certain budget for all hearings, and the president has to take care that the expenses do not exceed the budget.

Associations or experts are sent a catalog of questions in advance. As a rule, they are requested to submit a written statement to the committee in advance that is distributed to the committee members. When the hearing takes place, the experts repeat their statements or give an oral summary. After that, the members of the committee ask additional questions.

Hearings are mostly open to the public, but committees normally meet for deliberations behind closed doors, unless they decide to invite the public. Yet, after the testimony of experts and representatives of the associations, the deliberation of bills is begun or continued behind closed doors. In some cases, when the hearings are very long, the subject complicated and controversial, or the bill is of great importance, the committee does not begin deliberations until the minutes of the hearing are distributed to the members of the Committee.

The deliberations on a bill in a committee normally begin with a general debate on the pros and cons of a bill. After that, the bill is deliberated step by step. The chairman reads each paragraph, giving the members an opportunity to propose amendments. During the general debate as well as during single deliberations, the opinions or information presented by association representatives and experts can play an important role. Members of the committee can use this information to be the basis of an amendment. In the debate, they can use the information to support their own opinions.

Yet, the testimony presented in the hearing can also cause members to question their own opinions. It is difficult, sometimes impossible, to determine afterwards which single argument or piece of information presented managed to convince a single member of the committee to change his or her mind. But sometimes it is obvious that the testimony presented in a hearing led to a change of opinion by the majority and in the government. In some cases, when most of the association representatives and experts have warned the government and the majority about the adoption of a bill that required fundamental changes, the criticized parts of the bill were withdrawn or changed by far-reaching amendments. This can happen even before the government has introduced a bill in the Bundestag if it has held a hearing prior to that point. Such a situation has occurred when the government has not asked enough experts or underestimated the arguments against a draft bill. In parliamentary hearings, parliamentary groups nominate often nominate more varied experts and associations than the government did prior.

After final deliberations on a bill, the committee submits its report about the deliberations including a summary of the hearing, to the plenary together with a recommendation to adopt or reject the bill.

Committees that are asked for their opinions may hold hearings as well, but under the following conditions: the responsible committee consents and the hearing is restricted to the terms of reference of the committee whose opinion has been solicited and the majority of the committees take a decision to this effect.

Hearings Outside the Legislative Process

Committees have the right to consider and deliberate matters without the Plenary of the Bundestag referring bills to them. These matters can cover any kind of subject, for example a report of the government or another matter of political importance, but not bills. (A committee can hold legislative deliberations only when referred by the plenary). Committees may also hold hearings on these matters. For example, the committee on the interior can hold a hearing about private safety services or the committee on traffic can hold a hearing about the frequency of

accidents among young drivers. Such hearings may only be held if the majority of the committee members take a decision to this effect. The organization of the hearing is subject to the provisions that apply to hearings within the legislative process. No reports on these types of hearings are submitted to the Bundestag. No committee has the right to submit reports or proposals to the Plenary of the Bundestag on matters that have not been referred to the committee by the Plenary.

These types of hearings are essentially organized to inform committee members about a problem and its background. The purpose, in many cases, is to improve the control of the government and to prepare the committee for future legislative work.

Hearings outside the legislative process are also held by the committee on petition. In the Germany constitution, a fundamental right of petition is enshrined in Article 17: Every person shall have the right individually or jointly with others to address written requests or complaints to competent authorities and to the legislature.

By law, the Bundestag must set up a committee for petitions. This committee deliberates all requests and complaints sent to the Bundestag. This committee addresses complaints of citizens about real or alleged injustices or unfair treatment by authorities. The committee has the right by law to invite the affected person as well as witnesses or experts. The decision on such a hearing can only be made by the majority of the committee members. The hearing is not open to the public. The persons to be heard are simply invited to the committee deliberations. The committee is committed by the rules of procedure to inform the responsible member of the federal government about the hearing. If the committee of petition decides in favor of the person having complained, it recommends the government to take the complaint into consideration. In all other cases, the committee explains its decision to the person who has complained.

In the last three electoral terms of the Bundestag, hearings have not only taken place within committees but also in so-called study committees of the Bundestag. Study committees consist of members of Parliament and external experts who are nominated by the parliamentary groups and are appointed by the president of the Bundestag. These commissions are set up for the submission of reports to the plenary of the Bundestag on a wide range of significant general political issues, such as reform of public health insurance and demographic changes in Germany and their consequences. The study commissions submit their reports in time for a debate in the plenary before the end of the electoral term.

There are no rules of procedure valid for hearings in the study commissions. They proceed practically in the same way as other hearings. However, the study commissions mainly invite experts from universities or research institutes to testify. In the last electoral term, more than 50 hearings were organized by study commissions.

Rights and Obligations at Hearings

An association has no legal right to be invited to a hearing. Such right is not derived from inclusion on the list of associations, nor is such a right derived from the constitution. This was finally decided in a case by the Constitutional Court of the Federal Republic of Germany.

An association, which wanted to be heard but was not invited to a hearing, took legal action at the Constitutional Court responsible for cases dealing with violations of all basic rights. The association established its legal action by Article 103, paragraph 1, which states: "In the courts, every person shall be entitled to a hearing in accordance with law."

The Constitution Court decided that this right to be heard is only valid for a court but not for other authorities or institutions. The constitution permits the Parliament to organize its internal procedure by the rules of procedure. The constitution only stipulates who can introduce a bill in the Parliament and which majorities are necessary to adopt a bill, nothing more.

There is no legal obligation to accept an invitation to a hearing. However, I do not know of any case in which an expert or an association did not accept an invitation.

Persons furnishing testimony have no rights or obligations of witnesses testifying in court or before one of the Bundestag committees of inquiry. There is no obligation to answer questions and no obligation to tell the truth.

Hearings in State Parliaments

I have described the rules and the handling of hearings in the German Federal Parliament. These rules are similar to those in the parliaments of the 16 German states. As most legislative work is done by the Bundestag, hearings in the state parliaments are less frequent.

Hearings in Local Parliaments

The local parliaments in towns, districts or villages have no right of legislation. Legislation in Germany is only done on the federal and state levels. Therefore, there are no hearings on bills in local parliaments. However, on subjects that a local parliament does govern, for example, project planning, street planning and street building, it can organize hearings or events like hearings. Some of them invite the public to discussion forums or question hours where everyone can ask questions of the local parliament. Their questions are answered by the chairman. For deliberations on special subjects, persons or groups of persons are sometimes invited by a local parliament to present their opinion on a matter, and they are able to affect the decision that the parliament is going to make.

Development and Evaluation of Hearings

In the first electoral terms after 1949, hardly any hearings were held although the rules of procedure provided for them from the outset. Since the 1970s, hearings have become an increasingly integral part of the legislative process and are held for all bills of political importance. In the last electoral term, more than 300 hearings were organized altogether.

In the opinion of the public, hearings are accepted. They are positively regarded but also sometimes criticized. The positive aspects are regarded as:

- They provide an opportunity for associations to influence the legislative process with their opinions;
- They can contribute to greater transparency by avoiding or reducing the secret influence of associations;
- Members of associations can see that their wishes, objections or doubts have the chance to be taken into consideration by the legislature;
- Members of Parliament have an additional opportunity to collect more and better information about the details and potential consequences of a bill.

There are also criticisms:

- The way in which experts and associations are chosen by the ministries preparing the bills and the parliamentary groups in the Bundestag is sometimes criticized. It is assumed that the parliamentary groups nominate mostly associations and experts whose opinions are already known and agreed with. In this context, German hearings are contrasted with those in the United States where associations and citizens have an equal chance to be considered.
- Some hearings in the Parliament are considered unnecessary events because all opinions and information published there have been heard before in public or had been taken into consideration already by the Government in preparing the bill.

Role of Hearings in the German Legislative System

Finally, let me say something about the role and the importance of hearings in our constitutional and political system. The introduction of hearings in our legislative work was not the beginning of participation by various interests in the legislative process. Our multi-party parliamentary system has always invited political participation by interest groups. The introduction of hearings has largely improved and completed this participation.

Members of Parliament are directly elected in constituencies or through a list in their state. They are paid to do full-time jobs as members of the Parliament and have to work 23 weeks of the year. Members spend the remaining 29 weeks at home in their constituencies, explaining their actions in the capital. Since re-nomination, re-election and contributing better results for their party in the next elections are most members' top priorities, they have to constantly feel the people's pulse if they want to be successful. They hear critical arguments about controversial opinions in public meetings, through consultations organized by their party, or through contacts with local or regional interest groups. This prepares members by familiarizing them with critical opinions used by members of the opposition parties in controversial debates and deliberations in the Bundestag.

The members of the majority parties who support the government report in the meetings of their party-group about their experiences in their constituencies, and thus they act so to speak as a political "early warning system" for the government. This early warning system had been installed in our system, but by introducing the hearings we have improved and complemented it.

Transcript of lecture by the Honorable Leon G. Billings

PUBLIC HEARINGS IN THE UNITED STATES

Comparative Governments

There is a significant difference between the public processes in the United States political system and in parliamentary systems. For example, in the British parliamentary system, the focus on policy and accompanying decisions are made when the political parties develop platforms or “manifestos.” In the British parliamentary system, the election determines which party’s manifesto is most widely supported. The majority government that comes to power in the election implements its manifesto with little or no further public input.

Yet, exactly the opposite is true in a political system based on the republican form as exists in the United States. Parties do have their platforms, but they are usually ignored after the election. The separation between the legislative and the executive branches requires a negotiated policy result, especially when one party controls the legislative branch and the other party controls the executive branch. In this case, hearings are a means of informing the media, political supporters, the public and interest groups of the implications of and options for public policy. I will speak about the legislative system in the United States on both the federal and state levels.

Information Sources for Policy Makers in the United States

In a democracy, legislatures are political institutions. Members of legislatures – federal, state or local – are elected to represent a constituency. To the extent that members reflect the views of a majority of that constituency on matters that are important, they are returned to office. To the extent that they are perceived as out of step with that constituency, they are often removed from office.

There are many sources of information from which legislators form their opinions and make their decision. As a rule of general application, legislators have several means by which they “keep in touch” with their constituents:

1. **The media:** To the extent that issues within the purview of legislators are the subjects of public controversy and commentary, legislators are informed by electronic and print media, and often their policy positions are influenced by how that information is presented.

2. **Political campaigns:** The most important means by which legislators learn of their constituent concerns is during a contested campaign for election. This is the time when they meet actual voters, not just special interest groups that purport to represent real voters.

3. **Opinion research:** Depending on the ability of a legislator or a political party to finance voter surveys, opinion research is a modern and often reliable way to determine the views of constituents. This is more important during an election cycle but is used on a year-

round basis by the party in power in the White House. Political parties frequently use opinion research to advise their congressional members. Yet, the high expenses associated with opinion research often preclude their use in state legislatures.

4. **Town meetings:** Increasingly, legislators conduct informal forums for constituents to present their views. Generally, these meetings tend to focus on “issues of the day,” but they provide an unstructured opportunity for a candid exchange between elected officials or candidates and citizens with particular agendas. Through town meetings, candidates for office can attract larger crowds of people, listen to the public’s priorities, and present their own positions on important issues. This style of public meeting is a political instrument in that it not only provides an insight into their constituents’ views; it also provides elected officials with an opportunity to convey their own views to constituents. It also is a means by which the media carries these issues to the public at large. (Legislators like this format because, like formal public hearings, they can point to them as evidence of interest in constituent input on controversial issues.)

5. **Lobbyists:** The representatives of organized groups may be the single most pervasive source of information for public officials. Paid lobbyists are important at the federal level, dominant in state legislatures, and increasingly active with local legislatures, such as city and county councils.

6. **Fundraising:** All politics in America start with the checkbook. Virtually no successful candidate for federal, state or local legislature can be elected without some financial assistance. Personally wealthy candidates have the luxury of spending their own money, but, once elected, even those legislators ask for campaign contributions from interested parties. Thus the focus, priorities and prejudices of a major contributor become a major influence on and source of information for the candidate.

7. **The spouse:** In American politics today, the legislator’s spouse may be the most important source of information and the most influential constituent. Most legislators depend on the political skills of their spouse as a surrogate campaigner; as a contact with the community; and as a political partner. Because politics in America have become so all consuming, the spouse becomes an integral part of the process and in many cases determines the effectiveness of the legislator.

8. **Public hearings:** Public hearings are the formal, recognized method by which information on a public policy issue is obtained. Legislators use public hearings for two purposes: to educate the public on issues on which legislators have a predetermined view and to obtain public recommendations on matters which require creative thinking, broader understanding or just plain information. Public hearings are almost always focused on either existing laws (to determine if they are effective) or the need for new laws. In either event the publics that participate are usually people with either a personal, economic or philosophical interest in the issues.

Public Hearings

With this variety of sources of information and influence in mind, I would like to walk through how a specific set of policies became law and illustrate the role that public hearings played in that process. I am going to use our national environmental laws as an example, because I helped write the basic United States Clean Air and Clean Water laws in the late 1960s and early 1970s. Perhaps more than any other recently enacted public laws, these statutes reflect a combination of public input through hearings, lobbying and debate.

(The legislative history of these laws and their major subsequent amendments, including important segments of public hearings, committee and conference reports, debates in both houses of Congress and related material from the executive branch, are printed and available for historians, students and lawyers.)

U.S. Environmental Law and Public Hearings

United States environmental law is very much the product of a public hearings process. In 1963, long before the most important and fundamental environmental laws were enacted, the U.S. Senate Subcommittee on Pollution conducted a series of hearings throughout the United States to understand the nature of the air and water pollution problem.

The hearings were held to obtain and shape public opinion, as well as to receive scientific and technical data. Citizens who endured the adverse effects of pollution testified alongside college professors who analyzed those effects and managers of plants that caused them. We heard from inventors and regulators. We listened to fishermen and bankers. Every point of view was expressed. Their testimony was recorded and printed so that future lawmakers, program administrators and the courts could understand the basis for the laws that were later passed.

These hearings were conducted in a dozen cities. Members of the U.S. Senate attended the hearings – in the United States, legislative hearings are held **only** when elected legislators themselves can participate.

The Subcommittee had two or three pre-determined panels of local plant managers, environmental advocates and local and state government officials. After hearing from the scheduled witnesses, the Subcommittee heard from people who signed up the day of the hearing. Everyone who signed up was allowed to give testimony. All this testimony subsequently became part of the published hearing record and thus became a part of the history of a particular environmental law or a series of laws.

After these hearings identified the types of pollution problems that required a public policy initiative, the committee staff drafted proposed legislation. That legislation also became the subject of hearings. These legislative hearings, unlike fact-finding or oversight hearings, were held in the official office building in Washington, DC.

In 1967, the Subcommittee held 18 days of hearings on the Air Quality Act of that year. Nine days of those hearings were outside of the nation's capital.

Three years later, that same Subcommittee held 30 days of hearings on what became the basic federal Clean Air Act. Half of those hearings were held in several states, developing information, and the other half were held in Washington, DC. The Washington hearings focused on draft legislation which had been developed by the staff for the Chairman of the Committee, as well as other legislation which had been introduced on behalf of the Executive (branch) and bills proposed by other Senators.

A legislative process that adequately involves all of the various elements of the “publics” in the development of important legislation is a painstaking process. It requires time and it requires a commitment of intellectual effort on the part of elected officials – and their staff.

Senator Edmund Muskie (for whom I worked and who is widely regarded as the founder of global environmental regulatory policy) and his colleagues on the Senate Subcommittee devoted hours, days and weeks to the process of developing legislation. While staff organized the hearings, contacted the witnesses, prepared the meeting rooms, developed questions and later drafted legislation, it was the elected Senators themselves who asked the questions of the witnesses, considered the draft legislation, voted on its provisions and finally approved it.

In the case of the landmark Clean Water Act of 1972, Muskie’s Senate Subcommittee conducted hearings for 44 days. It met as a subcommittee, a committee and with the committees from the House of Representatives 45 times to draft the final legislation – that is, nearly 90 meetings attended by members of the United States Senate and House of Representatives over a course of two years – a commitment of Senator time that would not be possible today.

But, in the end, it was this process of intensive public involvement and the personal attention of the elected legislators that yielded the Clean Air Act and the Clean Water Act. For three decades, these two basic laws have guided the recovered environmental quality in the United States and the preservation of pristine air and water in regions that had not yet been damaged by the pollution byproducts of the industrial revolution. Moreover, as the process was so public and so painstaking, there developed a massive public commitment to the effective implementation of those laws.

Federal Legislative Hearings

I have brought with me and distributed some pages from a printed hearing transcript of a House Subcommittee before which I testified last year.¹ You will note that the index to the hearing tells who testified and also provides a list of additional information that was submitted for the hearing record. The transcript also identifies which members of the House of Representatives were present at the hearing and the time and date the hearing took place.

It is common for the chairman or person presiding at the hearing to make an opening statement. The purpose of that statement is to define the objective of the hearing and explain the interests of the committee in holding the hearing. Sometimes this is a political statement that is

¹ House of Representatives Committee on Commerce, *The Chemical Safety Information and Site Security Act of 1999*, 106th Cong., 1st sess., May 19-26, 1999.

an indication of the direction the chairman hopes the hearing will take. Other times it is simply an overview of the issues involved.

Witnesses make their presentations and then are interrogated by committee members. As noted above, staff members almost never conduct this interrogation. Often members of the committee will interrupt witnesses during their testimony to ask specific questions. Sometimes the witness does not even get to complete delivery of the prepared testimony because so many questions are raised. In any event, the witness is offered the opportunity to include the entire text of his or her testimony in the printed hearing record.

Hearings are often adversarial. Witnesses usually are not sworn; that is, they do not have to take an oath to tell the truth. But committee members do ask questions of witnesses which are intended to support the point of view or perspective of that individual member of Congress. Often this involves a vigorous effort to discredit the witness and the testimony. If the witness is friendly to a member's position, questions are never hostile. If the witness is hostile to that member's interests, the questioning can be both hostile and even sometimes downright rude.

With that background, let me discuss very specifically the hearing process for federal matters and for state matters. At the federal level, there are two venues for hearings: the executive branch and the legislative branch. Because in the American system the executive and the legislative branches of government are separate and distinct, each holds its own hearings for its assigned purposes.

Legislative hearings are governed by the rules, if any, of the committee that is holding the hearing. Other than open meeting requirements, there are no general rules that apply to the conduct of legislative hearings either at the federal level or in many state legislatures. Very often, the rules that pertain to legislative hearings are established either by the committee staff or the committee chairman, or some combination thereof. Sometimes they are made up to fit a particular situation, to accommodate a particular point of view, or to suit a specific location.

Oversight Hearings

There are two kinds of legislative hearings: oversight and bill hearings. Oversight hearings are hearings conducted by a Congressional committee for the purpose of reviewing the performance of executive agencies in implementing enacted law. They are also means by which legislative committees develop information from affected parties to determine how well current law is working, whether new law is needed, whether there is new information on which to base the initiation of new law, and sometimes for the pure and simple political purposes of enhancing the visibility of the committee chair or for calling attention to a particular partisan political issue.

Oversight hearings are conducted in Washington or "in the field," meaning in various locations across the United States. Generally, oversight hearings are conducted outside of the nation's capital either for the political agenda of the chairman because they are frequently held in his or her own state or district, or to gather information in an area which has a particular problem or a particular level of expertise. (It is not unheard of for oversight hearings to be held in a

particular location so that the chairman of the committee has a reason to be in that location for the real purpose of raising campaign funds).

Bill Hearings

Bill hearings in the U.S. Congress are very structured. They do not purport to take into account the views of independent individual witnesses, nor do they try to solicit the views of the general public either as individuals or as organizations.

As a general rule, a bill is developed by the staff of the Congressional committee for the chair of the committee or for the committee members. That bill is introduced into the House of Representatives or the Senate and then referred to the committee responsible for its content. Before any formal hearings, the bill is usually the subject of a great many meetings between the staff of the committee and interest groups located in Washington who have an interest in it. Frequently, the bill, if it is controversial (if it would have a significant economic impact) would be the subject of meetings between members of the legislative body (House or Senate) with lobbyists representing organized interests (trade associations, commercial industrial interests, environmental organizations, organizations representing state and local governments, labor unions, etc.).

During this process of vetting a piece of legislation – that is, subjecting it to the various political tests that any controversial measure must pass before it will be seriously considered by either house of the national legislature – public hearings will be scheduled. Generally, those public hearings will be from one to three days (in times past, a bill would be subject to 14 or 15 days of hearings) over a period of one or two weeks.

The hearings will be “by invitation only;” that is, the witnesses must be invited. The hearings will be structured so as to represent competing points of view and competing political considerations. Generally, the majority of the committee will have more witnesses representing their point of view than will the minority of the committee. Depending on the amount of public interest in the measure (or how much the press cares to cover the hearing), as few as one (if there is no press) and as many as all members (when TV cameras are present) of the committee will show up for some part of the hearing. Nevertheless, in practice, it is the rule rather than the exception that no more than one member from the majority and one member from the minority will sit through the entire hearing.

In the Senate, the witnesses will be expected to present 50 copies of their testimony 24 hours in advance and summarize that testimony in three to five minutes. Members will then ask questions, frequently prepared by staff. There is usually no limit on the amount of time the members can take to ask the questions, though on a particularly controversial measure with many members present, the chairman may limit each member to five minutes per witness. In the House of Representatives, members are almost always limited either to a five-minute timeframe or to one or two questions.

Structurally, a hearing in the United States Senate would begin with any testimony or statements from the members of the Senate, either as members of the committee or as witnesses.

This would be followed by testimony from representatives of the executive branch. There would then likely be two and no more than three panels of witnesses representing various points of view on the legislation.

A House of Representatives hearing would be similar, though because there are so many more members in the House, the amount of time taken to conduct the hearing would be significantly greater. In any event, in either case, the witnesses are largely determined by the staff, reflecting the views and interests of individual members. On rare occasion, a member will ask to have a specific witness, and that request is always honored by the staff. Staff almost never engage in the public dialogue with the witnesses, unless it is an investigatory hearing, in which case witnesses will be sworn to tell the truth and be interrogated by committee counsel. These, however, are not legislative hearings and are subject to very different rules than are legislative hearings. In legislative hearings, witnesses are not required to tell the truth and they are expected to express a point of view. The only control on the veracity of their testimony is the likelihood that a member of the committee may expose their lack of veracity, which would cause them embarrassment and damage the point of view that they are espousing.

Finally, hearings are transcribed verbatim by a court reporter and are later circulated to the witnesses and the members to correct the record. When a corrected record is complete, the hearing is printed and made available to the general public. (At one time years ago, a bill could not be brought to the floor of either the House or the Senate before a printed transcript of the hearing was available.)

Hearings are generally perceived as means by which members enforce or reinforce their particular proposals or view with respect to a bill or bills. Seldom do hearings change the outcome of a member's thinking on a bill. Thus, they are, to a degree, pro forma, though because they are closely observed by the various interest groups, they become an important part of the political process.

Hearings in the Field

There are two styles that are used in hearings outside of Washington, DC. The first is identical to the format used in hearings in Washington where the staff will invite a specific set of witnesses. Those invited witnesses will be the only persons allowed to testify. They will be given a specific time to appear, often on a designated panel of witnesses. The hearing will be conducted over a specific two- to three-hour timeframe. No more than two or three elected members of the committee will generally attend this hearing. The hearings are usually conducted in public facilities. Usually, local electronic and print media cover these hearings. Invited witness will be required to have a prepared statement, 40 to 100 copies of which will have been made available to the committee before the hearing commences. Each witness will be expected to summarize the prepared testimony in two to five minutes, followed by questions from the committee members. Some committees require submission of the summary of the testimony too.

The committee may or may not impose a limit on either the number of questions a member of the committee may ask or the amount of time each member may take in asking and

receiving answers to questions. As a general rule, there are no limits on the time available to the committee chairperson. Nevertheless, when an issue is particularly controversial, the chair will frequently impose a time limit on each member in order to allow every member an opportunity to ask some questions. Time limits on both testimony and questioning become essential on controversial matters if the committee is to complete its agenda in the time available. In the U.S. Congress, committees are generally not allowed to sit (that is, to conduct business, either hearings or consider legislation) when the Senate or the House of Representatives is in session. Thus, as a practical matter, because the Senate and House usually convene at noon on any given day, hearings are conducted between 9:30 am and 12:00 noon.

This constraint does not apply to hearings that are held outside of Washington, though it would be highly unusual for a committee to hold a hearing outside of Washington when Congress is in session. For the most part, hearings outside of Washington are held during periods of congressional recess. The format outlined above would apply to either bill hearings or oversight hearings in Washington DC, but it would not necessarily apply to field hearings.

The other style of field hearings, because they are often intended to attract a broader level of public input, likely include at least an initial set of scheduled witnesses and then open themselves up to testimony by the general public. It was the practice of the subcommittee for which I worked to allow the general public to testify by signing up as they entered the hearing room. Then, on a determination of the number of witnesses and the amount of time available, minutes were allocated to each witness.

In one case, I recall where we had a field hearing in the chairman's home state on the issue of super tanker oil spills. The sign-up sheet included nearly 100 citizens. Because it was the chairman's home state and because he knew that each of these people was a constituent and thus a likely voter, he insisted that everyone be heard. The hearing started at 7:00 pm and lasted until 3:00 in the morning.

State Legislative Hearings

I want to talk about state legislative hearings and to compare them to the federal process. In my 15 years on the United States Senate staff and my 10 years as a member of the Maryland state legislature, I have participated in as many as 1,000 hearings.

I have described the federal legislative and oversight hearing process. The state process in the legislature of which I am a member, while similar in some respects, is quite different. Let me begin with the similarities:

First, state legislatures do conduct both oversight and legislative hearings.

Second, state legislatures conduct both kinds of hearings in the state capitol and at locations throughout the state, though hearings outside the state capitol are almost never held while the legislature is meeting.

Third, committee staff members organize the hearings and invite the witnesses.

And the differences:

In general, unlike federal hearings, state oversight hearings are almost always more carefully structured with a fixed group of invited witnesses and a fairly defined time schedule. On rare occasions, it has been my experience that the general public is offered an opportunity to comment or make brief observations at these hearings, but seldom is the general public given the opportunity to give extensive testimony.

Legislative hearings in the State of Maryland are enormously burdensome, time consuming, redundant and are often an activity of limited relevance. A committee is required to have a hearing on every bill introduced in the state legislature in every session. In the State of Maryland, with six committees and 3,000 bills, each committee is going to have to hold hearings on an average of 400 to 600 bills. We meet every year and every bill can be proposed again every year. Often we will hold four hearings on the same bill over a four-year period.

The committee chair is solely responsible for determining which bills will be heard on which days and in what order on the day they are heard. Generally, the chairman groups bills on a single subject matter or at least in some manner as to focus the testimony. Because of the diversity of bills, the limited number of committees, and the breadth of jurisdiction of the committees, this is often not possible. Thus, members often hear a wide variety of different subjects on any given day.

Each morning, for 70 of the 90 annual session days, the committee posts the list of bills to be heard on a table outside the committee room. Witnesses sign in on a sign-up sheet, noting whether they are for or against the bill. In some cases, there will be as few as one witness (sometimes just the legislator who introduced the bill). Other times, there will be as many as 300 witnesses. Even if no one signs up, this opportunity will be considered a hearing on the listed bill.

The committee rules require that a witness must have signed up before the hearing begins, usually by 1:00 in the afternoon. If there are a large number of witnesses, the chairman will call five or six witnesses on the same side of an issue to the witness table at once and ask each of them to testify and then they are questioned as a group. Also, when there are a large number of witnesses, the chairman will rotate witness panels, hearing first from a panel of proponents of legislation and then a panel of opponents of the legislation.

In most cases, the chairman of the committee will review the witness list, determine how many witnesses are signed up and try to allocate the available time – sometimes each witness will get as little as one minute and seldom more than five. However, the chairman cannot, and seldom tries, to control the time that members of the committee use to question witnesses; nor can the chairman always control the time it takes a witness to answer the question. Because there are 23 members of each committee in the Maryland legislature, it can take a significant period of time on any controversial issue just for each of the members to ask and receive answers to their questions.

On several occasions during my tenure as a state legislator, I have participated in hearings that began at 1:00 pm and ended at 1:00 am. For example, when the state was considering requiring all automobiles to have their exhaust emissions inspected, we had over 300 witnesses. The hearing began at 1:00 in the afternoon and went until after 1:00 in the morning. Every person was heard. The first dozen or so witnesses received a great many questions. After that, the committee members realized that there would be no new answers and the hearing became a tedious process of letting every witness come to the table and repeat what others had already said.

Unlike federal legislative and oversight hearings, there is no verbatim transcript kept of hearings in the Maryland state legislature. The staff keeps notes. Members keep notes. And those notes become the basis for debate on the legislation when the committee considers each bill in its business meetings.

(While not important to the issue of the hearing process, I should note that in the State of Maryland, every bill that is introduced by a date specified in the rules is also entitled to be voted upon by committee. If the bill receives a constitutional majority of committee members, it is taken to the floor of the House of Delegates with a favorable report. If it does not receive a majority, it is taken to the floor of the House with an unfavorable report, discharging the committee of any further responsibility, and the bill dies.)

In both the oversight and legislative hearing process at the state level, significant time is given to hear expert witnesses, government agency representatives and sponsors of legislation. Seldom do committees limit the time allowed for sponsors, government agency witnesses or experts. Usually, it is the government agency witnesses who receive the most questions from members of the committee. Directly interested parties (special interests) – that is, organizations and individuals who are directly affected by a bill – tend to also have fewer limits placed on their testimony. These witnesses usually get significantly more questions from committee members. The general public often gets much less time.

Committee hearings at the state level are a more important aspect of the legislative process than they are at the federal level. During the state legislative committee hearing process, it is possible to raise questions that may, just by being asked, determine whether a bill passes or fails. This is in part because all members of state legislative committees are expected to attend the legislative hearings. Members hear the questions and answers and form their opinions on a piece of legislation in that process.

Conversely, at the federal level, hearings are intended to develop a record. They may provide a basis for determining if a piece of legislation is a bad idea, or they may provide an idea for a piece of legislation if they are an oversight hearing, but fundamentally the purpose of federal hearings is to build a record on which to base committee reports and statements and arguments during consideration of a bill in the whole House of Representatives or Senate.

The Maryland state legislature does not file a committee report on a bill. There is no record of debate and thus very little organized printed legislative history on a bill other than the committee file, which may show no more than who testified and a copy of their testimony.

Conversely, with federal legislation, there is an elaborate basis for future examination of the intent of the Congress. There are the printed legislative hearings to which I referred. There is a written committee report that must contain a justification for the bill as well as an economic analysis of its impact and an indication of how the bill would change existing law. There is recorded debate on the floor of the House or the Senate. A conference committee report shows changes that were made between the bills that emerged from each of the Houses of Congress. And then, of course, the debate on the conference report will be printed. All of these materials are printed and organized and available to the administrative agencies charged with implementing the law and to the courts charged with the responsibility of determining whether or not the law is constitutional or whether or not the agency is implementing it properly. These written materials are a critical element to inform the executive branch's regulatory function.²

None of these resources are available to the state courts in my state. Thus, a determination of the extent to which state laws are being administered properly or are constitutional is much more a function of the quality of the arguments made by the people who support those government actions versus the people who oppose those actions because there is no record that has been developed in the process of hearings and debates.

Federal Executive (Administrative) Hearings

The Executive Branch also holds hearings. There are two types of administrative hearings: informational and regulatory.

Very often an executive agency holds hearings to hear from the public and interest groups in order to determine whether or not there is a need for regulation, and, if there is a need, what that regulation should look like. These hearings are preceded by an "advance notice of proposed rulemaking" (ANPR). The executive agency seeking the information will hold hearings sometimes in Washington, but more often in two or three sites around the country. The public will be invited to participate. There will usually be tight time constraints on testimony, and often it will be necessary for a person or group to sign up in advance of the scheduled date of the hearing to be guaranteed an appearance. In some cases, however, these administrative hearings, like legislative or oversight hearings, can go on for many hours as required to adequately hear all of the witnesses or address the controversial nature of the subject matter.

Executive agencies also conduct a more important form of hearings that deal with proposed agency regulations. Regulations are the detailed measures required to implement laws passed by Congress. An agency cannot write regulations if it does not have legal authority; that is, a law must have been passed to authorize the agency to develop and implement the regulations.

There are several kinds of regulatory hearings. In some cases, because of the lack of controversy or the simplicity of a regulation, an agency will ask the public to simply submit written comments on a proposed rule. Those comments will become a part of a docket (very much like a legislative hearing record) and they will be taken into account in the final

² See Supreme Court Case No. 99-1426. *American Trucking Associations v. Carol M. Browner* (2000).

promulgation of the regulation. Promulgation of a regulation is the equivalent of enactment of a law. Once promulgated, a regulation has the full force of law as far as the courts and affected parties are concerned.

Second, and more important, are controversial regulations. The administrative agency will have an actual public hearing presided over by civil servant employees of the agency who are experts in the matter. In some cases, they will ask the public and special interest witnesses questions, but frequently they will simply take testimony for hours and hours. These hearings are always transcribed, either by tape recording or stenographer. The oral and written materials submitted are always made a part of the docket of the agency on the regulation. That testimony often becomes the basis on which an affected party will ask the courts to review the regulation to determine whether the agency had the legal authority to do what it did or whether, irrespective of its authority, the agency acted arbitrarily or capriciously in making its determination.

Regulations are more precise and detailed than the laws that authorize them. They are intended to give very specific guidance in order to achieve the objective of the enacted law. As such, affected economic interests spend enormous amounts of money on lawyers and consultants to prepare for participation in regulatory hearings.

There is a federal law called the Administrative Procedures Act (available online). Unlike legislative hearings, for which there are few rules, that Act describes specifically what an agency must do as a predicate to promulgating a regulation. An agency must follow rules established in the Administrative Procedures Act in the development of regulations. This Act identifies the alternative hearing and comment processes available to the administrative agency in developing regulations.

In some cases, laws enacted by Congress include specific procedures that are supplemental to or may be required in place of the rules of the Administrative Procedures Act. For example, congress may determine, as it has in U.S. environmental laws, that important regulations be developed only after an opportunity for “oral representation.” This means that the Environmental Protection Agency must hold a public hearing at which witnesses are given an opportunity to appear and speak.

Many federal regulatory agencies have similar requirements beyond the Administrative Procedures Act. The reason is that in many cases the national legislature has delegated to the regulatory agency broad legislative powers, and the legislators want to assure that there is as much public input into regulations as there would be in legislation.

Regulations are developed and promulgated in large part by career civil servants and thus not as subject to the political process as are legislators when writing laws. In the final analysis, however, the people who are in charge of the federal agencies are appointed by the President and confirmed by the United States Senate. They serve at the pleasure of the President, so to the extent they are not politically sensitive as they develop their rules and regulations, they can be instructed to act differently by the President or removed from office.

If you were to conclude on the basis of this discussion of regulatory and legislative hearings that there is an enormous amount of process in the American system, you would be quite correct. It is, in fact, these processes that protect the public from arbitrary or unreasonable or dictatorial actions by unelected government officials.

The State of Maryland and the other 49 states each have their own process for administrative rules and regulations. The State of Maryland has its own Administrative Procedures Act. It has its own rules with respect to legal challenge of rules and regulations. These differ from the federal rules in many respects, but, as a practical matter, they extend to the public similar opportunities as does the federal Administrative Procedures Act.

Conclusion

I have tried to describe the kinds of processes which are utilized in the United States to obtain the input of a wide variety of publics in our policy making process. As I pointed out above, it is important to note that those publics vary, from ordinary citizens to large corporations; from labor unions to attorneys and lobbyists for major interest groups; from federal, state and local government officials to college faculty and academic researchers. These processes are intended to provide a forum for any of those interested parties to make their contribution, express their views, support or oppose and help shape the ultimate outcome.

And that is what is important. Process only counts if it means something. To offer the various publics an opportunity to participate in a policy making process after the decision has been made – or to offer that public the opportunity to participate in a process where their participation is meaningless – is of no value. If there is to be a public hearing process, either with respect to legislation or regulation or even with respect to development of broader public policy focus, it must be a mechanism in which the public has confidence that their views will impact.

This does not mean that any given public, or even a combination of publics, have to get their way. But it does mean that the public has to feel that they were not only listened to but also heard.

Summary of Discussion Sessions, Beijing (December 4-5, 2000)

Session One – United States, The Honorable Leon Billings, Maryland State Legislature

Q: How is the list of participants for a hearing decided?

At the state level, legislative committee members do not prepare this list, as they would at the national level. Instead, a registration sheet for the hearing would be available to the public, and any citizen who wishes to speak could do so if they sign their name in advance.

Q: Can everyone who signs up speak at these state-level hearings? What if there are too many people signed up? For example, 1,000 people once registered for a hearing on use of fireworks in Beijing.

Yes, in Maryland anyone who registers can speak. If 300, or even 1,000, people register they all have the right to speak and members must sit through the hearing until it is completed. During these longer hearings, though, many people who have registered to speak will leave before their turn is called, even though they have signed up.

Q: Often, we have the potential for hundreds of comments that are similar in nature. Should the committee summarize these, and give rationale for the actions it takes after the hearing?

In the Maryland state legislative process, written committee reports will explain the committee's course of action, but not necessarily the actions that it chooses not to take. This is different with the process of developing administrative regulations, in which a government agency must explain what it does **not** do, as well as what it does do.

Q: Is there any mechanism through which the public can initiate a legislative hearing?

There is no direct way for a citizen to force a hearing, but certainly public pressure or interest in a specific issue can bring about one or more hearings. At the national level, there can be a dozen or more hearings on a single bill, depending on the level of public interest in the issue.

Q: Is it compulsory for the executive branch to carry out administrative hearings before passing regulations? If so, and this step is not followed, are there ramifications for the executive branch or consequences from within the court system?

A court would dismiss or overturn an administrative rule if it was promulgated without a requisite hearing or publication (announcement of a hearing). In this event, the court would require that a new draft regulation be filed in the appropriate government agency.

Q: Administrative agencies must write many regulations, and it seems impossible to hold a hearing for each. How do agencies determine which regulations require hearings, and for which it is sufficient just to give notice and solicit written comments?

Unless the law on which a regulation is based specifically requires an oral public hearing, notice and comment is generally sufficient. Government agencies usually do not hold public hearings on their own initiative, but only when required by law.

Q: Is there a difference between an agency involved in rulemaking and one involved in interpreting rules? Is interpretation of rules always based on statute or law?

Generally, government agencies do not interpret rules. Courts interpret administrative rules, based on statutes or laws.

Q: Does the public have access to the information produced during hearings? Is such information subject to the U.S. Freedom of Information Act (FOIA)?

In the United States, the *Federal Register* prints all notices of proposed rules, all rule-making proceedings and all final rules and regulations. This is all publicly available. Final regulations are also published in the *Code of Regulations*, which lawyers use when studying or referring to administrative regulations. All the comments from an administrative hearing are put in a file, called a "docket," within the responsible government agency. Any citizen can go to the agency, request to see the information in that file and make copies of that information (sometimes, the agency will even pay for the photocopying). If a government agency refuses to provide this information, a citizen can file a FOIA request. If the courts approve this request, the agency must release its information or face a penalty.

Q: What are the advantages and disadvantages to the hearings process in the United States?

The advantages are that legislators might learn something new, and that hearings can help to shape public opinion. If you are a politician with a specific legislative goal in mind, you will need to build public support for your position. Hearings are useful in this regard. To have a full process, there must be much repetition and people giving the same comments over and over, which is a disadvantage.

Q: What is the relationship between oversight hearings and regulatory hearings?

There is no formal relationship, but the legislative body may try to use oversight hearings to influence regulatory process. Legislators use oversight hearings to put political pressure on government agencies.

Q: Is there any relationship between the result of oversight hearings and the Supreme Court's role in judicial review?

There is no relation between these hearings and the Supreme Court's judicial review powers, because the courts do not consider Congress' comments regarding a specific law after that law has been passed. This is a fundamental element of the separation of powers in the U.S. system.

Q: If your state has more than 6,000 laws, how do you integrate or coordinate new bills with the

many existing laws?

First, I should note that the State of Maryland has a 300-year old legal code that covers nearly all subjects. Virtually all the new bills that the state legislature considers are amendments to existing laws. The Maryland state constitution requires that each bill focus on only one topic, therefore most bills include only a few word changes to existing laws and can quickly be approved without controversy. Each committee has a team of lawyers that advises whether a proposed bill duplicates or conflicts with existing legislation.

Q: When U.S. administrative agencies make regulations, there can be either oral or written presentations. Are the written presentations required for only "important" decisions? How is this decided?

Before the 1960s, most government decision-making in the United States was closed to the public and the press, including regulatory processes at both the national and state levels. Between 1965 and 1975, there was a movement to require agencies by law to open up decision-making to public scrutiny. In new environmental laws passed in the 1970s, for example, the U.S. Congress required that all state and local agencies discuss their proposed implementing regulations publicly, just as the national-level Environmental Protection Agency (EPA) planned to do. Now, other regulatory agencies such as the Food and Drug Administration (FDA) also require open, public hearings on new regulations.

Q: In legislative hearings, experts in a specific field can be invited, whereas the public at large may be unfamiliar with the subject matter. Is it appropriate to involve the general public in discussions of technical matters?

In order to hear the serious or the well-informed opinions, legislators often have to also listen to many frivolous or uninformed ones as well. But it is important that there are regular criteria as to when you do and do not involve the general public in a hearing.

Session Two - Germany, Dr. Rudolf Kabel, German Bundestag

Q: If one party is disappointed in a bill, can it call another hearing? Or, if no hearing was held, can the party vote against the part of the bill it opposes, or must it vote against the entire bill?

There can only be one hearing per bill. After a bill is introduced at the final plenary stage, a legislator can propose an amendment to the bill. If a member disagrees with the final draft, including all amendments, he must vote against the bill in its entirety or abstain - he cannot vote against some provisions and in support of others. In Germany, though, the opposition group has the right to force a hearing so long as it controls 25 percent of the seats in a committee.

Q: Can a party group force its committee members to vote a certain way?

Not according to the rules of procedure: each member has a right to vote his or her conscience. Politically, there can be consequences for a member who opposes the party's position, even instances where a member must resign from the party or other sanctions placed on a dissenting member.

Q: In Germany, the government will hold consultative hearings before it sends a bill to the legislature. If the same experts take part in both government consultation and legislative hearings, how does the legislative hearing perform a substantial role?

Legislative hearings allow for experts from opposition groups to take part, whereas administrative hearings are more likely not to include such expert witnesses. Also, legislative hearings are public, unlike the initial government consultations. This allows them to play an important role in building public support for or against a specific policy.

Q: But if the government is the main influence in shaping legislation, has the legislature relinquished an important power over the contents of bills?

Yes, this can happen – in a sense, it is unavoidable. But remember, it is the right of the minority group to call a hearing. They can claim that they were not part of the government's initial consultation process, since they are not part of the government, and use the public legislative hearing as a tool to build support for opposition to a bill.

Q: Is there a specific procedure or set of rules governing the amendment of a bill?

Yes, there are two chances to amend a bill: once in the committee stage, and then again at the final plenary stage. In both stages, all parties have an opportunity to propose amendments. Particularly for controversial bills, parties will propose changes for the sake of public attention to their stance, even if the amendments are unlikely to pass.

Q: What are your experiences with the involvement of organizations and interest groups in legislative hearings?

At the national level, it is difficult - if not impossible - to invite all interested associations to a hearing. But at the local level, politicians regularly hold consultation meetings with organizations and interest groups as a way to incorporate their views into the national-level legislative process. In the national legislature, party groups are responsible for identifying the groups that testify at hearings. Each party is allowed to invite a certain number based on their overall representation in the committee. Even though party groups in Germany are broad and represent most interests in society, there is criticism that not all interested organizations can participate in hearings. It is therefore also important for associations to communicate effectively through the media in order to make their opinions heard and to build public support for their positions.

Q: Are there any remedies for groups left out of a hearings process, e.g., can they appeal to the court system?

They cannot appeal to the courts, as there is no right that guarantees participation in a hearing. But a group can use public relations, such as communication through the media, to register their complaints and opinions. For legislators, it is thus politically risky to exclude any interested organization, because they do have the chance to retaliate through the press.

Q: Can you offer advice on the establishment of legislative hearings in China?

I can offer information on how they were established in Germany, though conditions in the two countries are of course different. For example, hearings in Germany depend on the existence of the many citizens-based associations and interest groups that I described earlier. In our experience, the organization of hearings has rested on having different political opinions within society, and needing to identify them so they can be adequately involved in the political process.

Summary of Discussion Sessions, Shanghai (November 29-30, 2000)

Session One - Germany, Dr. Rudolf Kabel, German Bundestag

Q: After 1949, the initial practice in Germany was to have a small number of hearings. Now they are more common. How did this happen?

Initially, there was no tradition of hearings, and only a brief 24-year history with any parliamentary democracy at all. The need to rebuild the country in a short amount of time after 1949 meant that it was difficult to hold hearings. But, gradually we studied practices used in other countries, particularly the United States, which was influential in encouraging reforms to German legislative practices. Jumping ahead in time, a growing number of MPs now consider holding so many hearings to be a waste of time. So, we are looking into ways to avoid those hearings that are unnecessary, namely those in which no new information is presented.

Q: How do government hearings differ from legislative hearings?

Government “hearings” are informal exchanges of opinions in which government officials can get information and a sense of public interest.

Q: Do government representatives participate in legislative hearings and, if so, to what end?

Government representatives, including civil servants, have the right to take part in legislative hearings, so they must be heard if they want to speak. Accordingly, if the parliament calls a government representative to testify, that representative must take part as requested.

Q: If citizens are not satisfied with the outcome of a hearing, are there legal recourses to which they can turn?

There is no right to petition for further deliberations once a legislative issue is settled. But, there is a responsibility for MPs to deliberate all issues fully. If there are any complaints with the results, a committee must respond as to how it deliberated.

Q: What are the differences among the three stages in the bill deliberation process?

Stage one, or the first reading, takes place in the plenary; then stage two, or the second reading, takes place in the committee. It is in stage two that recommendations for amendments are first made. Stage three, or the third reading, often takes place right after stage two. If there are any amendments made in the second reading, though, members can be given time to review written sets of amendments and consider their responses.

Q: How can a legislature balance efficiency with justice, particularly given the amount of time and resources needed to organize a hearing?

There are different opinions within the parliament on this matter. Generally, when new information and opinions are available on an issue, it is worth the time and cost to review existing policies and approaches.

Q: It is clear that not all bills have hearings associated with them. What criteria do members use in determining whether to hold a hearing on a given issue?

For bills that only require some technical change or revisions, a hearing is generally not needed. But if one-quarter of a committee's members demand a hearing, it must be held. For controversial issues, it is certain that the minority group will demand a hearing.

Q: Does the decision to hold a hearing ever become subject to political horse trading?

This would be an unusual situation because committees already have priorities set for the legislative agenda, e.g., which six or seven bills must be passed by the end of the year, or in a set number of days. This prioritization becomes the basis for organization of the committee's schedule.

Q: How do members decide which committee a bill goes to if it overlaps several subjects?

This sometimes can be a controversial subject. In the first reading, the plenary will decide on this matter.

Q: What range of amendments can a committee propose?

Amendments can range from minor or technical ones to very fundamental changes, in which very little of the original bill remains after amendment.

Q: Can the committee "kill" a bill, as in the United States?

Yes, most often with bills introduced by MPs from the minority group, the committee can kill the bill by simply choosing not to deliberate on that bill. The committee must explain to the plenary why it chooses to do so, although the plenary cannot force the committee to complete any deliberation.

Q: If members decide that a committee debate becomes a waste of time, can they halt it?

Not usually, but they can invest less time in hearings in which they are not interested, or more in ones that they think are particularly important.

Q: Can a Minister give an opinion or make statements that differ from those reflected in the government's bill?

If there are any differences, it ought to be resolved within the government before the bill is developed! But this does occur on occasion, and must be resolved politically between the Minister and the Chancellor.

Q: Is the content of a hearing publicized, e.g., in a public record?

The committee responsible for a hearing must give a report to the Bundestag plenary, which is printed and includes a summary of the hearing. The minutes from the plenary are published so MPs can refer to them, though the minutes are only given to MPs and not directly released to the public. An individual MP can publicly release these minutes if he or she chooses.

Session Two – United States, The Honorable Leon Billings, Maryland State Legislature

Q: If testimony at a hearing is divided, how will the committee reach its decision?

Ultimately, the decision with respect to the policy underpinning a bill will be a political decision and may not reflect the hearing testimony. This process we can call “simple and brutal”.

Q: What if there are no witnesses, does the hearing get called off?

Of the 3,000 bills each year in the Maryland state legislature, many are small changes to existing laws, because in Maryland there is a rule that each law must only relate to one issue. These bills, in fact, skip right through the committee stage (where a hearing would be held) and go straight to a plenary vote. But if there is no sponsor for a bill, then it will fail.

Q: What is the difference between a formal and informal hearing in the United States?

In the legislature, there is no difference – it is a hearing so long as it is conducted under the auspices of the Senate or House of Representatives. But a member of the congress must be present for the hearing to take place – in the United States, there are no hearings without at least one legislator.

Q: What is the difference between an administrative hearing and a legislative hearing?

An **administrative** hearing is held to discuss executive-proposed regulations. It is conducted by civil servants and will almost always result in a written regulation. A **legislative** hearing, on the other hand, is much less certain to produce a bill, because first there must be a decision as to whether a proposed policy is required at all. At the stage of administrative hearings, this policy question has already been decided.

Q: How do legislators ensure that government officials tell the truth at hearings?

This relies on an inherent system of checks and balances. Public officials must enjoy credibility to perform effectively and maintain their positions. If an official was to deliberately misrepresent the facts, that action will be noted and publicized. In fact, if an official simply makes an unintended mistake, political opponents will still try to use that to their advantage.

Q: What is the legal status of witness testimony at administrative hearings?

The testimony becomes part of a “docket,” a legal paper trail of information on that policy and subsequent regulations. Testimony is subject to perjury laws only if the witness has been sworn in, as if in court proceedings.

Q: For an administrative agency, is the hearing the main basis for its decision? If so, is there any liability for not accepting opinions given in the hearing?

Beyond hearings, there are many meetings that form the basis for an administrative agency’s decision. For example, when the Environmental Protection Agency (EPA) makes new regulations to limit the use of diesel fuel, it would meet beforehand with representatives of oil companies, diesel engine manufacturers, environmental groups, health and medical organizations, even other government agencies such as the Department of Energy.

Q: What is the influence of interest groups, both big and small, on legislators who have limited time?

I am well known for my pro-environment position in the state legislature, so some representatives of interests who oppose my positions do not waste their time trying to lobby me. Most of my meetings with lobbyists focus on issues that neither my constituents, nor I, care about. Often, I face lobbyists hired by large business or economic interests who try to “educate” me about their issues.

Q: What happens to the consistency of a policy when a new president comes into office?

An incoming administration would have to request changes to any rules before they can be made, which means going through the whole legislative process. In practice, existing rules are likely to stay in effect, because it is difficult to remove them. Any proposed rules left over from the old administration (which had not yet been enacted), however, can be suspended. For example, of the nearly 1,000 unfinished EPA regulations drafted during the Carter administration, only one was enacted under the Reagan administration.

Q: Have the number of hearings really become a burden to you as a state legislator?

There is nothing “pleasant” about sitting for 12, even 15 hours to listen to members of the public. But they are entitled to the opportunity to speak to their elected representatives, so we must listen, even if we disagree with their opinions. The essence of the process is that citizens have a right to voice their opinions about policy issues that affect them. And, hearings have changed my mind on occasion. Legislators have a responsibility to listen to

the facts, even if they initially think they disagree, because there are so many subject areas we must discuss and no one member can possibly be an expert on all these topics.

Session Three – United States, Glenn Cowan, Former Professional Lobbyist

Q: How can interest groups influence legislators, if they cannot or are not allowed to give money?

Interest groups can organize people (voters) which is valuable assistance to legislators both during election campaigns and between elections. Even if a group contributes money to a campaign, this only guarantees an audience with a legislator, not support for its policies. And that group's opponents are still likely to receive an audience with the legislator, even if they did not give money, since they also have the ability to organize citizens.

Q: It seems that hearings are already scripted, so how can interest groups use them to their advantage?

While many votes in the legislature are not close, or even well attended, occasionally members will change their minds on a policy based on hearings testimony. For an interest group to achieve this result, they must use the media to build public support for their position, especially in a country as large as the United States. During recent hearings on the so-called proposed "gag rule," which would have restricted doctors from informing women about medical options involving abortion, pro-choice organizations mobilized public opposition through an extensive media campaign that shifted the focus of the political debate from abortion rights to freedom of speech for doctors. In this way, hearings provide citizens and interest groups an opening into the political process, but groups must still work hard to maximize that opening.

Session Four – Group Discussion

(Questions directed to panel of all three foreign experts)

Q: What issues really need hearings? What criteria are used to determine whether an administrative or legislative hearing is needed?

This relates to the goals or purposes of hearings, including that of involving citizens in the decision-making process, or bringing specific expertise into the policy process. In the United States, for broad policy questions, such as whether stricter air pollution laws are needed, legislators generally solicit broad public opinion. For specific or technical issues, whether the limit on pollution should be set at 10 or 20 or 50 parts per million, experts in the subject are needed but the broader public does not expect or need to be involved.

Q: If hearings have costs associated with them – particularly the time burden they place on busy legislators – why require them for each bill, as in the Maryland state legislature?

That practice is specific to the State of Maryland in the United States. In Germany, by contrast, it would be impossible to hold a hearing on each bill. The committee responsible and their members must decide whether a hearing is necessary. In the United States at the national level, not every bill receives a hearing either. In the U.S. Congress, the committee chair determines whether a hearing will be held or not.

Q: Can hearings take place at various stages throughout the legislative process, or is it necessary to hold them at the committee stage?

In the U.S. Congress, there is no requirement to hold hearings or specification as to when they can or should be held. Usually, hearings take place at the stage in the legislative process in which broad policy issues are being debated, not at the stage in which specific or technical details are being considered.

Q: In context of the U.S. two-party system and the German multi-party system, how do committee chairs remain neutral? Or is that not presumed to be part of the chair's role?

In the United States, the committee chairs are never neutral. The chair and his party use the power to call hearings as a tool for generating public support for their specific policy positions. This extensive power of the committee chair grew out of the competitive nature of the two-party system that drives legislative politics in the United States. In Germany, however, committee chairs are allocated proportionally based on parties' overall representation in the legislature. Both the ruling and opposition groups thus have opportunities to chair a committee. The committee members, not the chairs, decide what takes place in committee, including whether to hold a hearing. During hearings, committee chairs must remain neutral.

Q: What sort of preparation is required for a hearing?

There are a number of items you need in order to hold a hearing. These can include:

- a. Sponsor / host
- b. Subject matter
- c. Location
- d. Schedule / determine the number of hearings needed
- e. Process for notifying interested public
- f. Rules of procedure
- g. Means of recording the hearing proceedings
- h. Criteria for evaluating testimony.