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expressed.
DIVERSIFICATION AS A MEANS OF FINANCIAL SUPPORT FOR SURFACE TRANSPORTATION UTILITIES

BY KENNETH H. TUGGLE*

The collapse of the $6-billion Penn Central empire did more than bring down the mightiest of the railroad conglomerates. The shock wave it created brought new demands on Capitol Hill and from the Interstate Commerce Commission for legislation that would prohibit future railroad diversification.

Those statements are from an article in Business Week of March 11, 1972. They contain a number of factual errors. But more important, they draw a wholly erroneous conclusion from the legislative proposal made by the Interstate Commerce Commission regarding conglomerates and diversification. In a few moments, I shall comment on our legislative proposal.

As to whether conglomerate diversification was the cause of Penn Central's difficulties, I am in no position at this time, to state flatly one way or the other. The matter is pending before the Commission on a formal investigation docket. It is being looked into by others as well, including committees of Congress. But I can state unequivocally that a large part of Penn Central's problem is an outgrowth and a manifestation of a basic malady affecting railroad operation throughout the northeast quadrant of the nation.

Today, seven major northeastern railroads are in reorganization under section 77 of the Bankruptcy Act. None of the other six is distinguished for diversification. On the other hand, New England's Bangor & Aroostook Railroad, said by some to have been victimized by a conglomerate, is not in bankruptcy. Nor are the Missouri-Kansas-Texas (The Katy Line), the Kansas City Southern, the L&N, the Union Pacific, the Santa Fe, Southern Pacific, Illinois Central, and numerous other railroads which are conglomerate affiliates, some having been actively diversified for more than 100 years.

These comments on Penn Central are intended to bring out two key points:
* The Interstate Commerce Commission has not concluded that diversification was the cause of Penn Central's fall.

---

Today's Commission has not determined that diversification is necessarily bad for transportation companies, or inconsistent with the public interest in transportation.

Before drawing any conclusion, we should examine the facts. First, what is a conglomerate? Generally speaking, it is a group of affiliated corporations, each engaged in a different and normally unrelated business pursuit.

Control of the group may lie in either a dominant operating company or a non-operating holding company.

A carrier may create a non-carrier holding company to which its stock would be transferred in exchange for the holding company's stock. The holding company would then diversify.

Regulated carriers have become "diversified" in another way—being acquired by an existing non-transportation conglomerate.

There are various reasons why regulated carriers become affiliated with conglomerates. Some railroad men have candidly stated their chief reason—to escape regulation. With motor carriers, it is not quite the same. In fact, it appears that certain non-carriers acquiring truck lines quite willingly submit to I.C.C. regulation. Assuming that all conglomerates are seeking to maximize returns for their stockholders, why the difference?

The major rail systems traditionally have engaged in nonrail businesses, primarily land-oriented. Their industrial development departments foster growth of industrial parks and other business at locations adjacent to the rail line, and for this purpose, the railroads would have the land available.

The western rail systems obtained vast acreage from the Federal Government as an inducement to construct their lines in the first place. That was all part of the national program in the last century to promote settlement of the West. Part of that acreage was sold to obtain construction funds. But much of it has been held, and today produces income from minerals, lumber, agriculture and other non-rail activities.

Through the conglomerate structure, those lands and other rail assets can be released from certain governmental restraints, thereby facilitating their use in enterprises promising more attractive returns. History shows that assets frozen into a railroad produce the traditionally low rail rate of return. They might even be consumed in public service wholly without recompense—as appears to have been the case with certain properties of the New Haven and the Jersey Central (two railroads now in reorganization).

Some railroads lie—nailed to the ground—in economically depressed areas, where the sustaining industries of bygone days have moved away
or have irretrievably lost market position. Examples are the textile industry of New England and the anthracite coal industry of Pennsylvania. Certain rail resources, fixed in place to meet the needs and aspirations of the last century, today stand unused, and worse than that, have little prospect of productive employment in the foreseeable future.

This is not to say they cannot be used for railroad purposes. The point is that their use is not likely to produce an adequate return to the owners.

Diversification by railroads is also fostered by tax considerations generated through use of the consolidated tax return. To a railroad with a seemingly endless parade of deficit years, tax loss carryovers and investment credits are meaningless. But the conglomerate, like magic, makes the tax benefits materialize.

Diversification reflects, undoubtedly, a coming of age of railroad managers. The economic realities of the computer era have weaned them away from the 19th Century notion of monopoly power. They understand the cyclical nature of their industry; they acknowledge the existence of formidable competition in other modes of transport; they perceive a future of frustration in the capital markets, vying for acceptance against nonregulated competitors.

To them, diversification offers the stability of a broader base, the glamor of product variety, the attractiveness of growth, and a freedom for enterprise. The picture is one of enhanced profits and investor acceptance.

They have tried other paths to rejuvenation but have fallen short of the mark. Some of the railroad mergers were launched too late, or were too long in consummation, or too slow in bearing fruit.

The multi-modal transportation department store concept ran afoul of ancient taboos. Revenue input and rate competition are attenuated by regulatory strictures.

Abandonment of deficit operations evokes hostile political and public response. Nationalization could no longer be dismissed as nonsense. Seemingly there was no way up and no way out.

To the railroads, the non-carrier holding company and its potential for diversification offered economic salvation.

With motor carriers the story is not quite the same. This industry has had enormous growth, obviously flourishing in a regulatory climate. To its benefit is the ever-increasing highway orientation of our society, with its planned 48,000-mile interstate throughway, its ubiquitous network of all-weather roads, and its emphasis on speed and flexibility. In recent years, some of the larger motor carriers have had returns on capital ranging from 8 to 25 percent. Opportunities for growth and profit seem to arise wherever the trackless truck can travel.

As a result, the urge to diversify has not yet captivated the motor
carriers. They have integrated horizontally (with equipment leasing companies, maintenance firms, terminal operators and warehouses), but with the entire corporate structure geared to the performance of transportation service.

The invasion by non-carrier conglomerates is beginning to make a dramatic change, however. Some of the truck lines have been annexed into affiliation with such diverse businesses\(^2\) as baseball, chemicals, clothing, television, mutual funds, oil drilling and others.

Probably the chief qualifications of the motor carrier are: attractive cash flow, high return on investment, relatively low capital requirements, and growth potential. These attributes would tend to enhance the quality of the acquiring conglomerate's securities, and, at the same time, offer a source of funds and profit.

Let us look briefly at what diversification under a conglomerate structure has done for some carriers. The Union Pacific Railroad was diversified almost from its inception. But in 1969, it formed a holding company with several nontransportation subsidiaries, and spun off to them various properties which historically "belonged" to the railroad.

In the preceding four years, when the railroad was the parent, U.P. had an average annual income of $105 million. In the next two years, as a subsidiary within the conglomerate, the railroad had incomes averaging $116 million.\(^3\)

With Southern Pacific, Illinois Central and others, the story is the same. As a parent railroad, they enjoyed profits; but as subsidiaries in conglomerates, their profits increased.\(^4\)

Recognizing that long-range trends are not yet visible, and that income statements do not tell the whole story, these successes should not be ignored.

Let me cite two examples on the motor carrier side:

International Utilities, a diversified conglomerate, acquired Ryder Truck Lines in 1970, and Pacific Intermountain Express in 1971. With Ryder, there was a dramatic turnaround from prior years when it was plagued with problems and deficits. With P.I.E., profits remained strong while service was extended so that the Ryder-P.I.E. system can provide

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\(^3\) Not including an extraordinary charge of $77 million in 1971, reflecting Amtrak's takeover of passenger service.

\(^4\) Not including extraordinary charges in 1971, reflecting Amtrak's takeover of passenger service.
DIVERSIFICATION

single-line service between major population centers throughout the country.

Greyhound presents a unique chapter. Until 1963, it was content to be a bus line, and in many respects it was No. 1. But then, it formed a holding company and began to diversify. In 1969, it took over a giant conglomerate already in being. That was Armour-Dial. With annual sales of $2 billion, it was the second largest meat packer in the country.

Some of the motivational factors governing Greyhound in this almost explosive expansion seem apparent. First, the jet plane and the 2-car family, stunted the growth of bus patronage.

In 1963, Greyhound had liquid assets and balance sheet strength sufficient to commit perhaps 30 percent of its total assets to diversified opportunities. Today it holds investments with a net worth listed at three quarters of a billion dollars, of which the bus lines make up less than one-third.

These success examples do not tell the whole story.

There is another side for which I will use two brief examples. The Chicago & North Western Railroad created a holding company, using railroad funds for diverse investments. First a chemical company was acquired. It was an immediate success. That was followed by another chemical company, then by fabrics, steel and diverse other lines. Naturally, the railroad’s resources and substantial tax credits gave the project a big boost.

But in 8 years, management became disillusioned with the long-term prospects of the railroad industry, and this year sold their railroad. As a parting shot, the conglomerate management was reported as saying that the sale of the railroad will improve the earnings quality of the holding company by eliminating from the conglomerate’s picture the unpredictability of the railroad’s earnings.

In the other example, the Bangor & Aroostook Railroad put itself into a conglomerate. Railroad assets and tax credits were consumed, and after a few years, the railroad was spun off. The new owners have challenged some of conglomerate’s dealings with the railroad as its subsidiary, and have filed a suit for recovery of damages.

I believe it is conceded that diversification often offers financial stability, especially to industries sensitive to economic fluctuations. The conglomerate can utilize the tax laws in dimensions not otherwise available; it can achieve economies of scale in management and administration; it can obtain credit on preferential terms and gain favor with investors; it has easier access to cash and capital.

In turn, the conglomerate can provide ready financing at low interest to its affiliates—for equipment, maintenance, capital improvements, and upgrading of service.
This would enable the carrier affiliates to reduce expenses; to expand, innovate and improve as warranted by the business; to establish long-range programs, and make their moves at the most opportune times.

These significant advantages should be available to carriers, no less than to other industries with which transportation utilities must compete in the capital markets. To deny these advantages to transportation would be inequitable and short-sighted.

However, an obvious purpose of the conglomerate is to invest where the returns are greater; and if the carrier lags behind or loses promise, it can be jettisoned like the C&NW and the Bangor & Aroostook.

Conglomerates have been known to strip assets from carriers, by directing the payment of large dividends, by upstream loans and advances that never really get paid back, by heavy assessment of management fees for perfunctory services, etc.

If, in fact, a carrier has over-capacity and excessive reserves, disinvestment or diversion of resources to more profitable activities may not be inconsistent with the public interest. A rational plant reduction and realignment of corporate resources, without adverse effect upon essential service could be economically sound. But, as we have seen, conglomerate manipulations are not always advantageous to the carrier, or in turn, the public it serves.

The duty of a public official in transport regulation is to serve the public, to the end of providing a transportation system adequate to the ever-evolving needs of the nation and its commerce. With that as the objective, we must be concerned about the economic soundness and earnings capacity of transportation companies. That concern is, in fact, a matter of statute.

By statute, it is unlawful for carriers to issue securities, or incur certain obligations without I.C.C. approval. That approval is contingent upon the carrier's continued ability to serve the public.

By statute, the Commission prescribes reports and a uniform system of accounts, and may approve the consolidation of carrier properties subject to reasonable conditions.

This entire statutory plan can be circumvented and even be subverted, by skillful employment of the conglomerate device. The holding company and the non-carrier affiliates, outside the I.C.C.'s jurisdiction, can issue securities, incur obligations and engage in intercorporate transactions which can draw upon the carrier subsidiary and encumber its ability to

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7. Section 5(2) ICA (49 U.S.C. 5(2)).
serve just as much as if the carrier itself were doing these things.

If a carrier advances cash to finance an affiliate's project, or for the same purpose, is forced to open a line of credit, or pay out a dividend, or make an upstream loan, the effects upon the carrier are no less serious than if the carrier issued securities of its own in the same amount.

The important question, however, is not how much a conglomerate takes out of a carrier, but rather, how much is left in. And, to pass judgment upon the latter, we should consider:

* What has been the effect upon the carrier's ability to serve the public?
* What resources are needed to meet the reasonable capital requirements of its transportation business?
* What service and capital obligations can the public reasonably impose upon the carrier?

Based on these and other policy considerations, and recognizing that the larger carriers are turning up the conglomerate road, the I.C.C. has proposed legislation to maintain the integrity of transport regulation.

Obviously, a national transportation policy setting standards for the industry would be futile, if the major transportation producers could evade it. To close the gap, the Commission's bill would extend regulation over conglomerates on three basic points:

* First, when a non-carrier obtains control of a carrier. (The present law is addressed to situations involving two or more carriers.)
* Second, when a non-carrier issues securities affecting a carrier subsidiary.
* Third, when remedial steps are needed to correct conglomerate abuses likely to impair a transportation affiliate.

In dealing with non-carriers now subject to I.C.C. jurisdiction, the Commission has generally refrained from extending its regulation outside areas of its own expertise. Our new proposal would continue that policy.

The proposed legislation, in the manner of a sanction, would in itself, be a deterrent against transactions inconsistent with the specified standards.

In order to employ the remedial jurisdiction, the Commission would first have to find an existing or threatened harm and identify the cause. Thereupon, it could issue a cease and desist order, and could place under its cognizance all the carrier's intercorporate transactions, until the situation is corrected.

If diversification is a lawful and advantageous way of doing business, its availability should not be denied the transportation industry, which
must compete with non-regulated industries for financial and investor support. But since the Nation and its entire economy are heavily dependent upon the regulated surface transportation utilities, safeguards against abuse are warranted. Employment of the conglomerate technique in the carrier business must be placed under such reasonable restraints as are necessary to protect the public interest in transportation.
AIRCRAFT LEASING—PANACEA OR PROBLEM?

BY RICHARD GRITTA AND PETER LYNAGH

Introduction

Railroad cars have long borne the stenciled markings "This car is The Property of The City Bank of X-Land." It is bizarre, however, to board a beautiful new DC-10 and see a small placard stating that some trust company is the owner of the plane and not the friendly airline. More and more, the airlines are turning to the lease as a means of securing aircraft.

The leasing of flight equipment by the 11 trunklines has grown tremendously over the last decade. In the decade of the sixties, over $1.5 billion dollars worth of aircraft were leased by the trunks.¹ The Air Transport Association reported that by December 1969, 37 airlines, accounting for 2403 aircraft, were leasing 324 airplanes.²

While leasing is a popular form of securing aircraft, not all airlines rely on lease financing. Those airlines who have experienced financial difficulties depend more on this method of finance. 83% of Northeast's fleet was leased; 34% of Eastern's fleet was leased; 22% of American's; and 19% of TWA's and United's fleets were leased. Profitable airlines, such as Northwest, Delta and Continental, had no leases and National, another profitable carrier leased only 13% of its fleet.³ The advent of jumbo jets, and mounting financial problems in the seventies, indicate that leasing will continue to be a popular form of financing aircraft.

This paper will look at the characteristics of the financial lease, the types of leases used by the airlines, and the reasons airlines have turned to leasing as a source of funds. A discussion will follow on the accounting implications of leasing and the capitalization effect of leasing. Finally, conclusions will be presented with respect to leasing and the future financial stability of the airlines.⁴

¹ Richard Gritta, Asst. Prof. of Finance, Bowling Green State Univ. D.B.A. in Finance, Univ. of Md.
⁴ Calculated from data in the CAB: Form 41.
⁵ Emphasis in the paper is on the "Big Four" Trunks—American, Eastern, TWA and United—as they account for over 83% of all leases by the 11 Domestic Trunklines.
Nature of The Airline Leases

Lease Types: Lease contracts can be divided into two basic categories by purpose: The financial lease and the operating or service lease. Each type of lease is defined below: Financial Lease—"Defined as a contract under which a lessee agrees to make a series of payments to a lessor, which, in total, exceeds the purchase price of the equipment acquired. Typically, payments under such a lease are spread over a time period equal to the useful life of the equipment. The contract is non-cancellable by either party during the initial period. The lessee is thus irrevocably committed to continue leasing the equipment."

Operating Lease—"Defined as all other lease contracts, they typically are cancellable by the lessee upon notice of cancellation to the lessor. Operating leases, therefore, do not involve any fixed commitment by the lessee and in this respect are similar to most types of business expenses."

Thomas A. Nelson has identified several major traits of the financial lease which aid in its identification:

1. The decision to lease is based primarily on financial considerations rather than on strictly operational factors. Leasing is thus considered as an alternative source of capital by management.
2. The lease is normally noncancellable, or cancellable only under severe penalty, during the initial term of the lease.
3. Rentals payable are designed to return to the lessor the total cost of the asset plus a return on the invested funds.
4. The lessor, the legal owner of the assets, retains title at the expiration of the initial lease term. Options to renew or purchase are often included.
5. Financial leases normally employ the "net" lease principle which requires the lessee to pay all the maintenance costs, repairs, insurance premiums, taxes, and all other costs normally associated with ownership.
6. The primary security behind a financial lease is normally considered to be the general credit of the lessee rather than the value of the leased property.

Comparisons of actual leases on file with the C.A.B. and the character-

istics listed above were made to see if the airline leases were financial leases.

Common Provisions found in the leases reviewed are listed below:

1. These leases were alternatives to purchases of aircraft financed via the sale of long-term debt or common stock. The financial condition of many of the carriers, and the conditions existing in the capital markets, contraindicated the use of such sources of funds (see below). There was no evidence that operational considerations were a significant factor in the decision to lease the aircraft.

2. Leases were non-cancellable by either party. In case of default or voluntary termination, the entire obligation under the lease agreement was considered due. That obligation was generally defined as the present value of the annuity stream of remaining payments, discounted at the prime rate of interest at the time of default.

3. Aggregate rentals for the initial term of the leases exceeded the then current purchase price of the aircraft, thus providing a return on the lessor's funds. Normally, the length of the initial term of the lease was greater than the economic life of the plane. In an Eastern Airline's lease for a Boeing 727, the cost for the plane to the lessor was $6.03 million. Aggregate rentals over the 15 year lease totaled $8.75 million. Eastern's depreciable base on such an aircraft is 14 years.

4. Title was retained by the lessor at the expiration of the initial lease period. Options to renew or repurchase were present in every long term lease agreement.

5. Lease covenants stated clearly that the leases were net. All expenses were assumed by the lessee. All risks of ownership rested with the lessee, not with the lessor.

The evidence indicates that the majority of the leases employed by the trunkline carriers are financial.

Airline Need For Leasing—One of the major reasons the airline industry has turned to leasing is the severe drop in airline profits over the past several years. Low or negative profits negated the use of internal equity (retained earnings) as a source of funds. In addition, volatile and depressed stock prices made external equity finance difficult and expensive. With wide savings in prices, the proper timing of stock issues was virtually impossible and thus acted as a strong deterrent to stock sales.


Depressed prices meant a prohibitively higher cost of equity capital. With market prices often selling below reported book values, further sales could have diluted existing book values.

Capital structures of The Trunkline Carriers were already overburdened with debt finance, and any additional use of debt was prohibitive. Convertible debt was also inadvisable. Many airlines had floated large amounts of convertible securities, and with the ensuing decline in airline stock price the issues were “hung”, thereby constituting a possible large dilution in earnings to common stock.

Another related factor which encourages the increased use of aircraft leasing is the fact that commercial banks have become very interested in aircraft leases. In a typical 747 leasing deal, the bank will put up $5 million of the $20 million total and borrow the remaining $15 million at 10% from outside sources. The airlines pay the bank $2 million per year for 15 years. Out of this $2 million, the bank pays interest to its creditors and retires the principal over the life of the loan. That leaves a cash flow of $170,000.

In addition, the bank, as owner, is entitled to the 7% investment tax credit of $1.4 million. Most airlines have not maintained profits at a level sufficient enough to allow them the benefits of the investment tax credits.\textsuperscript{10} The bank is also entitled to accelerated depreciation. Cash flow, investment tax credit and depreciation amount to a 56% return on the banks own investment in the first year. After ten years the return drops to 20%. Leasing, then, is a very profitable business for the banks.\textsuperscript{11}

\textit{Leasing and Financial Risk}

Leasing is a key and growing source of funds to the airline industry. A source is defined as any increase in a liability or owners equity item, or as a decrease in an asset. A use of funds would consist of an increase in an asset, or a decrease in a liability or owners equity item.\textsuperscript{12} As lease obligations do not normally appear directly on a firm’s balance sheet, however, their significance as a source of funds is not detected by traditional ratio analysis. To the extent that leases possess the characteristics of long-term debt finance, such analysis will understate the degree of “financial risk” actually faced by the airlines.

“Financial Risk” broadly defined encompasses both the risk of possi-


ble insolvency and the variability in earnings available to common stock. The cause of “financial risk” is the use of fixed income securities, such as long term bonds, which results in the obligation to pay interest or other legal obligations. Some methods used to measure “financial risk” are: “The debt ratio” (percent long-term-debt to total capitalization); total debt to assets ratio; total debt to net worth; the interest coverage ratio and the current ratio.

Many accountants and financial analysts view the use of lease agreements as essentially long term debt financing. Two committees of the Accounting Principles Board of The American Institute of Certified Public Accountants (A.I.C.P.A.) are presently studying accounting changes for leased equipment. These changes would make the capitalization of leases the standard accounting principle. This change would have no legal force; however, auditors would not certify financial statements which do not follow accounting principles.

One method of taking into account the long-term debt incurred by leasing is the capitalization technique. This capitalization technique was employed to measure the effect of long-term leasing of aircraft on the “financial” risk of the “Big Four”. Ratio Analysis was performed for the “Big Four” before leasing was taken into account and recomputed after leasing was taken into account.

Methodology—The capitalization process requires the selection of an appropriate discount rate. Three possible approaches to the estimation of the rate that will yield a result with a small margin of error are: adjust the current “prime rate” for a firm’s credit worthiness; add ½ to 1 percentage points to the rate of interest paid by the firm on its latest debt offering; add ½ to 1 percentage points to the price on the bond market of similar credit.

As no airline floated straight debt during the 1967-69 period, the third approach, the summation method, was used. During 1969, Moody’s Baa Corporate bond rate vacillated between 8-8½. Most airline bonds were Ba rated, so ½ was added to the Baa rating to reflect the slightly lower

13. The total risk complexion of a firm is of importance to both airline management and the financial analyst. “Financial risk” is one component of total risk. The other is “business risk”, the risk associated with the operation of the firm. The latter risk arises largely from the nature of the particular industry and thus lies almost completely outside managerial control. See Van Horne, James C., Financial Management and Policy, second edition, (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1968), p. 18. The airline industry, because of its cost structure and the volatility of revenues, is high in “business risk.”


15. Myers, Accounting Research Study No. 4, p. 46.
credit rating of the airlines securities. A 1% differential was added to adjust for the lease transaction, and a 10% rate determined:

| 8.5%  | Baa         |
| 1%    | Risk Differential |
| 1%    | Lease Transaction |
| 10%   |             |

Using this 10% discount rate, the financial lease obligations of The Big Four were capitalized in two stages. First, the present value of the aircraft lease rental was determined by discounting at 10% the remaining yearly rentals (an annuity) under each lease. The current year payments were excluded as current liabilities. The sum of these values for each airline thus represents the capitalized value of that airline's leases; that is, its debt equivalent. Second, the annual rental payments under longterm real property leases (all were financial in character) were discounted at 10% to obtain their debt-equivalent. The capitalized values of both the aircraft and the ground leases were then summed to obtain the total imputed debt. Tables I-V show the calculations and the results.

# TABLE I

**EASTERN AIRLINES — CAPITALIZATION OF FINANCIAL LEASES (Dec. 1969)**

<table>
<thead>
<tr>
<th>LEASED AIRCRAFT</th>
<th>DATE OF LEASE</th>
<th>YEARS REMAINING (END OF 1969)</th>
<th>TOTAL YEARLY RENTAL (ALL AIRCRAFT)—1969</th>
<th>PRESENT VALUE AT 10%</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 — B727</td>
<td>6/64</td>
<td>6</td>
<td>$2.42 million</td>
<td>$ 8.34 million</td>
</tr>
<tr>
<td>15 — DC9</td>
<td>7/66</td>
<td>8</td>
<td>$1.91 million</td>
<td>$ 8.45</td>
</tr>
<tr>
<td>3 — B727</td>
<td>10/68</td>
<td>14</td>
<td>$1.61 million</td>
<td>$10.40</td>
</tr>
<tr>
<td>6 — DC9</td>
<td>10/68</td>
<td>14</td>
<td>$2.15 million</td>
<td>$13.88</td>
</tr>
<tr>
<td>7 — DC9</td>
<td>9/68</td>
<td>14</td>
<td>$2.39 million</td>
<td>$15.43</td>
</tr>
<tr>
<td>8 — DC9</td>
<td>8/68</td>
<td>14</td>
<td>$2.73 million</td>
<td>$17.63</td>
</tr>
<tr>
<td>5 — DC8</td>
<td>12/68</td>
<td>14</td>
<td>$4.08 million</td>
<td>$26.35</td>
</tr>
<tr>
<td>1 — DC8</td>
<td>2/69</td>
<td>14</td>
<td>$1.04 million</td>
<td>$ 6.72</td>
</tr>
<tr>
<td>11 — B727</td>
<td>12/69</td>
<td>15</td>
<td>$6.41 million</td>
<td>$42.93</td>
</tr>
</tbody>
</table>

61 on long-term leases

Total $24.47 million

Total $150.13 million

**Total Capitalization:**

- Long-term debt $626.2 million
- Capitalized leases $150.1 million
- Aircraft $201.0 million
- Ground, etc. $224.9 million

---

1 Rounded to the nearest year
2 Excluding the current portion of the obligation
3 EAL's 1969 minimum total annual rentals on real property ($20.1 mil.) discounted at 10%

Source: Basic data obtained from EAL's, CAB, Form 41.
### TABLE II
TRANS WORLD AIRLINES — CAPITALIZATION OF
FINANCIAL LEASES (Dec. 1969)

<table>
<thead>
<tr>
<th>LEASED AIRCRAFT</th>
<th>DATE OF LEASE</th>
<th>YEARS REMAINING (END OF 1969)</th>
<th>TOTAL YEARLY RENTAL (ALL AIRCRAFT)—1969</th>
<th>PRESENT VALUE AT 10%¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>13 — B707</td>
<td>7/68</td>
<td>14</td>
<td>$6.57 million</td>
<td>$42.40 million</td>
</tr>
<tr>
<td>2 — B707</td>
<td>6/68</td>
<td>14</td>
<td>$1.37 million</td>
<td>$8.83</td>
</tr>
<tr>
<td>2 — B707</td>
<td>4/68</td>
<td>13</td>
<td>$1.25 million</td>
<td>$7.74</td>
</tr>
<tr>
<td>4 — B707</td>
<td>4/68</td>
<td>13</td>
<td>$2.73 million</td>
<td>$16.92</td>
</tr>
<tr>
<td>2 — B727</td>
<td>2/68</td>
<td>13</td>
<td>$1.07 million</td>
<td>$6.62</td>
</tr>
<tr>
<td>9 — B707</td>
<td>3/69</td>
<td>14</td>
<td>$4.92 million</td>
<td>$31.79</td>
</tr>
<tr>
<td>6 — B707</td>
<td>3/69</td>
<td>14</td>
<td>$4.43 million</td>
<td>$28.60</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Total</strong> $22.34 million</td>
<td><strong>Total</strong> $142.90 million</td>
</tr>
</tbody>
</table>

Total long-term leases

<table>
<thead>
<tr>
<th>Total Capitalization:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Long-term debt</td>
</tr>
<tr>
<td>Capitalized leases</td>
</tr>
<tr>
<td>aircraft</td>
</tr>
<tr>
<td>ground, etc.²</td>
</tr>
<tr>
<td>Common equity</td>
</tr>
</tbody>
</table>

¹ Rounded to the nearest year

² Excluding the current portion of the obligation

³ TWA's 1969 minimum total annual rentals on real property ($22.0 mil.) discounted at 10%

Source: Basic data obtained from TWA's CAB Form 41.
### TABLE III

**AMERICAN AIRLINES — CAPITALIZATION OF FINANCIAL LEASES (Dec. 1969)**

<table>
<thead>
<tr>
<th>LEASED AIRCRAFT</th>
<th>DATE OF LEASE</th>
<th>YEARS REMAINING (END OF 1969)</th>
<th>TOTAL YEARLY RENTAL (ALL AIRCRAFT)—1969</th>
<th>PRESENT VALUE AT 10%</th>
</tr>
</thead>
<tbody>
<tr>
<td>22 — B727</td>
<td>12/68</td>
<td>17 17</td>
<td>$ 9.46 million</td>
<td>$ 67.29 million</td>
</tr>
<tr>
<td>5 — B727</td>
<td>1/69</td>
<td>17</td>
<td>$ 2.15</td>
<td>$ 15.29</td>
</tr>
<tr>
<td>4 — B727</td>
<td>9/69</td>
<td>15</td>
<td>$ 2.34</td>
<td>$ 15.67</td>
</tr>
<tr>
<td>3 — B707</td>
<td>3/69</td>
<td>9</td>
<td>$ 2.55</td>
<td>$ 13.35</td>
</tr>
<tr>
<td>10 — B707</td>
<td>6/68</td>
<td>14</td>
<td>$ 6.79</td>
<td>$ 43.85</td>
</tr>
<tr>
<td>10 — B707</td>
<td>6/69</td>
<td>14</td>
<td>$ 7.41</td>
<td>$ 49.62</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td><strong>$30.70 million</strong></td>
<td><strong>$205.07 million</strong></td>
</tr>
</tbody>
</table>

54 on long-term leases

**Total Capitalization:**

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Long-term debt</td>
<td>$681.2 million</td>
</tr>
<tr>
<td>Capitalized leases</td>
<td></td>
</tr>
<tr>
<td>aircraft</td>
<td>205.1</td>
</tr>
<tr>
<td>ground, etc.</td>
<td>243.0</td>
</tr>
<tr>
<td>Common equity</td>
<td>403.3</td>
</tr>
</tbody>
</table>

1 Rounded to the nearest year
2 Excluding the current portion of the obligations
3 American's 1969 minimum annual total rentals on real property ($24.3 mil.) discounted at 10%
4 Source: Basic data obtained from AAL's CAB Form 41.
### TABLE IV
UNITED AIRLINES — CAPITALIZATION OF
FINANCIAL LEASES (Dec. 1969)

<table>
<thead>
<tr>
<th>LEASED AIRCRAFT</th>
<th>DATE OF LEASE</th>
<th>YEARS REMAINING (END OF 1969)$^1$</th>
<th>TOTAL YEARLY RENTAL (ALL AIRCRAFT)—1969</th>
<th>PRESENT VALUE AT 10%$^2$</th>
</tr>
</thead>
<tbody>
<tr>
<td>6 — DC8</td>
<td>7/65</td>
<td>6</td>
<td>$4.41 million</td>
<td>$15.20 million</td>
</tr>
<tr>
<td>6 — DC8</td>
<td>6/69</td>
<td>15</td>
<td>$4.34</td>
<td>$29.05</td>
</tr>
<tr>
<td>5 — DC8</td>
<td>6/69</td>
<td>15</td>
<td>$3.80</td>
<td>$25.42</td>
</tr>
<tr>
<td>23 — B727</td>
<td>12/65</td>
<td>9</td>
<td>$9.27</td>
<td>$48.53</td>
</tr>
<tr>
<td>10 — B727</td>
<td>6/69</td>
<td>12</td>
<td>$4.32</td>
<td>$25.51</td>
</tr>
<tr>
<td>7 — B727</td>
<td>12/67</td>
<td>13</td>
<td>$1.73</td>
<td>$10.71</td>
</tr>
<tr>
<td>15 — B727</td>
<td>12/69</td>
<td>12</td>
<td>$7.22</td>
<td>$42.60</td>
</tr>
<tr>
<td>3 — B727</td>
<td>6/69</td>
<td>15</td>
<td>$1.77</td>
<td>$11.87</td>
</tr>
<tr>
<td><strong>Total</strong> on long-term lease</td>
<td></td>
<td></td>
<td><strong>$36.86 million</strong></td>
<td><strong>$208.89 million</strong></td>
</tr>
</tbody>
</table>

Total Capitalization:
- Long-term debt: $872.2 million
- Capitalized leases:
  - aircraft: 208.9
  - ground, etc. $^3$:
  - Common equity: 587.3

$^1$ Rounded to the nearest year
$^2$ Excluding the current portion of the obligations
$^3$ UAL's 1969 minimum annual total rentals on real property ($13.5 mil.) discounted at 10%
Source: Basic data obtained from UAL's CAB Form 41.
### TABLE V
**RATIO ANALYSIS-BEFORE AND AFTER CAPITALIZATION OF AIRCRAFT & GROUND LEASES (1969)**

<table>
<thead>
<tr>
<th>Current Ratio</th>
<th>Before¹</th>
<th>After (aircraft)</th>
<th>% Change</th>
<th>After (ground)</th>
<th>% Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>EAL</td>
<td>1.12 (1)*</td>
<td>1.00 (1)</td>
<td>−10.7%</td>
<td>0.91 (1)</td>
<td>−18.8% (1)</td>
</tr>
<tr>
<td>TWA</td>
<td>1.44 (4)</td>
<td>1.34 (4)</td>
<td>−6.9%</td>
<td>1.25 (4)</td>
<td>−13.2% (4)</td>
</tr>
<tr>
<td>AMR</td>
<td>1.29 (3)</td>
<td>1.14 (3)</td>
<td>−11.1%</td>
<td>1.05 (3)</td>
<td>−18.0% (2)</td>
</tr>
<tr>
<td>UAL</td>
<td>1.15 (2)</td>
<td>1.02 (2)</td>
<td>−11.3%</td>
<td>0.98 (2)</td>
<td>−15.5% (3)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Long-Term Debt/Total Capital</th>
<th>Before¹</th>
<th>After (aircraft)</th>
<th>Spread¹</th>
<th>After (ground)</th>
<th>Spread¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>EAL</td>
<td>73.2% (1)</td>
<td>77.0% (1)</td>
<td>+3.8%</td>
<td>81.4% (1)</td>
<td>+8.2% (3)</td>
</tr>
<tr>
<td>TWA</td>
<td>63.0% (2)</td>
<td>66.8% (2)</td>
<td>+3.8%</td>
<td>71.5% (2)</td>
<td>+8.5% (2)</td>
</tr>
<tr>
<td>AMR</td>
<td>53.9% (3)</td>
<td>60.0% (3)</td>
<td>+6.1%</td>
<td>65.8% (3)</td>
<td>+11.9% (1)</td>
</tr>
<tr>
<td>UAL</td>
<td>52.7% (4)</td>
<td>56.2% (4)</td>
<td>+3.5%</td>
<td>60.9% (4)</td>
<td>+8.2% (3)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Interest Coverage</th>
<th>Before¹</th>
<th>After (aircraft)</th>
<th>% Change</th>
<th>After (ground)</th>
<th>% Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>EAL</td>
<td>0.90x(1)</td>
<td>0.66x(1)</td>
<td>−26.7%</td>
<td>0.54x(1)</td>
<td>−40.0% (1)</td>
</tr>
<tr>
<td>TWA</td>
<td>4.49x(4)</td>
<td>3.54x(4)</td>
<td>−21.1%</td>
<td>3.10x(4)</td>
<td>−30.9% (4)</td>
</tr>
<tr>
<td>AMR</td>
<td>2.81x(2)</td>
<td>2.16x(2)</td>
<td>−23.1%</td>
<td>1.90x(2)</td>
<td>−32.3% (3)</td>
</tr>
<tr>
<td>UAL</td>
<td>3.78x(3)</td>
<td>2.75x(3)</td>
<td>−27.2%</td>
<td>2.55x(3)</td>
<td>−32.5% (2)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Total Debt/Net Worth</th>
<th>Before¹</th>
<th>After (aircraft)</th>
<th>% Change</th>
<th>After (ground)</th>
<th>% Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>EAL</td>
<td>3.79 (1)</td>
<td>4.46 (1)</td>
<td>+20.9%</td>
<td>5.35 (1)</td>
<td>+45.5% (1)</td>
</tr>
<tr>
<td>TWA</td>
<td>3.07 (2)</td>
<td>3.53 (2)</td>
<td>+14.9%</td>
<td>4.14 (2)</td>
<td>+34.9% (3)</td>
</tr>
<tr>
<td>AMR</td>
<td>2.73 (3)</td>
<td>3.31 (3)</td>
<td>+21.2%</td>
<td>3.94 (3)</td>
<td>+43.0% (2)</td>
</tr>
<tr>
<td>UAL</td>
<td>2.28 (4)</td>
<td>2.71 (4)</td>
<td>+18.9%</td>
<td>2.94 (4)</td>
<td>+29.1% (4)</td>
</tr>
</tbody>
</table>

²Because the limit is 100%, spreads before and after are more meaningful than percent changes.
³Ranks in parenthesis: 1 = poorest or highest in risk.
The net result of the capitalization is to add an additional $1505.9 million in imputed long-term debt. $448 million was added to American’s existing debt for a total of $1129.00 million, 65% of total capitalization. $351.1 million was added to Eastern’s existing debt for a total of $977.3 million, over 81.1% of total capitalization. $362.9 million was added to TWA’s existing debt for a total of $1120.1 million or 71.5% of total capitalization. $349.9 million was added to United’s existing debt for a total of $1215.9 million or 60.9% of total capitalization.

Ratio Analysis—Ratio measures of “financial” risk were computed before leasing was taken into account and recomputed to consider the effects of financial leasing on risk. Ratios recomputed were:

*Current Ratio* (current assets to current liabilities) The current year’s rentals were treated as current liabilities of the firm. Current assets remain unchanged.

*Debt to Equity Ratio* (total debt to net worth): The present value of the lease rentals were added in as short-term debt. Net worth remained the same.

*Long-term Debt Ratio* (long-term debt to total capitalization): present value of lease rentals were included in both long-term debt and total capital.

*Interest Coverage Ratio* (earnings before interest and taxes to interest): ½ of the annual 1969 rental payments were treated as interest and added to both EBIT and interest.¹⁷

The current ratio and interest coverage ratio are measures of the narrow definition of “financial” risk; that is, they measure the danger of insolvency and of the short run ability of the firm to meet its obligations as they come due. The debt to equity ratio and the long term debt ratio measure risk in a broader sense, as the potential fluctuations introduced in earnings available to stockholders arising from the use of long-term debt finance.

Table V presents the results of both stages of capitalization. Each ratio for each airline has deteriorated significantly. Each of the four airlines is thus measurably higher in financial risk when financial leasing is considered.

Within the four, any increase in the differential spread in risk is somewhat more difficult to detect. Relative rankings in risk remain unchanged by the capitalization in every case. However, Eastern’s current and interest coverage ratios have experienced a slightly greater deterioration after capitalization than those of the other three.

Conclusions

Presently everyone is happy with the leasing of aircraft. Airline Companies get to purchase new aircraft, which they would have great difficulty doing under the present stringent profit picture. Commercial banks, the lessors, made a handsome return on their investment. Institutions lending the lessors 75% of the purchase price make their 10% interest. Finally, the aircraft manufacturer gets to sell more planes.

In reality, the airlines appear to be damaging their financial structure at a point in time when damage can be ill-afforded. The airline industry, which suffers from a high degree of business risk, is already too deep in financial risk. Present accounting techniques allow the airlines to hide the long-term obligations of leasing arrangements. Future A.I.C.P.A. actions may bring a mandatory close to this procedure.

Leasing of aircraft for the airline industry is by no means a panacea. It is a "Deus-ex-Machina" appearing at a point in time when airlines profits are down, but at a point when the airlines must reequip. Leasing may be the solution today, but it also may be tomorrow’s problem.
MARITIME POLICY: WILL THE SEAS BE FREE OR CONTAINERIZED?

BY JACK PEARCE*

Introduction

The dislocations containerization has engendered could result in more free and efficient ocean transport markets, or in increasingly rigid collective carrier controls. This article submits that the first course is better and suggests methods for moving in that direction.

At the same time containerization has disarranged the tableware on Atlantic trades, some of the less developed countries have been attempting to use bilateral agreements and other devices to assure their carriers larger slices of the shipping pie in the commerce between them and their more affluent partners. The American reaction to this compartmentalizing development has been a reluctant, partial acquiescence. This article suggests an approach to meeting some of the aspirations of the less advantaged group while keeping growth-fostering flexibility and efficiency in the worldwide ocean shipping complex.

I. Conferences, Regulation, and Containerization: What's New About the Market?

Since the days of the Alexander Report, conference-permitting U.S. laws have been propped up by the propositions that open, competitive ocean markets would constantly have unworkable overcapacity, that U.S. carriers could not compete as independents against foreign cartels, that collective agreements secured regularity and dependability of service not otherwise likely, and that the conference-FMC system would prevent "discriminations" between shippers, ports, etc. The suggestion to companies with freight to move that none would get ahead of the other in the competitive race on account of ocean carriage has done much to secure acceptance of these propositions.

The momentum of affairs (a general and inoffensive phrase covering a multitude of phenomena, including zealous defense of the system by those principally involved) has prevented any wide-spread public rethinking of


these assertions to date. For those who are enamoured with the regulated maritime order, this may seem fortunate. In the author's opinion, none of these views would survive the first gentle swells of critical awareness engendered by modern understandings of market mechanics.

If the great American body politic has not troubled the water unduly, the ungovernable passions of men in commerce to do a job and get rich thereby has. The mischievous container has changed the composition of ocean fleets, altered the number and disposition of market participants, changed trade patterns, and disarranged with gusts of competition the sedately hanging veils within the great tent of the conference structure.

Few have dared to think the commotion would bring down the tent. If the reader is so foolhardy as to follow, he will now embark on a brief synopsis of why an observer might conclude that the old canvas could now be struck, and new accommodations installed on the fairground.

A. Something New: Market Structure and Entry Conditions.

Some of the first obvious effects of the containerized shipping technique were to reduce the total number of ships involved in moving liner cargo, increase the capital costs of getting into shipping containerizable cargo, and engender consortia of firms using this technique.

According to one study, the total number of U.S. subsidized ships plying liner trades dropped from approximately 311 in 1965 to 247 in 1970. Some of the new containerized vessels can handle about as much tonnage in a year as four C-4 ships; ships of above-average size in pre-containerized days. The typical vessel cost is now in the $25 million to $30 million range (including three sets of containers).

In market structure terms the total number of market participants seems likely to be less than when the price of admission was lower; their average size larger.

1. Overcapacity and the Future

Economists now treat as elementary the observation that a combination of high capital requirements for entry and relatively few market incumbents will substantially limit competition. When capital barriers to entry are high and rivalry is limited, the effect is a tendency toward undercapacity, underproduction, high prices, and high profits.

The tendency has its limits, as do all. At some level of price enhance-

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ment, additional resources will enter. The higher the entry barrier, or the
tighter any entry control, the higher the available returns, other things
equal. The easier entry, the more nearly returns will approximate the
general opportunity costs of capital.

The effect of the container technique is, then, to undercut the atomistic
competition premise for allowing conference agreements. Given the capital
costs of containerized shipping, and absent price fixing, the private
market would in the future be unlikely to err on the side of overcapacity,
over time.

The argument of inevitable overcapacity absent carrier control proba-
bly was never apposite, except in conditions of attempted price enhance-
ment by collective price fixing, and except to the extent governments
directly subsidized the trade.

Modern economists of respectable credentials known to the author
would rather uniformly assert that relatively easy entry conditions, rela-
tively small unit size, and numerous sellers tend toward close capacity-
demand coordination, rather than chronic excess capacity.

This pleasant symmetry can be spoiled by holding prices above competi-
tive levels. Excessively high prices encourage the entry of excess capacity,
absent effective entry restrictions. If entry restrictions are effective the
above-competitive prices achieve the intended result of above-competitive
returns to capital and/or labor.

If one wished illustration of the economists' tenets concerning the effi-
ciency of atomistic markets, absent price fixing, one could hardly do
better than to examine the modern tramp market. The lady, maligned by
description, is a remarkable institution.

The understanding of economists and experience with the tramps sug-
gests that a large part of the problem reviewed by the Alexander Report
lay in the fact that would-be price fixers were always getting their price
enhancement arrangements messed up by unwelcome entrants and un-
faithful partners.

Does the author deny the existence of any "overcapacity", ever? No.
First, the miscalculate-adjust cycle presumes occasional miscalculation.
People developing a new, rich market like containerized shipping
may let their reach exceed their grasp, until a few empty handed trips to
the board room reawaken their natural caution, or enlist the caution of
more prudent successors. In nine-tenths of the American economy, the

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3. Recent justifications for container pool agreements seem to rely less on the hoary past
than on a combination of projections of capacity in the upcoming few years, as compared
with projections of demand, and horrified exclamations about "overcapacity" induced "rate
wars". The projected increases in capacity are seen as inevitable, absent collective restraint.
management of this rolling adjustment under competitive conditions is thought to be a requirement of adequate management. The failure to do so has been cause for foregoing the company limousine and forfeiting the opportunity to write the President's letter in the Annual Report.

Second, we can easily induce more capacity than is needed by holding prices well above cost levels, as observed before.

Then, if prices do fall off the elevated plateau, we will see a picture of low utilization ratios and low prices, until price drops attract sufficient demands and individual sellers retire enough capacity to allow a group of efficient sellers to make a profit.

A conference, or cartel, arrangement which specifies capacities and services for its members, by a consensus arrangement, is likely to slow, if not persistently to distort, adjustments of capacity to demand. An individual ship line can decide to add or subtract increments of capacity more quickly than the consensual body.

In sum, basic business sense and modern economic understandings both point out that in atomistic and concentrated markets we should encounter temporary but not endemic overcapacity, absent collective price enhancement. Cartel arrangements tend to create problems of overcapacity, and slow adjustment of capacity to demand.

In other words, if we do not as yet understand history and basic economics, we will now have a splendid opportunity to repeat the procedure of agreeing to permit carriers to limit capacity and hold prices above that price level which would regulate capacity without either carrier collective intervention or government intervention. If this were done, the result would be excessively high prices, and either unnecessarily high capacity

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4. A good deal of work in the airline industry has pointed out the persistence, and high costs, of this phenomenon in that market. See, for example, Jordan, Airline Regulation in America, Johns Hopkins Univ. Press, 1970.

5. See, for example, Bennathan and Walters, Shipping Conferences: An Economic Analysis, Journal of Maritime Law and Commerce, Vol. 4, No. 1; pp. 93, 96-100, 108.
levels or monopolistic returns to capital and/or labor. If this does not sound entirely cogent, it is because foolish activity rarely, in retrospect, does. Staying at an elementary level, let us ponder the wisdom in childhood’s chant “Fool me once, shame on you. Fool me twice, shame on me.”

2. Fewer People But More Competition?

An harassed participant might query why, if we are moving toward a market with less competitiveness in its natural state, everyone in the market is getting rattled around so much. Ah, one might reply, let us consider the situation in which we started, and then consider how the new shipping techniques changed competitive potentials.

Industry participants and United States regulators have striven manfully, even when the gender of some participants happened to be the opposite, to contain competitive forces within conferences and between conferences.

The container has shaken things up in several ways. First, by lowering costs and otherwise facilitating transport it has widened the market scope of each entity seeking to move or receive freight. Because of containers, inland freight could move out of more port locales, through different port locales, to more destinations.

This market widening effect is large enough to escape the attention of involved observers but so simple, basic, and significant as to justify notice of its outlines. The effect is familiar when put in historical context. People in New York could more easily, amply, and flexibly interchange with people in California after the railroads than before; and then even more after the completion of the basic high speed intercity highway network.

One of the desirable results of the phenomenon is that the scope of choices between goods and services (and thus the scope of competition) is increased.

To revert to our own quaint past, the merchant in San Francisco might find his teeth on edge at seeing New York goods appear on rivals’ shelves by strange and unexpected means. Notwithstanding, all now agree that the larger and richer markets are worth the costs, including some bankruptcies. That institution, like other more pleasant ones, is always with us.

An ingenious observer might be struck by the thought that this market widening and intensifying effect is what transportation is all about.

Second among major trade effects, the concentration of freight into fewer vessels and the use of larger port facilities necessarily caused some adjustments in trade patterns.
In this market and traffic shifting process, ports have vied to get into
the new mainstreams. The port disequilibrium has been a prominent
feature of the whole adjustment process. Trade, no longer confined to old
tributaries, has cut some channels deeper, shifted others.

Third, there has obviously been a good deal of carrier jockeying to get
good field position in a rich new pastureland. Such rivalry can settle down
into stable patterns, without disappearing, under non-collusive condi-
tions.

As a concomitant of all this, North Atlantic and South Atlantic ports,
North European and Mediterranean ports, and all Atlantic conferences
have found themselves suddenly eyeball to eyeball, instead of at arms
length. The waltz has been replaced by a variety of more active and
intimate—some more sedate partygoers with less wind and ambition
might say chaotic—forms of frolic.

From the standpoint of expanding our international trade and domestic
output, this is all to the good, the author suggests. The process should be
encouraged, not constrained. If the process were to continue, much of the
trade limiting effects of conferences would be dissipated. The economies
and capacities of containership operation would broaden and ampli-
fy pan-Atlantic and pan-Pacific trade by a significant measure. If the pro-
cess is constrained, all the involved trading nations, and their citizenries,
will benefit to some extent, but much less, from the evolution of the
containership technique.

B. Implications of Current Economic Conditions and Understandings
for Conference Rationales.

Let us quickly note that containerships must operate on regular, rela-
tively high-frequency schedules to make a buck, given their capital costs.
This incentive is unbelievably potent in assuring the company or indi-
vidual who wants his goods moved that ships will show up regularly to move
them: conference or no conference.

Indeed, we need not have feared a lack of regularity of service from
break-bulk ships, for those shippers who are willing to pay for regular
service, absent conferences. One of the cardinal characteristics of an
unrestrained market is its tendency to give buyers what they are willing
to pay for.6

6. Rather than tarry over suggested qualifications to this assertion—an exercise long on
myth, tradition, and elements of protectionism—let us focus on the current situation, and
current understandings. Standing around in the Museum of Past Eccentricities and Log-
omachy, doing obeisance to yesterday's icons, may qualify us as a curator of that institution.
A similar observation can be made concerning the ability of unconstrained markets to provide price stability. Modern economists are quick to note devices other than cartel arrangements which are widely used to provide price stability when a buyer is willing to pay for it. These devices include long-term contracts between individual shippers and carriers, and futures markets.

Can Americans compete against foreign cartels? Many of our major ship lines are owned by large conglomerates. We are, after all, not pygmies. Europeans are always complaining about the size of our feet. Further, a flexible, independent, well financed company may often do very well against larger or coordinated rivals whose attention is divided between the customer and each other. One is led to salt the suggestion that we can't compete against "foreign cartels" so heavily as to give rise to a strong disinclination to swallow it.

One can also observe that the foreign cartel argument works beautifully for all shipping companies as long as each presses it with its own government. If the governments ever start chit-chatting with each other about a more efficient, competitive regime, as the author will shortly suggest, our carefully nourished fear of those foreign devils may suddenly subside.

II. What's Up at the (Government) Office

A. Contain Containerization, or Look for New Wineskins?

So the world overtook us. The new ships came down the ways, the goods went into boxes, and the markets shifted. After a few initial attempts to escape conference strictures, the ocean carriers have proposed that the U.S. Government sanction new conference arrangements to protect prices and profits from risks arising from the competition inherent in the new methods of operation.

The first suggestion was the so-called "superconference" proposal filed in October 1969. The principal aim was to create a framework for agreement on prices, shipment schedules, and trade flows across the Atlantic trade zone. The nature of price and service agreements to be reached was left open, because the diversity of carrier positions and strategies at the time limited the degree of concord. In effect, the proposal was to let out

We would guard for our children a rich, antique heritage of impediments to trade. The children would prefer, I think, to run tomorrow's ships.

7. See, for example, Bennathan and Walters, Shipping Conferences: An Economic Analysis. Journal of Maritime Law and Commerce, Vol. 4, No. 1: pp. 93, 100.
8. FMC Agreement No. 9813.
the seams in the conference cloak, thin the fabric, and throw it over a
broader geographic scope. As all interested parties know, this got no-
where, and was dropped officially in August 1971.

While this was going on carriers were establishing themselves in the
container market, trying to keep prices at or above break-bulk rates for
a product with much lower unit costs, and seeing lost of new tonnage
plunge into their newly enriched waters.

The next carrier move has been more draconian—a push for a strict
revenue sharing pool, with allocated sailings and capacity limitations.9

Interested observers found the staging professionally done. The Journal
of Commerce began reporting numerous public statements about “rate
wars”. The Chairman of the Federal Maritime Commission embarked on
a hurried scamper about the Atlantic to palpate the chests and hear the
moans of dyspeptic carrier officials and their allies. Executive Branch
agencies were beseched to find a solution.

Then the industry modestly appeared before the Federal Maritime
Commission bearing the cure to our ills. The classic solution. All will be
well if we let the vendors of the service eliminate competition among
themselves, deciding among themselves who will serve, when to serve, and
how much; and thus remove risks of loss of profits.

We are such a gullible people. So scrupulous. So fair. Thousands of
us are born every minute. No matter that we decided in 1890 that this
sort of thing generally restricts productive activity so much as to justify
criminal prosecution. We made an exception in 1916.

The FMC is giving the proposal extended consideration.10 The Depart-
ment of Justice involves itself, making ominous noises. A few ports seek
to protect their relative positions in whatever eventuates. Independent
carriers seek hedges against predation. Some of the people who have
freight to move eye events. Some shippers may be apprehensive and
distressed. If so, their voices are not heard. The great American public
attends to other affairs: the push and pull of daily existence; war and
peace.

We are, thus, at a point at which a relatively straight-forward govern-
ment decision—denial of proposed pooling arrangements—can move us
into a substantially more competitive and efficient ocean transport mar-
ket. We would then be in a position to reassess the over-all regulatory
scheme, and modify or dismantle it at a relatively unhurried pace.

9. FMC Agreement No. 10,000.
10. While considering, the FMC has approved discussions in other trades intended to
lead to the proposal of additional pools. See, e.g., FMC agreement No. 10,022, approved
in December of 1972. Some people in the trade say rates have “stabilized” in recent months.
If so, this effect of the authorized carrier discussions should not be surprising.
Conversely, approval of such pooling agreements, if not reversed by judicial or legislative action, would allow our 20th century ocean trade cartel scheme to encompass, limit, control, and extract for carrier purses most of the benefit of, the major new potentials of the containerized shipping development.

B. "Developing" Countries: Greedy Like Us, and Wanting to Force the Pace.

Thus far we have been looking at a glitsch in the floating crap game run by the Americans, Europeans, and Japanese. Let us not arrogantly assume that we have a corner on constructive endeavor, folly, or global significance.

Let us briefly frame a perspective for viewing the remainder of the world. The maritime industry makes this task more interesting than one might assume. One might think it difficult to write, and rare to encounter, both platitude and heresy in the same words, sentences, and paragraphs. Our maritime traditions are such as to make this almost inevitable.

Since dugout canoe days, it seems, almost everybody with a shoreline has put something in the big salt lake. The author's limited view of economic history suggests that a relatively few countries usually seem to dominate the major trade flows. There has always been pushing and shoving over who gets to carry the freight. Somehow Greece has managed to hang in there reasonably well over two or three millenia. But Greece and every other country have seen fortunes wax and wane as time goes on.

The moral of this is also platitude and heresy. Over the long run the world ocean is not our lake.

Let's advance the proposition a step or several. Americans have a stake in making the freedom of the seas concept mean flexible movement of freight by whatever routes and bottoms may most efficiently do the job—not just American bottoms.

Why this radical suggestion—that any little or big country get the freight on which it provides the most useful service, according to competitive market criteria?

First, we need efficient transport markets to build international trade volumes both now and in the long run.

Second, of less importance but much interest, if the bottom under the freight is determined less by the ownership of the goods than by how well that particular bottom does the job, Americans may be able to make out on the ocean as long as we care to compete. For as long as we are the largest exporting and importing country, our carriers will have home-
court advantages on the world's largest trade flows. Afterward, we are at least still in the ballgame.

As anyone having a passing acquaintance with maritime affairs knows, the simple, obvious common sense in these statements encounters whole-hearted endorsement by perhaps 30% of the relevant population, possibly 30% of the time. A good portion of the remainder of the time seems to be spent vigorously pursuing projects which seem to unperceptive observers such as the author to create inefficiency and sacrifice freedom of the seas.\(^\text{11}\)

We see now in this country numerous initiatives to continue and expand the tradition of reserving for domestic shipbuilders and ship operators specified portions of trade coming to and from our shores, on which we thus have some leverage. Proposals to rope off a portion of the oil imports have floated about congress,\(^\text{12}\) and if enacted would add to Jones Act\(^\text{13}\) requirements that domestic coastwise commerce move on American bottoms, requirements directed toward assuring that about half our foreign assistance shipments be carried by our natives to the grateful beneficiaries' port, and the public welfare program administered through shipbuilding and vessel operating subsidies.

Some of the less developed countries have recently tried to become even more pushy. For example, Brazil initiated a series of actions culminating in a bilateral arrangement guaranteeing Brazilian bottoms 40% or more of all liner trade between her country and the U.S.\(^\text{14}\)

The Brazilians assert as a major justification for these actions a need to build infant industry carrier capacities, the better to enable her to compete with the affluent countries. (Brazilian ship lines have incentive to seek revenue guarantees without this extra added element. It does give the rip-off an appealing, and many think legitimate, cover.)

Finding it somewhat easier to perceive Brazil's folly than our own, U.S.

\(^{11}\) This might be corrected by greater public scrutiny. Eternal vigilance, our forefathers counseled, is the price of liberty. This inquiry must probably come from outside the maritime industry rather than inside it. The aforementioned honorable vigilance, like competition, is really welcome only when visited on everyone else.

\(^{12}\) See Section III of H.R. 13324, 92nd Congress, as cleared by the Senate Commerce Committee. See also S. 3404, 92nd Congress. 46 USC § 883.

\(^{13}\) FMC Agreement No. 6810.

\(^{14}\) Such a shipping system would undoubtedly tend to foster a more closely linked international community. Such a shipping market would, we might expect, increase the aggregate wealth of the international community and decrease the differentials in wealth in that community faster than would otherwise occur. As the nation currently richest in the world, we might find this process first tolerable, if it did not proceed so rapidly as to decrease our growth rate below, say, 2.5-3.0% a year; and then enjoyable, as we found the world an altogether richer place.
Executive Branch agencies were somewhat reserved about Brazil’s venture. In the end they, and the FMC, acquiesced in this conduct.

What attitude should we take in the future concerning enterprises such as this? In a dark-hued pot and kettle community, one can take the position that everyone is entitled to his smudges, and an additional blemish or two matters only if somehow it disarranges a composition of light and dark we had had in mind for our neighborhood. Or, one could join the clean-up forces.

If one does the latter, one must deal with the desire of the “developing” nations to build their capacities, and, in addition, to have some measure of control over some of the tendrils which link them to other parts of the globe.

The author suggests we should try to focus the attention of all nations on developing a relatively dense web of ocean transport responding efficiently and primarily to market imperatives rather than national imperatives, presenting each would-be buyer and seller with a close-packed variety of easily-made choices, undisturbed by major armed conflicts affecting the trade web. He here notes in the margin, and will later expand on, some benefits of this for the entire economic community.16

III. What To Do, What To Do?

If we wish to create the kind of international shipping situation described, what must we combine with the reshaping effects of containerization, and what alterations should we make in our current approaches to our “less developed” trading partners, to help the process along?


At least two groups could have some effect in bringing the general community around to changing the regulatory rules of the game in international shipping. These are users of transport services, and those elements of American and other governments which understand and are inclined to foster efficient market systems.

15. Lest this be thought to mean that this group has an interest in getting something for nothing, we can observe that those who have freight to move must expect to pay for that service a value equal to the returns the involved capital and labor could command in other employment—their “opportunity cost”.
1. **Transport Users: The Public’s Freight Paying Agents: Permissive, Passive, or Progressive?**

The situation described presents to the major and minor corporations who have goods to move internationally a ready-made white jersey. The general community’s money and goods flow into the ocean transport system through the companies and persons who contract to have freight moved—the shippers. These people have a direct interest in maximizing the difference between the value of transport arrangements and the costs of providing them.16

If organized to do so, this group could tug the fabric of trade policies significantly toward liberalization. The shippers have a legitimate, basic interest. They are much more numerous than the carriers. They include large and small business enterprises. Why has this white jersey been seen so infrequently around the Federal Maritime Commission and Congress to date?

First, some shippers have valued arrangements which purport to give them some assurance that their competitors will not get ahead of them in the transport market. This short-run interest has tended to obscure the longer-range interest in a larger, more diverse, richer market.

Second, for many companies freight costs are a relatively small proportion of total costs, and seem to engage top management attention and initiative a correspondingly small proportion of the time.

Third, some shippers may have felt powerless to change the situation. Some of the author’s experience would suggest that the group mobilizes its thinking only when presented with suggestion of an opportunity to make a change, and direct stimulus (from inside or outside the group) to wade through the conceptual underbrush and do the necessary.

Fourth, preoccupation with the day-to-day business of living in today’s rules may tend to create an unevaluated, at least provisional acceptance of current frames of reference. Again, in the author’s experience, until issues are focused, one seems to encounter widespread acceptance of prevailing carrier-oriented economic myths among the shipper com-

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16. The author and others have often been loath to criticize the agency personnel themselves for this situation. One can assign as one cause the thought-stifling effects of the heavily compromised, conceptually fuzzy, and often restriction-oriented legislation which governs the regulatory bodies. Also the cultural isolation resultant from specializing in one or a few industries from the producer side is widely known and understood.

The problem is not entirely a lack of talent. Any one working with the agencies will frequently see that entrapped in these swaddles are many perceptive minds with acute understandings of some aspects of industry experience.

Whether one criticizes, explains, or excuses the individuals is irrelevant. What matters is the result.
munity. In at least one situation in the author's experience, a number of individuals demonstrating a good grasp of economic phenomena have come forward when specific proposals for change were made and the shipper community began to focus intensively on coping with or furthering the possible changes.

The issues raised by containerization are now several years old. We still seem to be in the first, inarticulate, business-as-usual stage, insofar as shippers are concerned.

A change in this shipper business-as-usual approach is needed.

If interested in doing so, shippers could do the following. First, a few people respected in the shipper subculture, who are interested in decartelizing maritime trade and its regulation to the maximum extent feasible, could identify themselves as a group, and begin to act coherently.

Second, this group could define what they would like to see happen, and define some proposals for action which are consistent in thrust while flexible in detail.

Third, such a group could see and begin to work with government agencies interested in a competitive, efficient world shipping regime. The Justice Department and the Council of Economic Advisors are strongly oriented in these directions. The Department of Transportation and the State Department contain men who can understand the viewpoint.

Fourth, such shippers could appear before and work with the FMC and the relevant congressional committees, in formal proceedings and in such informal discussions as are not inappropriate.

The program is simple. A word of caution is, however, in order. Such a body of shippers should expect a somewhat confused and at times hostile first reaction from some of the people in the regulatory agencies and in Congress.

Our hypothetical light-bearers should expect to be suspected of having at the center of their cleverly hidden motives an implacable desire to drive into bankruptcy the carriers who haul their freight. They must expect to be assigned responsibility for inevitable, total chaos in our international trade. And they must reckon that many good people whom they address will have to overcome the assault on objectivity which comes from the prospect of admitting that one's most assiduous endeavors have been either unimportant or harmful to the community.

If the standard bearers were to have significant success, the fruits would come only over time—in some cases after the acting parties are retired or involved elsewhere—and would accrue to many who never lifted a finger.

The twelve apostles had a scarcely more agreeable task. And, as it turned out, the twelve had a considerably better chance of being remembered favorably for having made the effort.
Why undertake such a task? If shippers are to make a substantial constructive contribution to our maritime policies, something like this would seem to be a means of doing so.

2. The Governments—Bringing Out the Best In A Mixed Lot.

When the author began to cut his teeth on problems which involved several government agencies, he found that each of the agencies he encountered approached any given problem with its own distinctive worldview.

Justice, the Council of Economic Advisors, and (some elements of) OMB have long thought in terms of creating efficient, competitive markets. The Commerce Department has consistently argued for promoting American commerce. Sometimes Commerce's view has, unfortunately, seemed so limited as to mean promoting whatever a dominant firm or group of firms seemed to want at the moment. Sometimes the understanding of what would promote trade has been much more sophisticated.

The State Department has evidenced considerable sensitivity and educability as to market economics and trade promotion. Its attitudes are heavily influenced by inclinations toward government-negotiated administration of trade relationships.

The Department of Transportation has yet to take on a clearly defined personality in this area. On domestic surface transportation legislation, working with a group of agencies, it has opted for revising older forms of regulation to move for more efficient, competitive markets. One can hope that the department will move in this direction in international surface transport.

The independent regulatory agencies are a special case. Though the observation seems too pejorative and glib, it is literally accurate, insofar as the author's own experience is concerned, to say that in their formal positions on regulatory matters independent regulatory bodies only rarely have evidenced either an understanding of market economics, in terms widely used by professional economists and widely understood by articulate businessmen, or an understanding of effective means of trade promotion.17

The author has had much less direct experience with foreign governments. However, to the slightly sensitized eye, familiar features fre-

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17. The Department of Transportation could initiate this effort, if it were to formulate a clear sense of direction and then to proceed, or even if it were to wish to act as catalyst. Other agencies need not await DOT, if that agency does not act. Indeed, at least one piece of folk wisdom would counsel not waiting: all that is needed to extinguish liberty is that good men do nothing to preserve it.
sequently appear. The German High Cartel Authority increasingly evidences orientations and judgments similar to the U.S. Justice Department's Antitrust Division. Economists in the EEC have much the same intellectual inheritance as Anglo-American economists. Common Market agricultural policies are excruciatingly similar to ours in some respects.

Nothing, assuredly, is quite the same on the two sides of the Atlantic. The fact of diverse government viewpoints, and much of the content of some of the discernible viewpoints, are the same.

What should those interested in efficient, productive market systems do in this situation? The answer seems obvious. Foster common cause with and among the government groups who are inclined to work for such markets.

One would think it advisable for the Antitrust Division and the German High Cartel authority to think in terms of adding the one and one of their respective contributions in hopes of getting 2½. CEA economists might do well to discuss these matters with EEC and Japanese economists. Economists and others within the State Department who are interested in an expanded, competitive international trade regime might find or create a role in fostering and participating in such discussions. So also might relevant persons in the Department of Transportation.

Would there be some competition over roles among the U.S. government agencies? Yes. This is not necessarily bad, if the superior approaches are selected out, and then implemented.

Would we get too many cooks in the stew? This depends in part upon whether their activities are well coordinated or not.

In sum, the author suggests the following. Those agencies in the United States Government interested in creating the sort of ocean shipping market discussed in this paper could initiate contacts with counterpart or sympathetic foreign government groups on ocean shipping pool questions. They could also initiate efforts to create a coordinated, agreed program across the U.S. Executive Branch.18

Past formulations of international air transport policies would seem to

provide both precedent and a prototype mechanism for coordinating the various agencies within the United States Government, and their contacts with foreign government agencies.

B. The Catch-Up Nations—Negotiate Allocations or Try the Open Field (With, Of Course, a Fair Advantage).

What can a poor nation do? Even with two fingers on each hand tangled up in red tape the "developed" nations busily lob containers back and forth across their Atlantic sea, weaving ever-thicker webs, until from the outside the whole thing may look like a cocoon, with numerous rich men's clubs comfortably nestled within.

First, of course, one is led to observe that if a nation builds and operates ships well the web is likely sooner or later, in some grudging and partial manner, to accommodate this fact. (Were it not for the Japanese example, the author would fear a lack of credibility in this observation. With that example, he only fears lack of adaptability in our own economy.)

This does not entirely resolve questions of market organization, and questions of how soon or late, how partial or complete, how grudging or responsive the international system makes its accommodations. The nations playing catch-up ball have displayed noticeable interest in these matters.

Let's look at it from the viewpoint of a country in the less-dense trade flows, tributary and/or marginal to the more developed markets. The author will suggest that a "developing" nation has a choice between investing efforts in negotiating allocations of traffic, using such leverage as can be found, or investing in efforts to open up the shipping system in a way which gives the local group a decent shot at the business.

The first choice is, in effect, an attempt to get a bigger slice out of a pie smaller than it might otherwise be. The second choice is, in effect, to take a chance of getting some return from a bigger pie.

If a major trading country wished to maximize the size of the international pie, it would seem well advised to move toward opening up opportunities in a way yielding a surplus for all concerned, with those now benefitting least from international trade arrangements getting at least a small net gain in relative position in the process.

Americans, of all the world's people, should know it is easier to share a large larder than a small one; easier to equalize the milk in the glasses by pouring more for all than by robbing Joseph to reward Janet.

Addressing, then, those at least momentarily intrigued with fostering a more open, efficient, productive, and in the process competitive, inter-
national shipping system, let's look at what we have to offer our less wealthy brethren and trading partners in exchange for their participation in such a system.

1. *What's In It For the Third (And Most Populous) World?*

Increased efficiency in trade and increased volumes of trade are the first inducement for the nation interested in building its wealth more rapidly. Lower cost and more facile international shipping increases the total volume of imports, exports, and over-all economic activity. A recent article indicates that the increase in efficiency resulting from lack of conference restrictions is of sufficient size to be observed.19

Freedom from administered discrimination in shipping markets is a second significant inducement. If carriers do not administer prices and sailings, and sellers must bid for freight, and take what they can profitably carry, then no one nation or a group of nations, and no one carrier or group of carriers, could discriminate against others except by means external to the shipping market, such as tax devices or specific government directives. The field for discrimination against small countries would thus be reduced.

This easily stated point carries implications many may find novel. Carriers and shippers accustomed to attempting to administer freight relationships often lose sight of the fact that a thoroughly competitive market thoroughly prevents discrimination, by keeping all prices relatively close to minimum necessary costs plus a reasonable profit. Nations concerned with access to international markets may not have focused on the fact that an open, competitive market would provide a rather thorough check against one major source of market limitation and discrimination. Nor may they be aware that cartel-imposed price enhancement is quite likely to bear heavily on those with fewer market alternatives—the less developed countries.20

Carriers interested in perpetuating conference systems and market allocations might suggest that these benefit developing countries. Our less wealthy but possibly more ambitious brethren might consider, when ap-

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19. See for suggestions, though not conclusive evidence, on this point, Bennathan and Walters, pp. 110-114. There may be two tendencies at work—the tendency to enhance prices more on high-valued merchandise and the tendency to enhance prices more when buyer alternatives are fewer. The first effect would seem to bear heavily on developed countries having more processed merchandise, and also to bear on the processed-goods sectors of less-developed countries (the sector these countries are typically trying to develop). The second tendency would seem likely generally to affect less developed countries more than developed countries.
proached by domestic or foreign interests advocating restrictive shipping policies, that these persons have little or nothing to give which is not subtracted from someone else (often someone in the same local economy), and from the international community as a whole. If the proponents of conference or allocation arrangements consist largely of carriers in richer trades saying price and service restrictions in developed and less developed markets will benefit less developed markets, the basis for the generosity would seem more than a little implausible.

All this said (and the reader, like the writer, may feel relieved that the saying of it is past), a third inducement to developing countries may be required. Put bluntly, more developed countries might give their competitors a little more assurance of somewhat greater success to international shipping markets, by investing a little technical and financial assistance in them.

This is so counter to much of our tradition as to be almost unspeakable. Let us hasten, then, to qualify it. The author does not suggest deeding to others free of charge our newest shipbuilding facilities, and our most modern vessels. Neither, for different reasons, does he suggest endowing eager aliens with our old facilities, unless the foreign countries voluntarily, on good information, find real value in the facilities, and, generally, are willing to pay something for them.

Indeed the proposal is selfish, in the sense that it is designed to build wealth in which Americans would share, in the long run. (The run may seem so long that many may be inclined to think it approaching infinity, and therefore irrelevant. The author is of a different view, obviously)

From the other side of the transaction, the author would counsel the putative beneficiaries of this enlightened United States self interest against massive escalations of their immediate market penetration plans, and expectations of immediate, enormous gains in commercial success.

There is very good reason to believe that in more fully competitive markets, entities now relatively disadvantaged would do relatively better, over time. The discipline of open, competitive markets is such that such entities would do better in large measure by evolving capacities out of what they now can do with some proficiency. A fair market is necessarily a hard market as to some transactions for some of the parties some of the time.21

A program of removing restrictions on less developed countries' shipping interests at a somewhat more rapid rate than the removal of restrictions on developed country shipping interests is not inconsistent with the

21. Developing nations rightfully feel, on the other hand, that a hard market is not necessarily always a fair market.
general approach outlined in this paper. Indeed, such a policy might do more than technical and financial assistance to achieve desired development results.

2. Who's a Patsy?

If the foregoing is generally correct, then we should rarely, if ever, indulge ourselves, our carriers, foreign governments, and foreign carriers in restrictive bilateral allocations of traffic.

If we allow such restrictions to multiply, and use deck-stacking techniques to attempt to secure what we consider to be our fair share in international shipping, we limit our trade, multiply inefficiencies, warp our tax laws, and otherwise burden our taxpayers.

If we allow such restrictions to multiply while we are seeking by other means to secure a more open regime, we are busily cluttering the floor with debris we shall later have to clean up.

One could consider whether temporary arrangements building up the capacities of foreign countries might not stand them in good stead when arrangements then become more competitive. The risks and costs of this course are substantial. First, the "temporary" restrictions are apt to be costly. Second, judging from the history of subsidies, grants of monopoly and similar regulatory largess, making the arrangements temporary rather than permanent is very difficult. Possibly there should be some incidence of casts to help heal broken bones. We would be overdoctoring if we were to hobble most who run. Healthy exercise has more to recommend it.

The United States government is not entirely without ability to resist restrictive bilateral agreements. The State Department may have limited tools, but is not entirely lacking in ability marginally to influence trading partners. The FMC can disapprove submitted agreements. In extremis, it can invoke Section 19 of the Shipping Act of 1920, to discourage an overenthusiastic or shortsighted trading partner's use of muscle.²²

Attempts to resist restrictions could be unbalanced were we often to indulge in restrictions seemingly advantageous to a particular U.S. interest while never indulting a restriction which has a short run advantage to a foreign interest.

The way to avoid this unbalance, of course, is to improve our market rather than to further cripple it on the behest of additional claimants, whether domestic or foreign. The author has always been puzzled by

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²². 46 USC § 876.
suggestions to the effect that the way to cope with a circulatory constric-
tion in the left leg is to draw tight a tourniquet on the right leg.

If we were to opt for liberalization, we would not find the course easy. We
should have to resist contrary impulses from portions of our own
body politic, and from other nations. Indeed, "liberalization" is the rig-
orous, demanding course: protectionism the pursuit of indulgence.

IV. Addendum: Who Are the Villains?

The author has treated with great disrespect propositions fervently
espoused by generations of ocean carrier owners, managers, and lawyers.
He has casually invoked rigorous competition and substantial risk for the
people who acquire ships, help organize ports, and carry the freight. Does
he now proceed to paint his chosen pincushions a deep black?

Perhaps in the latter half of the twentieth century we might expect
businessmen to be less assiduous in the antisocial conduct of creating and
furthering cartels.

The author is much more inclined to be impatient with legislators and
the personnel of various government agencies who have some influence
over whether we have conferences, what form they take, and whether we
foster a restrictive international regime or a regime conducive to growth.

This impatience proceeds from premises some might think naive. Taxpayer-funded government agencies should serve the interests of the
entire body politic. Whatever the constituency pressure, sooner or later
legislation is going to be judged on whether it serves or disserves the entire
community. Just as individual states have more to gain from an efficient
national system than from autarky, so over the long run do nations have
more to gain from an efficient international system than from autarky,
or mercantilism.

Government officials who adopt and further policies which cost the
economy large losses, whose impulses tend to balkanize rather than build
international intercourse, have as much utility to the general taxpaying
public as barnacles to a ship.

Carriers who hold up prices and restrict services make less of a con-
tribution than they could. Government officials who employ tax funds for
these purposes simply subtract from the national welfare. Carrier man-
agements may be guilty of shortsightedness in pushing for restrictive
trade regimes. Government decisionmakers to whom welfare economics
is as familiar as mandarin chinese, and who cannot distinguish private
from public goals, are blind to public duties.

Shipper managements deserve, in the author's opinion, at least a few
flicks of the whip. Can it be said that a management is meeting its
responsibilities to its shareholders and the general body politic, in transportation purchasing, when it passively tolerates a selling cartel? In the author's opinion, no. What can be said of the adequacy of a manager's knowledge if he does not know what a cartel is, or what its effects are? In the author's opinion his knowledge is inadequate to his task. What use to his company is adequate knowledge, if the manager is unwilling to do what is needed to break the cartel's grip? In the author's opinion, little or none.

Conclusion

In this article the author has suggested that the containerization-caused period of disruption in settled conference arrangements be used to modify American regulation of conferences so as to curtail or eliminate their major price fixing and output-limiting functions. He suggests that major transport users, interested government agencies, and other interested elements in the community combine efforts to this end. In addition, he has suggested that a deliberate and determined effort be made to channel the development urges of nations toward the creation of an efficient, productive, competitive, non-discriminatory ocean transport system, unhampered by the private cartels now extant.

The author does not expect these views to receive immediate wide acclaim in maritime circles. These suggestions differ widely from the traditions of American maritime regulation, the content of current subsidy programs, the apparent tendency of the FMC on both containership pools and bilateral agreements with less developed countries, the expressed points of view of most ocean carriers, and the apparent inclinations of many shippers of freight who choose to suffer the extant regulatory system, or to attempt to circumvent it, rather than to challenge it.

If the views expressed here are substantially correct, we would as a national and international community be better off if we changed our ways as suggested. If one has either inclination to consider or responsibility to bring about this sort of improvement, then espousing these approaches, so foreign to so many, may not be a great social burden.
"ADMINISTRATION" v. "PARTICIPATION"? THE "PUBLIC HEARING" IN THE URBAN TRANSPORTATION DECISION PROCESS

ROBERT W. CURRY*

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A recent review of transportation decision-making in Massachusetts emphasized the following theme:

"The transportation decision process should provide for both decisiveness and widespread participation. The need is for an open process in which local governments and interested private organizations can make informed contributions, and can secure a genuine sense that they are being heard, without sapping the state's ultimate capacity to act."

This kind of statement challenges all concerned with sensitive and intelligent administration to confront realistically a fundamental question: can we identify, analyze, much less create the conditions necessary to effect a reinvigorated, action-oriented, yet democratic process of decision? Is it "participatory" yet "decisive" administrative performance of public functions such as the provision of transportation services even possible?

This essay has two central purposes. First, there is a legal and political analysis of the style and content of "citizen participation" in urban transportation administration as presently achieved through "the public hearing". Second, there is offered a recommendation concerning more effective use of citizen access mechanisms in transportation decision-making which hopefully will contribute to a rethinking of the hearings process as a device for adapting the needs of administration to society's valuation of "democracy." Essentially, this essay represents an experiment in administrative "institution designing."

To suggest that the fashioning of a more "responsive" decision process is difficult to reiterate a truism. A brief look at some of the larger reasons why may help set the context for this analysis.

We are living in an age of organization where specialization of function and centralization of authority have been the dominant trends of the twentieth century institutional development. Politically, we are witnessing the attenuation of legislative policy initiative and program monitoring and the concomitant delegation of vast amounts of policy-making power to bureaucracies performing diverse societal tasks. This has led to new claims to legitimacy on the part of bureaucratic decision-makers, often rooted in the needs of specialization of function and the development through experience with a particularized set of problems of an "expert" capacity to initiate and apply policy "in the public interest."

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Increasingly, "official" actors in the administrative process are intervening in decision situations once conceived as distinctly private and nongovernmental.

Yet, to recognize that the state is coming more and more to play a "managerial" role in our national economic and social life, is only to begin to recognize the complex implications of that fact for the process of decision affecting our lives. For purposes of this analysis, one aspect of this unfolding of the "positive state" is of critical importance and will be considered here. In general terms, we are experiencing the " politicization of law and the legal process."

This phenomenon has several aspects. First, given that lawyers have often considered themselves reasonably equipped for the task of "arrangement-framing," and the drafting of designs for re-organized administrative processes, it is essential that lawyers as well as other observers and participants in administration perceive the basic fact that "an expert capacity to exercise discretion" means the necessity of engaging in politics. Students of political science have long ago laid to rest the "politics-administration" dichotomy and any accompanying notions about the rationalistic "execution" by an "expert" bureaucrat of policy choices previously made by a democratic legislature. Indeed, given administrative latitude in declaring and applying concrete policies, agency decisions have necessarily been "little political arenas" encompassing interaction of a wide variety of actors.

Second, this theme and its implications are just now coming to be recognized in the literature of "administrative law", as evidenced by calls for the analysis of the political nature of discretionary agency action. For example, Professor Reich has argued that our conceptions of administrative law must broaden from their predominantly "regulatory" focus to

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3. The contours of governmental influence are not fully described by the concept of "managerial" function. It has been argued that the growth of government has implied an alteration of our entire notions about "property" relationships. See Reich, The New Property. 73 Yale Law Journal 733 (1964). Observers have attached various labels to the kind of state resulting from this process, including, among others: "the Public Interest State," "the Welfare State," "Administrative State," "Positive State."


accommodate the imperatives of "the Public Interest State." He suggests that Congress has used an "ICC prototype" (governmental policing of basically private activities) to launch an ever-increasing assignment to various agencies of new and complex tasks of allocation of and affirmative planning for the use of scarce national resources. He also suggests that the agencies have been obliged to perform these varied tasks under generally a single procedural design manifest by only three categories of decision-making techniques: (i) adjudicatory, (ii) rule-making, and (iii) executive (discretionary). For Reich this narrowness of focus and the accompanying "myth" of expertise has led to an overreliance on seeming legitimacy of agency procedure which has denied the role of value choice inherent in the planning process, and which has fostered secretive, ad hoc policy decisions. He asks whether our constitutional system can at once be "democratic," subject to a "rule of law" and "equitable" and states that:

"these issues are boiling beneath the surface of our administrative law and likely to surge up dangerously when a nation which expects its government to be responsive, limited and fair discovers, in a flood of political awareness, that these expectations are becoming less and less real just as government intrudes more and more into the lives of citizens and hence into their consciousness."

Lawyers are now being asked to join with other students of public administration to ask how, if at all, the bureaucratic exercise of discretion can be made "responsive," i.e., consistent with other societal values or expectations concerning "liberty," "equality," and "democratic participation." Our efforts must increasingly be directed toward designing internal administrative procedures which recognize and support the fact that we will only control or "structure" discretion by effecting an invigorated, open, informative, political decision process. Less and less may we justifi-

7. Reich, supra note 4 at 1246. Professor Jowell, supra note 4, felt a need to offer another "model of the administrative process" which recognized that a single agency may perform diverse tasks which might call for different, internal decisional designs, but all of which involved more or less "discretion." The thrust of his argument was that given the necessity of implicit valuations in the selection of planning goals and the means of attaining those goals, administrative procedures must be designed which opened the agency process to diverse political forces and interests affected by those decisions.

Cf. Kenneth Davis, Administrative Law Treatise (1970 Supp.) § 1.04-13. Davis argues that we have not yet conducted analysis of the "eighty or ninety percent of the administrative process" involving the exercise of discretion in making policy in the absence of significant judicial review or the neat application of formal, procedural safeguards which follow categorization of the decision process as either "adjudication" or "rule-making."
ably look to law or judicial command to "confine" discretionary administrative choices.

I. Transportation Administration: The Bureaucratization of Imbalance

Today there are great and conflicting demands at many levels of government for decisions and actions concerning the provision of critical, urban public services. Yet, only now are we beginning to sort out the vast and complex interrelations among various, substantive policy issues confronting the city, and more generally, between those issues and questions about the design of the political system, such as the need for metropolitan government. All of these issues involve a multiplicity of valuations processes relating to fundamental cleavages permeating urbanizing society.

Thus, like other, urban policy makers, transportation officials are now beginning to find that they can no longer avoid confrontation with a whole panoply of forces operating to create an "urban crisis." For example, in Boston, there is just getting under way a federally financed effort at "participatory planning" for a regional "balanced transportation system." Born out of a transportation crisis which consisted of widespread dissatisfaction and indeed, open hostility and resistance to the effects of transportation policies on the environment, employment, taxes, housing, social disruption, and mobility of citizens to name just a few, the Boston Transportation Planning Review was initiated by the Governor of Massachusetts, after a halt was called on most major expressway construction in the Boston area, in order that the planning process could function not only to provide "pure" transportation services, but more importantly, so that transportation decisions could use "the transportation thread to shape and mold the urban fabric."

Clearly, the philosophy underlying the Boston experiment is not the general rule. Transportation administration is characterized by a not unfamiliar, institutional fragmentation of political power among compet-


9. See STUDY DESIGN FOR A BALANCED TRANSPORTATION DEVELOPMENT PROGRAM FOR THE BOSTON METROPOLITAN REGION, Prepared for Governor Francis W. Sargent, under the direction of the Steering Group on the Boston Transportation Planning Review, November, 1970, p. S-5. The Study Design emphasizes that the planning process must be "multi-valued." And, indeed, the number and range of values and problems to be reconciled in achieving a transportation facility decision are truly staggering. See Appendix A for a list of "criteria" to be used in the evaluation of alternative plans/proposals to be generated by the Review.
ing, "modal" bureaucracies at the state level, and other federal, state and local actors in the overall decision process. It is this division of administrative energy between modal agencies, the reasons for this diffuse development, and its effects, which have operated as critical constraints on the evolution of an administrative process which could function while effectively considering the range of values manifest and latent in an urban transportation context. An extensive analysis of this complex "ecology of games" is not within the scope of this essay. However, before evaluating the degree of participation being achieved in the planning process by such devices as the public hearing, it would be useful to consider briefly salient features of the present style and organization of the administrative process in which such "participation" is being attempted.

First, at the federal level, there exists a significant imbalance between federal-aid sources for investment in highways and investment in other forms of transportation. Given especially the availability of a continuous federal source of funding for 90% of the cost of building interstate highways, there exists a tremendous incentive for states to try to "solve" their urban transportation problems by investing in urban expressway building, regardless whether in specific situations, there may be, on balance, better arguments for another kind of facility. Another feature of the Highway Trust Fund is the lack of frequent and intensive political and budgetary review of a long-standing, fundamental policy commitment in light of rapidly changing, social, technological and political realities.

Second, the obvious results of this federal imbalance has been the distortion of priorities on the state level and the concomitant institutionalization of this distortion in the imbalanced growth of "modal" state agencies designed to support the purposes of the available funding. Thus, while metropolitan transit agencies have characteristically inherited the ailments of bankrupted railroads and decreasing city revenue sources, state highway departments have developed direct and intimate relationships with the Bureau of Public Roads, have planned and built most of the inter-city interstate links, and are now looking to continue that success by using "90-10" funds to complete the rest of the presently planned interstate system comprised mainly of urban segments.

Third, the main criteria applied in the construction of these facilities.


has forseeably been those related to “transportation service”: generally, efficiency. This style of action is completely consistent with every known and valid axiom of organizational self-maintenance and enhancement needs. Having bureaucratized a “modal” policy which until recently was assured of having important resources consisting mainly of the Fund, and given the “incremental” dynamics of informational search and self-initiated change,\textsuperscript{12} it becomes well-nigh impossible for the agency itself to recognize, much less accept or operationalize, the basic fact that urban technology and social forces have developed in ways making increasingly artificial a technical distinction between modes which has always been an arbitrary means of making and implementing policy.

Fourth, given the nature of their resources, road agencies have been understandably successful in cultivating good relations with potential allies in the legislature and elsewhere. They have had only marginal competition from either allocational or functional rivals, have delivered good service to their beneficiary clientele, and until recently, have experienced only minimal attack from either their “sovereigns” or clientele disadvantaged by their policies.\textsuperscript{13}

It is no wonder, then, that the highway agencies would try to perpetuate this political honeymoon as they approached the task of completing the interstate system in urban areas. Yet, it is little wonder that such strategies and techniques would encounter substantial if not debilitating controversy in urban areas where other urban issues were already challenging the viability of the urban policy.

The ameliorative responses of various policy makers to these facts have been diverse. For our purposes it is sufficient to observe that on the federal level there has been added within the last nine years a wide range of administrative requirements related to housing, the economy and the environment of the city. One of the most significant of these has been the establishment of an “A-95”, state, budgetary review process\textsuperscript{14} which seeks to coordinate, among other things, expenditures for transportation planning and construction with other, federally assisted, state-run programs. However, notwithstanding the impact of these requirements and the “clearinghouse” review, (which have essentially been added on to the same, ‘fragmented apparatus), any governor or other public official who attempts to expand the potential field of choices and influences consid-

\textsuperscript{12} See generally Anthony Downs, Inside Bureaucracy (1967); Martin Shapiro, supra note 5; Charles Lindblom and David Braybrooke, Strategy of Decision (1963).

\textsuperscript{13} See Downs, supra note 13, at 44.

ered by the transportation decision process will face powerful and independent bureaucracies nurtured on the one-sided policies in effect since the Second World War.

Thus, our effort to evaluate and make recommendations for a participatory hearings process must be tempered by the realization of a history of transportation policy imbalance and the institutionalization of that distortion. Also, we must recognize that transportation bureaus (all modes and at all levels of government) are already facing critical problems in managing internal and external communications, in achieving organizational control, in conducting informational search, and in initiating change. This fact of bureaucratic life is at least partly the result of the presently severe workload accompanying increasingly complex federal and state program requirements mentioned above. If procedures are designed which seek to "open up" the process but which, in the tradition of federal requirements of the last several years, are simply add-ons to present agency tasks, there is a substantial possibility that the new mechanisms will not only not open the process up significantly or genuinely, but will at best, simply initiate the addition of another bureau or group of bureaus responsible for the paper work generated by the new procedures or, at worst, will cause a breakdown of any present agency capability for change in policy by creating even greater antagonisms, resentments, or affirmative attempts at sabotage.\textsuperscript{15}

II. The Transportation Public Hearing As A "Participatory" Device: A Legal Analysis

The "public hearing" has been one of the primary means chosen to operationalize the objective of opening the decision process to increased private "input" from the level of communities and neighborhoods affected by a proposed facility. This section of the analysis seeks to review the present status of the hearings process in terms of judicial interpretation of statutes and administrative procedures and practices. It concludes with some observations concerning what we may reasonably expect from the courts with respect to judicial requirements for any specific procedural designs for a hearing.

A. The Public Hearing: A "Right" to "participation"?

The Constitution (specifically, the due process clause) has not been

\textsuperscript{15} Interview with Mr. Michael Bernard, Senior Staff Transportation Consultant, Office of Planning and Program Coordination, Executive Office of Administration and Finance, Commonwealth of Massachusetts, in Boston, March, 1971.
interpreted as requiring that any kind of "hearing" be granted by an administrative agency to any person or persons who are members of a group or class generally affected by an agency’s transportation facility construction decisions and who are, in effect, seeking political representation for their view of the "public interest." In the absence of a situation where an agency’s decision involves circumstances affecting a specific, named individual’s substantive “rights” cognizable in law and concerning which there are facts peculiar to the individual which are relevant to the agency’s decision,¹⁶ and in the absence of a statutory/administrative regime declaring such a right, the controlling doctrine generally remains that articulated by Mr. Justice Holmes in the Bi-Metallic case¹⁷

"Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."

Given also that no individual has any “substantive rights” to a particular kind of transportation service¹⁸ the right to a hearing which has been articulated on judicial review of transportation agency action has been a procedural right to influence the administrative planning and decision process, derived from statutes and granted to citizens generally, as resi-

¹⁶. The distinction being drawn here is admittedly an “analytic” or “formal” difference which does not describe all of the reality of requests by persons for an administrative hearing. Yet, it is my view that it helps to understand a present judicial perception of a distinction between a constitutional dimension of the hearings question and a political dimension involved in the group conflict surrounding bureaucratic decision-making.

¹⁷. Bi-Metallic Investment Co. v. State Board of Equalization of Colorado, 239 U.S. 441 (1915); cf. County of Santa Barbara v. Hickel, ___ F2d ___, (9th Cir., 4/21/70); County of Santa Barbara v. Malley, ___ F2d ___, (9th Cir., 4/21/70).

¹⁸. But see Hawkins v. Town of Shaw, ___ F2d ___, (5th Cir., 1/28/70) which held that in the absence of a showing of a compelling state interest, the equal protection clause required a city providing greatly inferior levels or quality of municipal services to black neighborhoods to equalize services throughout the city. Given the rapid movements in the area of “substantive equal protection,” see Cox, Foreword: Constitutional Adjudication and the Protection of Human Rights, 80 Harvard L. Rev. 91 (1966); Developments in the Law—Equal Protection, 82 Harvard L. Rev. 1065, one must note the possibility that claims of “right” to certain levels or qualities of public services may be increasingly frequent and successful.
dents of a neighborhood, area, or entire city affected by a proposed facility. A typical example of this statutory right to "citizen participation" may be found in the Federal-Aid Highway Act:

"Any State highway department which submits plans for a Federal-aid highway project . . . shall certify to the Secretary that it has held public hearings, and has considered the economic and social effects of such location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community . . . . Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered." ¹⁹

What is the character of the proceedings required under this right? What are considered to be the primary purposes for its creation? What effects, if any, is this hearings process expected to have on the making of substantive policy?

First, one may note that on January 14, 1969, the outgoing Federal Highway Administrator issued a Policy and Procedural Memorandum entitled "Public Hearings and Location Approval" which elaborated in considerable detail the hearings requirement for highway planning set out in Title 23.²⁰ The purpose of the "PPM" is to afford all "interested

¹⁹. 23 U.S.C. § 128(a), as amended by the Federal-Aid Highway Act of 1970, P.L. 91-605, § 135. See also similar language in the Urban Mass Transportation Assistance Act of 1970, 84 STAT. 962, 964 § 2(d) (see 49 U.S.C. § 1602(d)). § 6 of this Act, under the heading "Environmental Protection," provides not only that the Secretary of Transportation shall make certain findings concerning the social, economic, and environmental effects of a proposed mass transportation facility, but also that "in any case in which a hearing has not been held before the State or local agency . . . or in which the Secretary determines that the record of hearings before the State or local public agency is inadequate to permit him to make the findings required under the preceding sentence, he shall conduct hearings, after giving adequate notice to interested persons, on any environmental issues raised by such application. Findings of the Secretary under this subsection shall be made a matter of public record." (Emphasis supplied).

²⁰. 23 C.F.R. Part 1, Appendix A (1969). In October, 1968, the FHWA had published a notice in the Federal Register, 33 F.R. 15663, proposing the adoption of a new Part 3 of Title 23 of the Code of Federal Regulations, "Public Hearings and Location and Design Approval." Written comments were solicited and extraordinarily, an informal public hearing was held in Washington in December, 1968, to provide an opportunity for oral comment by interested parties on the proposed regulation. For an interesting survey of the main themes coming out of the comments made at that hearing, see Joan Nicholson,
persons" "full opportunity for effective public participation in the consider-
ation of highway location and design proposals before submission to the
FHWA for approval" and "to provide a medium for free and open dis-
cussion designed to encourage early and amicable resolution of contro-
versial issues that may arise." A two-hearing procedure was promulgated
which was to require that State highway departments consider fully a
wide range of factors, including no less than twenty-three (23), enumer-
ated "social, economic and environmental effects."

Second, one may observe one court's perception of the significance of the
hearings process. In D.C. Federation of Civic Associations v. Volpe,21
the U.S. Court of Appeals for D.C., in a 2-1 decision reversing the
District Court, held that Section 23 of the Federal-Aid Highway Act of
1968 required that both "the planning and the construction of the Three

Highways—The Bulldozer and 1968 Hearings, in Cahn and Passet, eds., CITIZEN PARTICIPATION: A CASE BOOK IN DEMOCRACY, (1969). This proposal differed from the PPM that was finally published, 34 F.R. 727-730, in several different respects. First, the PPM that was published was issued not as a "regulation" but as an internal memorandum of the Bureau of Public Roads (hereinafter, BPR) which was only printed as an appendix to Part 1 of Title 23 of the C.F.R. in order that it would "be given wide distribution and be readily accessible to all affected persons." One possible significance of this distinction may be that such a PPM could be withdrawn without complying with the rulemaking provisions of the Administrative Procedure Act which require that the "repeal" of a "rule" is effective only upon proper notice in the Federal Register and provision of opportunity for interested persons to participate in that repeal by comment at least in writing. 5 U.S.C. §§ 551, 553(b)(c). See Sierra Club v. Hickel, 262 F. Supp. 480 (N.D. Cal., 7/23/69) However, the Comptroller General has ruled that FHWA PPM's do have "the force and effect of law," and cannot be "waived retroactively." Decision of Comptroller General, B-149882, 7/9/63. Second, the FHWA proposed regulation would have formalized an already functioning informal appeals procedure with respect to highway decisions made by the local or State highway department. The Federal Highway Administrator had evidently been forced to give much personal time and attention to specific, local controversies. The formalized procedure would have allowed any "interested person" to seek a reversal of a local decision and would have granted an automatic stay pending disposition of this appeal. However, strenuous objections to this procedure were made by state governors and highway agencies and "road-minded" interest groups. The PPM deleted this appeals process. Third, the proposed regulation stated that the primary purpose of the "corridor public hearing" was to "explore the question of whether alternative methods of transportation would better serve the "public interest." Opposition groups argued, however, that such an issue was better suited for exploration at an earlier stage, during the "continuous and comprehensive planning process" required by 23 U.S.C. § 134, and implemented by FHWA PPM 50-9, "Urban Transportation Planning." Accordingly, the proposed definition was deleted from PPM 20-8. However, the Administrator stated that "PPM 50-9...was being amended to require that the public be given the right to express their views with respect to such issues as the choice between alternative methods of transportation." However, to this writer's knowledge, no such amendment has been promulgated at this time.

Sisters Bridge comply with all applicable provisions of Title 23 of the United States Code.\textsuperscript{22} Rejecting the interpretation urged by the federal and D.C. defendants that Congress had intended that the Three Sisters Bridge be constructed without compliance with certain procedural requirements articulated in Title 23, Judge Wright stated that such an interpretation "would result in discrimination between District residents affected by the Bridge and all other residents of the United States affected by highway projects in their localities" and thus compelled an inquiry into whether such discrimination would be based on an individual classification between groups of citizens which rose to the level of the violation of the equal protection clause. The Court found that the defendant's view would "endanger the constitutionality of the statute."

In his analysis rationalizing the application of the "strict scrutiny" test, Judge Wright focused on the importance of the public hearings requirements in Title 23. In rather lofty terms he argued that:

"the preservation of a democratic form of government requires that all concerned protect the right of each citizen to influence the decisions made by his government. Since this case involved the right of citizens to participate in the political process as it relates to federal highway projects, we subject this statute to the same scrutiny we would apply to any legislative effort to preclude some, but not all, citizens' participation in decision-making."

Although it recognized that the right to participate in a highway hearing was "not the exact equivalent of the right to vote on the project," the court argued that such a right was "the only form of direct citizen participation in decisions about the construction of massive freeways, decisions which may well have more direct impact on the lives of residents than almost any other governmental action." Judge Wright concluded by declaring that since "public hearings are the forum ordained by Congress in which citizens...participate in highway planning decisions," the right to do so demanded, where adversely affected by legislation, close scrutiny in an equal protection context.

\textsuperscript{22} The Three Sisters Bridge is a multi-lane span across the Potomac River near the present Key Bridge in Georgetown, currently planned as part of a highly controversial urban expressway network for the District. For a detailed discussion of some of the history of this controversy, see \textit{D.C. Federation v. Volpe}, 316 F.Supp. 754. Section 23 of the 1968 Act provides that "notwithstanding any other provision of law, or any court decision or any administrative action to the contrary...not later than 30 days after the date of enactment of this section...the government of the District of Columbia shall construct the...bridge."
B. The Current "Legal" Status.

In light of this judicial description of the importance of the hearings process; observing that the PPM articulates in detail a two-hearings procedure; and given that the public hearing is one of the only participatory mechanisms demanded by Congress with respect to transportation planning, one might surmise that administratively, the hearings process was or is coming to be an important device implementing a decision process which actually involved private citizens, or, at the very least, the courts were strongly urging such a view upon transportation administrators. Unfortunately, in this writer's view, neither situation is the case. It will be argued here that the courts have with few exceptions tolerated an administrative view that the hearings are only minimally relevant, if at all, to the planning and decision process.

For example, recent litigation focusing on the use of open space for an urban expressway has also considered the hearings requirement; arguments made by the trial and appellate courts are fairly exemplary of most cases which touch upon the hearings issue. In Citizens to Preserve Overton Park v. Volpe, a federal district court was confronted by private citizens of Memphis, Tennessee, and local and national conservation organizations, who sought to enjoin the Secretary of Transportation from releasing federal-aid highway funds for construction of a segment of Interstate 40 which was to run through a park in Memphis. Among other grounds the plaintiffs urged non-compliance with the public hearings requirements. Yet, notwithstanding that the public hearing which was conducted involved certain procedural defects, the court held that these

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23. It is asserted here that with respect to the transportation planning process required by 23 U.S.C. § 134, very little "participation" has been achieved in a majority of urban expressway construction situations.


25. Plaintiffs also alleged that there had been non-compliance with the requirements of § 4(f) of the Department of Transportation Act of 1966, 49 U.S.S.C. § 1653(f), which declared that the Secretary shall not authorize the use of federal funds to finance construction of highways running through public parks "unless (1) there is no feasible and prudent alternative to the use of such land and (2) such program includes all possible planning to minimize harm." It was this issue which was the primary concern of the Supreme Court on appeal.

26. The plaintiffs offered to show that the newspaper notice of the hearing which was held (i) indicated that it was to involve both a "corridor" and "design" hearing and (ii) did not notify the public that it could submit written statements. At the hearing only design factors were considered (location approvals were given in 1956 by the BPR, in 1966 by the Federal Highway Administrator, and in April, 1968, by the Secretary of Transportation, after, it may be noted, the effective date of § 4(f).) Also, the transcription of the hearing to be sent to BPR was poor, the comments of many people not even being transcribed at all,
constituted harmless error. It reasoned that the purpose of the hearing was simply to inform the community and to solicit its views with respect to the proposed project; that the hearing was well-attended; and that the plaintiffs did not show that any persons desiring to speak were prevented from doing so.

On appeal the Supreme Court did not discuss the adequacy of the hearings held. However, in rejecting the substantial evidence test as the proper standard of judicial review, Justice Marshall, writing for the majority, stated:

"the only hearing that is required by either the Administrative Procedure Act or the statutes regulating the distribution of federal funds for highway construction is a public hearing conducted by local officials for the purpose of informing the community about the proposed project and eliciting community views. . . . The hearing is nonadjudicatory, quasi-legislative in nature. It is not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial evidence review."

In effect the Court is suggesting that what is said at a hearing has little "legal" significance for the making of substantive, environmental policies at issue. And, to be sure, it was standing of firm ground with respect to judicial precedent. Language to the effect that the hearing is not to be

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27. The Court stated that review under the substantial evidence standard, 5 U.S.C. § 706(2) (E), is authorized only "in certain narrow, specifically limited situations . . . when agency action is taken pursuant to rulemaking provision of the Administrative Procedure Act . . . or when the agency action is based on a public adjudicatory hearing." It noted that the decision to approve expenditure of federal funds for the park segment of the I-40 project "was plainly not an exercise of a rulemaking function."


But see Overton Park, supra, 432 F2d 1315 (Celebrezze, J., dissenting.) Referring in a footnote to the public hearings requirement, and to the opinion of Judge Wright noted above, supra note 22, Judge Celebrezze declared that "by perfunctorily approving a highway appropriation under (§ 4(f)) the Secretary can nullify the important procedural guarantees of Title 23, as well as render illusory the 'national policy' declared by Congress. When such terrific power over environmental affairs is placed in the hands of an administrative official with minor expertise in the natural sciences, the courts must scrupulously oversee his
“quasi-judicial” or “adversary” in nature but is simply to afford an opportunity for “expression of views” is found in most cases which consider the hearings problem. And, not surprisingly, if the statements made at the hearings do not constitute the kind of record which must necessarily, in legal terms, restrict the decision of an agency, then the decision-makers remain completely free, if politically/strategically possible, to ignore the “steam” that was “let off” at the hearings.

Yet, the dispositive choice made by the Supreme Court in Overton Park (remand to the district court for “plenary review” of the Secretary’s decision with respect to the § 4(f) requirements) raises important questions relevant to the function of the public hearing concerning (i) the development of a complete record for administrative decision and (ii) possible, subsequent review of that record by the judiciary. These warrant brief exploration here.

Justice Marshall also expressly rejected the alternative of de novo review in the district court. Yet, in discussing the remand proceedings, he noted that the lower courts had based their review on the affidavits presented by the litigants which in this case, according to Marshall, were "‘post hoc’ rationalizations...which have traditionally been found to be an inadequate basis for review.” Declaring that the Administrative Procedure Act required that the court review the agency decision on the basis of the “whole record” compiled by the agency, he directed the district court to consider the full administrative record before the Secretary at the time of his decision. He added that there were no formal findings made by the Secretary (which, however, the Court had held were not required) and “since the bare record may not disclose the factors that were considered or the Secretary’s construction of the evidence,” it may be necessary to examine the decisionmakers themselves to determine whether the Secretary had acted within the scope of his authority and if the Secretary’s action was justifiable within the applicable standard of review (abuse of discretion).

In a separate opinion in which Justice Brennan joined, Justice Black argued that the case should be remanded to the Secretary for him to “given this matter the hearing it deserves in full good-faith obedience to the Act of Congress.” Black perceived a crucial link between the fulfillment of the duty with respect to the § 4(f) requirements and the holding of hearings which he described as hearings “that a court can review, judgment, in order to guarantee to the people of the affected communities that their words, and the words of their experts, have not merely been recorded and transcribed, but rather weighed and scrutinized in the manner of courtroom evidence”. Query: could not “the public hearing” help perform at least some of this protective function?
hearings that demonstrate more than mere arbitrary defiance by the Secretary.” In Black’s view § 4(f) constituted a congressional command that:

“the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, fact-findings, and policy determinations under the supervision of a Cabinet officer... whether the findings growing out of such hearings are labeled ‘formal’ or ‘informal’ appears to me to be no more than an exercise in semantics. Whatever the hearing requirements might be, the Department of Transportation failed to meet them in this case.”

Thus, one must ask whether a doctrinaire rejection of the “substantial evidence” standard for review and the delineation of the status of the hearing as a “quasi-legislative” opportunity for mere expression of views are to be invoked indiscriminately to deny the possible contribution that a hearings procedure might make to a more effectively designed administrative process? My view is that the Overton majority’s limited perception of the nature of the hearings process may prove to be dysfunctional in a number of ways.

First, it certainly short-changes the importance of a properly conducted hearing for the development of the “whole record” for judicial review of agency action. Indeed, the discussion of the hearing in both the majority and separate opinions in Overton Park focused on the usefulness or non-usefulness of a hearings procedure for their role on judicial review of the decision of the Secretary of Transportation.

Second, and in my opinion, most important, an effectively designed hearings process could and should serve to help publicly surface the conflicting valuations, assumptions and policy preferences inherent in any transportation decision situation and the varying impacts of those policy choices on different groups affected by the decision.

Two points deserve emphasis. One, a functional elevation of the legal status of the hearings procedure would not necessarily operate to constrain the legal freedom of an agency official to make a decision that he deems politically appropriate and/or preferable from his personal perspective. For example, consider the Overton situation. There the Secretary faces the Congressional imperative that he shall not approve the construction of the facility unless there is “no feasible or prudent alternative.” Assume a procedural requirement that state and federal agencies make substantial effort to insure that a hearing or series of hearings are held which allow the development of a record which will presumably constitute a significant if not predominant part of the “input” before the decisionmaker. Assume also that environmental and other citizens'
groups offer substantial and sophisticated arguments against the desirability of the expressway location, etc. One must observe that it is becoming increasingly difficult to make any certain or doctrinaire predictions about whether a particular court in particular circumstances will or will not, on review of the "whole record," reverse the decision of an agency "on the merits" under the standard of review declared applicable in Overton—"abuse of discretion." The agency simply has an abundance of political-legal resources and allies with which to offer to the court a highly credible record with formal findings and supporting arguments which persuasively rationalizes a choice to build the facility.

A second point related to the above is that substantive policy perspectives on issues related to the environment, transportation, housing, welfare, consumer's rights, etc. are moving people to seek increased procedural access to administrative decision-making, but even more, it seems, advocates are today shifting the thrust of their attacks to the courts, often of agency action. However, of agency action. However, all of us who are concerned with these issues must ask ourselves whether we wish to or can rely on courts and judges to be the better, best or, at any rate, ultimate makers of policy in this time of the rapid evolution of the "positive" or "administrative" state?

It is suggested here that "better" substantive policy decisions must be in substantial part the result of our efforts to achieve a "better" design for the administrative process making most of those policies. In this view the real significance, if any, of such "participatory" mechanisms as the public hearing must be found in terms of its role in helping the administrator to perform more constructively and innovatively his necessary political function of resolving the conflicts unavoidably present whenever he makes major transportation or other policy decisions. Correspondingly,

29. This certainly is not to suggest that courts always "favor" an agency on judicial review under "abuse of discretion." See Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, pp. 359, 586, et seq. However, in Overton there are circumstances militating in favor of the agency even given the restrictions of § 4(f). For example, the State of Tennesee has acquired right-of-way up to the edge of both sides of the park. Also, the agency can argue with respect to location that much needed urban housing would be displaced by another alternative. And, with respect to design (surface v. "cut-and-cover") the agency might argue that the cut-and-cover, depressed alternative might increase the cost by nearly one-hundred million dollars, might augment the safety hazards of the road, and might increase environmental harm to the park due to increased pollution caused by tunneling and depression of the road.

an institutional arrangement of a hearings procedure which will attain whatever capacity it may have to benefit and influence the entire administrative process, will itself be the result not primarily of judicial command but of a political process of conflict and reconciliation between competing interests which are affected by transportation decision-making.

Accordingly, my attention will now shift in Section III to an examination of just what functions one may reasonably expect a "public hearing" to perform and what limits have operated on that performance. In Section IV there will be offered for discussion a recommendation for an institutional design of a hearings process.

III. The Transportation Public Hearing As A "Participatory" Device: A Functional Analysis

There is already an abundance of literature on the abstraction "citizen participation." It can and does mean many things to different observers. My perspective is simply that "participation" is functionally equivalent to the degree of private involvement and influence in public decision-making and non-decision-making. This section of the analysis considers the viewpoints of both private persons/groups affected by transportation decisions and public bureaucracy/politicians making those decisions. There is an examination of the public hearing as a "participatory" mechanism which may perform certain functions and which may be limited in serving those purposes by certain constraints. Three general functions are considered: (A) ritual/democratic functions; (B) administrative "information" and sequencing; and (C) private information, influence and protection.

A. Ritual/democratic functions.

Robert Dahl has convincingly shown that "responsiveness" and other democratic values can seemingly be implemented in policy-making not by actually allowing citizens to participate in or influence the decisions made essentially by public officials who monopolize information and other decisional resources, but by orchestrating varying structures which only appear to be "participatory." In the case of New Haven urban

31. See Bachrach and Baratz, Power as Non-Decision-Making, in Banfield, ed. supra note 10 at 454. Cf. Banfield and Wilson, CITY POLITICS, (1963), footnote 1 at 101. The authors distinguish between "influence" (the ability to act to move others to act in accordance with one's intention) and "authority" (the legal right to act). This analysis assumes that public officials will generally have the latter. A major concern here is how effectively private citizens can use the hearing to muster the former.

32. See Dahl, WHO GOVERSNS (1961), 130.
renewal, the device used by the mayor and others was the "Citizens Action Commission." With respect to transportation, the public hearing is a technique susceptible to such manipulative attempts.

The motives for this not are not difficult to understand: renewal agencies want to "renew," and transportation agencies want to "transport." If a device is readily available to an agency which will not only not have to settle conflict but which may even serve to avoid conflict and allow a project to go ahead because it is now justifiable in terms of societal expectations such as those concerning democracy, then, from an agency perspective, the more of this kind of democracy, the better.

However, the problems with ritualism are just as easy to understand. Particularly with respect to transportation facility development which serves "clients" more numerous and conceptually and geographically diverse than those affected by urban renewal, devices such as the public hearing, at least as presently conducted, are not very convincing or demonstrative with respect to "democracy in action." It is hard to imagine anyone feeling that a hearing served to inject meaningfully into the decision apparatus all or most of the diverse, substantive valuations exigent in a transportation choice situation. Also, it will be argued shortly that effective participation in transportation planning via the public hearing presupposes both a certain kind of prior participatory process and a certain set of skills on the part of many, would-be participants which they often have not experienced or developed. Thus, the use of the hearing simply as a ritual endeavor to gain project acceptability may be increasingly experienced as such by those who sense that they have indeed, influenced only little, if at all, the actual decisions made. In this sense the hearing may very well dysfunctionally serve to heighten suspicion of agency intentions, exacerbate citizen-agency conflict, and promote greater unacceptability for a specific proposal.33

B. Administrative information and sequencing.

One of the most frequently reiterated rationales for the hearing is that it functions to "inform" the agency34 about a diverse range of valuations

33. Jowell, supra note 4 at 171, has described another, possible function of participation: that of "socio-therapy." It is suggested that with respect to individuals and groups who have not often had the self-effectuating experience of influencing the course of decisions over their own lives, participation through the hearing might serve to generate a feeling that they were "invited in" to the process of social decision, thus helping to overcome the poor's sense of powerlessness. One may question, for many of the same reasons with respect to ritual manipulation, whether any hearing could ever serve this purpose.

34. It is recognized that there may be no clear distinction between the process of "inform-
which transportation planners and technicians may have overlooked. The argument is essentially that community involvement can produce a healthy, countervailing force in the planning process. It is said that citizens and their representatives can offer their own brand of "expertise" in terms of increasing administrative sensitivity to the varying needs of private persons affected by the agencies' decisions.

However, several limitations on the informing capability of such devices as the hearing may be suggested. From an administrator's perspective, it is often the case that he feels that rarely has the hearings process ever offered anything in the way of information which was new or relevant to the overall "public interest" involved in the construction of a public transportation facility. He may ask how he is to determine whether any group appearing at the hearing is truly "representative" of the many, substantive points of view involved in a transportation issue. Also, if he has conducted a hearings process, he can probably testify to an experience whereby he became a target for the venting of aggression at government in general, a citizen catharsis covering a broad series of concerns which may seem unrelated to the specific topic at hand.

One hypothesis which purports to explain at least partially this difference in agency/citizen perspective has been suggested by James Wilson. He argues that there is a "public-regarding" v. "private-regarding" difference in style, ethos and/or "mentality" which cuts across agency/citizen relations as a difference in class predisposition. Agency members generally may share in the style of upper and middle class individuals who have considerable education, seem to take an enlarged view of the needs of the community, have an enlarged sense of a personal efficacy, a long time perspective, and who, accordingly, possess a large proportion of organizational skills which are exercised through the agency.

However, particularly with respect to transportation issues involving facilities traversing inner city areas, potentially interested citizens may be lower income individuals, having a greater difficulty in "abstracting from concrete experience," having a limited time perspective, who have a low

sense of personal efficacy, are unfamiliar with the requirements for organized endeavor towards the creation of better opportunities for themselves, and who are moved to participate in public events if at all, only on the basis of short-term, narrow threats.

Indeed, for some of the reasons just mentioned, there may be a “difference in perspective” on the part of agency officials and inner-city groups. Yet, there are several difficulties with any explanation for the lack of informational exchange between citizens and officials, at a hearing or otherwise, which focuses exclusively on a class determined difference in breadth of vision as the crucial variable. This is primarily because those in relatively higher classes are precisely those who, because of their geographical location in a metropolitan area and political resources available to them, can most comfortably advocate transportation construction whose harmful impacts affect them least. It is the skills, attributes and values of the middle class which have predominantly shaped the present thrust of transportation policies (primarily, private auto; also, commuter, line-haul rail, and airplane.)

It is generally the residents of the inner city (often, the poor) who bear the highest negative impacts of almost any transportation facility—highway, transit or otherwise. They are not “community-regarding” because a public facility has often disrupted intimate, “private-regarding” aspects of their lives: their already low housing stock; their schools, etc.\(^{36}\)

Another factor often considered more relevant than class as a limiting constraint of the performance of an informing function via a participatory hearing is the rationalist and technical milieu of transportation decision-making. It is said that transportation planners talk in a language all their own, in terms which an average citizen from almost any class can hardly understand. It thus becomes difficult for a citizen group which did desire to understand an agency proposal to offer meaningful criticism or alternative proposals.

Yet, notwithstanding the actual complexity of transportation planning, a lack of experience with technical jargon and concepts may not be as crucial as it may first seem. The fact is that planners are only rarely consulted by the actual decision-makers in a transportation agency.\(^{37}\)

\(^{36}\) It is also relevant to observe that when middle class persons are threatened by narrow, more “private-regarding” impacts (such as an impending low-income housing project in their neighborhood) they too are quite capable of responding with less “breadth of vision” and a limited time-perspective, although their essentially parochial response may be framed in terms of an ostensible, collective “public interest,” given their monopoly of organizational skills/resources.

\(^{37}\) See John Woford, Issues in Urban Transportation Planning, paper prepared for the
Their expertise may be utilized in support/rationalization of a major decision already made, but the information which they generate probably only infrequently contributes to the actual decision process.

A more important function of “technical expertise” in transportation decision-making may be that of providing a political resource to the bureau official who is seeking to minimize the number of influences with which he must contend to get a decision capable of implementation. This point is simply a manifestation of an underlying theme of this analysis that administration is politics and transportation decisions are likewise political. Agency officials are rarely ever “informed” of anything at a public hearing primarily because they have rarely wanted to be exposed to influences which may demand consideration in an organizational decision process already complicated by intense conflicts generated internally and by stresses created externally by actors other than those who are attempting to make their voices heard at a hearing.

A slight divergence is necessary to explain a point often overlooked by advocates of increased “participation.” Those who normatively exhort an agency to be more democratic have only rarely dealt with structural needs generated by the organizational decision apparatus within which officials work and subjectively perceived by an administrator. Students of organization and bureaucracy debate over how one may generally describe the way organizations make decisions.38 It is not my intention to wade through this controversy here. I will simply assume the descriptive validity of an incremental model and list my understanding of a few of its central themes as they operate to limit the capacity of private groups to “inform” or “influence” the decision process.

First, transportation agencies, like other large bureaucracies, are formed to achieve some purpose that cannot be attained without the coordinated efforts of a large number of persons working on different tasks. Yet, the very process of organization creates a number of obstacles preventing efficient coordination. Such constraints are the product of “conflicts of interests”39 which include differences in individual goals and

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39. A substantial number of the ideas conveyed here about bureaucratic incrementalism are taken from Downs, op cit supra, note 13.
perceptions of reality, and of technical limitations on the capacity of officials to acquire and assimilate information. Thus, officials often screen out data which appears adverse to their interests, formulate alternative solutions to problems which tend to prefer their own goals, and develop their own "specialization of information" which, as a concommitant of organizational specialization of function and development of "expertise," tends to narrow perspectives and eliminate alternative solutions which might objectively benefit themselves and the organization in general.

Second, incrementalism rejects a view that decisions by bureaucracies are made by one or even a few persons who establish goals according to an accepted set of valuational priorities, who search out all "relevant" information about all alternatives to a problem, and who evaluate and select from among these alternatives in terms of a "best" or "right" solution per the accepted criteria. Instead, an incremental model posits essentially the conduct of a "marginals" analysis of a limited number of alternatives by a large number of individuals both within and without the organization who generally evaluate alternatives being considered in terms of personal interests and who select a decision or non-decision by reaching consensus among only those absolutely necessary to implement the choice made. Also, given that the costs of searching out alternatives are extremely high, only a limited number of solutions to a problem will be considered by the numerous participants, and the action finally agreed upon will tend to be one of the first considered. In addition the number of consequences considered with respect to each alternative evaluated will tend to be limited.

If these assumptions indeed describe even partly some of the bureaucratic "facts of life," the implications for the citizen who is seeking to inform, influence or be informed by an agency are not very encouraging. Two related propositions may be summarized:

1. If the costs of information acquisition/analysis are high and if the capability to implement a decision is diffusely spread throughout a large number of intra- and extra-organizational decision centers, the overwhelming need for consensus will reinforce the commitment of substantial resources to the reduction of the number of participants involved. Certainly, only the most powerful interests inside and outside the bureaucracy will be represented in the large majority of complex decisions. Those agents without power or influence will be under-represented and underprotected from the adverse impacts of a policy choice.40

40. Amitai Etzioni, supra note 39 at 387, has suggested that an incrementalist assumption of "pluralist" decision-making implies that the object of the bureaucratic game must become that of forging a coalition among only those participants necessary "to win."
2. Given the first proposition, the citizen group seeking information from an agency, whether the request concerns a "technical" aspect of the planning process or information about a significant policy process in being, will face substantial difficulty if he is not recognized as being within the power setting generally involved in agency decisions. Such attempts are often perceived by agency members as attempts of "outside" influences to gain decisional resources, i.e., as initial forays leading possibly to a full-scale invasion of bureau policy territory.\textsuperscript{41} Even if not so perceived, the attempt to get information necessary to communicate effectively with an agency may be ineffective because of the extensive use of sub-formal and personal communications networks which facilitate transmission, alteration and cancellation of messages without public scrutiny. A citizen ignorant of the structure of this informal network, will usually experience that classic feeling of "getting the run around."\textsuperscript{42}

Against this background the "technical expertise" surrounding transportation planning appears in a different light. Without underestimating the difficulty that private groups can have in trying to understand either the technical jargon of the planners or the multifaceted and highly interrelated social issues involved, a primary function of the "technical nature" of the process becomes that of setting boundaries on the numbers of diffuse interests with which the agency must actively interact to achieve a decision.

An alternative to this stalemate of non-dialogue between the agency "experts" and the lay citizenry has been suggested by "advocate planning" groups. Recognizing that "who gets what, when, where, why and how are . . . basic political questions which need to be raised about every allocation of public resources,"\textsuperscript{43} the advocate group would provide professional planning support for competing groups' claims as to what proposal is in the "public interest." They would, it is said, act as technical interpreters, analysts, and proponents of plan to break down the myth of the "unitary plan" drafted by an agency in terms purporting to be self-evident and non-contentious. By placing the arguments and informational sources of the agency under the scrutiny of a counter-planner, bias and hidden value assumptions could be exposed. In essence, this strategy for enhancing private capacity to communicate with and to inform the agency is a strategy for providing private groups with tools for the wield-

\textsuperscript{41} See Downs, \textit{supra} note 13 at 211.
\textsuperscript{42} \textit{Id.} at 113.
\textsuperscript{43} See Davidoff, \textit{The Planner as Advocate}, in Banfield, ed., \textit{supra} note 10 at 544, 555.
ing of influence: "advocacy planning" represents a "repoliticization" of
the planning process.\footnote{44}

However, like other organizations, the advocate planning group has
only limited resources. In choosing how to use these resources it will face
some of the diverse, social and political obstacles faced by the public
agency attempting to interact with citizens with respect to controversial
issues. These will not be discussed in detail here.\footnote{45} However, it is sufficient
to note that in trying to work with the "client" group or groups (indeed,
one significant problem is trying to determine who, among all of the
various groups of people potentially affected and/or interested in a transpor-
tation issue, to choose to apply resources towards) the advocate planner
may very well be perceived not as a group representative of group
values, but as a "manipulator" of the same "ilk" as the public agency.
On the other hand, the counter-planner may be viewed by the agency as
an outsider who is not helping to draft a set of alternative, working
hypotheses to aid in the formulation of better, transportation proposals,
but who is functioning to "rigidify" community resistance to the agency
by fostering an entrenched neighborhood posture which will make recon-
ciliation impossible short of total agency surrender.\footnote{46} Also, the agency
may attempt to obviate the resourcefulness of an advocate group by
questioning not only the representativeness of the client group, but also
the advocate's qualifications/capacity to speak meaningfully for the
clients he represents.\footnote{47}

However, in overall terms, it seems clear that given the organizational
needs of the transportation agencies and the technical milieu of the decision
process, advocacy planning represents one, viable strategy for the
enhancement of private capacity to inform and to influence that process.
Serious issues are raised as to the funding of such a strategy, however.
Foundations and established groups may be relied upon to some extent,
but especially for those lower income groups seeking involvement in the
making of transportation decisions, technical assistance funding by the
government seems a necessity.\footnote{48}

Yet, assuming one favors such increased, citizen-agency technical/political communication, one may question whether the public hear-

\footnote{44. Lisa Peattie, Reflections of an Advocate Planner, in Banfield, ed., supra note 10 at
55.}
\footnote{45. Id.}
\footnote{46. See 66 Columbia L. Rev. 485, 592.}
\footnote{47. See Jowell, supra note 4, at 312.}
\footnote{48. The Boston "Restudy" is planning to spend over $180,000 for "technical assistance"
purposes. See supra note 9 at pp. 2-4, BE-2.}
ing is the best or only technique for achieving it. It is often suggested that the professional planning process is supplanting any fact-finding function performed by the public hearing. Also, new means of "scientific" social research and data collection are becoming available. And, as noted earlier, transportation officials are now legally required to consult with a greater number of agencies and decision centers which ostensibly can represent an increasingly wider range of values.

However, two competing considerations can be raised here. First, it is argued that the kind of "information" which an agency official could find useful, at least "objectively" speaking, is not only intellectual but also political and emotional. The transportation official and/or planner who works predominantly within the confines of large office can more easily overlook (if not purposively disregard) valuational input lodged within the pages of a thick, data/statistics report submitted by a social preference consultant. An agency staff's perception of facts about a proposal might significantly alter if they had to confront, "one-on-one," an earnest, even if not "sophisticated" verbal presentation by a citizens' representative concerning the impacts of a proposed facility. With technical assistance, such presentations might become highly compelling. Transportation decisions do not simply involve data collection and rational conclusion. A psychological, as well as political process is going on.

Second, the increased requirements for consultation and review may have helped somewhat to broaden the range of interests considered by transportation administrators, but it has correspondingly augmented their workload and has generated a specific need for a workable sequencing technique. Sequencing here means essentially coordination of a vast number of major, formal inputs, i.e., reports, reviews, comments, etc. which are now required to be included at varying times during a multi-phased decision process, in order that a decision about a facility can be legally made and executed. This is basically a problem of control by a responsible agency which has become a literal nightmare in transportation.

It is suggested here that a public hearing might be used in support of this control function by providing a formal, public target for the disparate staffs involved to meet. By relating administratively a certain set of inputs to a hearing scheduled for a certain date, and by announcing as part of the agenda that the results of a certain, required review or comment process, at least in working draft form, will be available for consideration at the hearing, the officials primarily responsible for conducting the planning and decision process might gain increased leverage of the difficult problem of insuring that all who are authorized to "comment" do so by a certain, public deadline. Also, if delay is essential (for political reasons
or otherwise) hearings dates can be moved back, but even the minimal explanation which will be necessary may help to focus public attention of the agency's work and help to open the process to public scrutiny. Knowledge of this scrutiny on the part of agency staffs involved may add some necessary "bite" to the target dates set for public release of the various reports.

C. Private information, influence and protection.

On the other side of the coin of administrative needs for information are needs for influence on the parts of private groups with stakes in the outcomes of urban transportation decision-making. This part of the analysis focuses on the public hearing as a participatory device which may or may not support private demands for (i) information about the on-going policy process; (ii) influence on the choices considered by that process; and (iii) protection from adverse impacts brought to bear on certain groups as a result of the way that decisions are made in that process.

1. Initial contact/information

It is a truism that without access to an administrative apparatus, a private agent can have little chance to influence the method or substance of agency decisions. Yet, it has been argued above that incremental decision-making implies that a bureaucracy will limit as much as possible the number of participants in an agency's policy domain and concomitantly, places a premium on extensive use of informal communications networks which are largely beyond public scrutiny.

The transportation administrative process demonstrates, especially in the earlier stages of policy formation, this tendency towards secrecy and reduced participation. One student of the transportation planning process has observed that:

"secrecy has been the hallmark of every transportation report that I have seen—whether involving airport expansion, alternative alignments for a major highway, design details of a segment of an expressway, details of major downtown 'people movers,' transit extensions. The secrecy has been imposed by all levels of government—local, regional, state and federal." 49

The fact that a transportation agency is chartered not simply to provide a service but also to perform a conflict management function within an

49. Wofford, supra note 38, at 4.
allegedly democratic societal framework seems to be lost on the administrator who, intent on keeping from the public information about any policy position tentatively or otherwise being urged by the agency, rationalizes his unwillingness to inform or involve others by suggesting that the decision is highly controversial and the policies governing the decision have yet to be worked out. Yet, politically, it is precisely before a policy is made and during the process of making it that a private group needs information about what issues are being considered.

Thus, a public briefing (not necessarily—at the earlier stages of the planning process,—a full hearing)\(^50\) might perform an important function of formally announcing when an agency is beginning to consider a certain policy issue and provide earlier access for purposes of information, comment and tentative criticism. This type of initial contact could occur in several neighborhoods which are potentially affected by the policy choice and has the advantage of offering an informal means of dialogue which can be conducted by the agency sponsoring a proposal or by an independent body conducting a “multi-modal” planning process. The greater use of these neighborhood briefings by the agency might help to set at the outset the tone of relations between an agency and the citizenry; instead of allowing secrecy to foster suspicion/hostility, dialogue could be used to initiate the process of informing the community about an on-going process of planning for a transportation facility and to begin the arduous task of building consensus.

Also, this type of public exchange as a means of providing community information might supplement and even have significant advantages over the present system of information access: the freedom-of-information act procedures. The prototype, of course, is the Federal act codified in 5 U.S.C. § 552, which was the result of a long struggle supported particularly by the national press which was seeking to open up the administrative process and implement a “people’s right to know.”

Some states have also considered such a regime for its own administrative agencies. Thus, in Massachusetts, Governor Sargent has issued a “Freedom of Information” Executive Order.\(^51\) This directive essentially parallels the federal regime by generally requiring disclosure of information and then listing several “specific” exemptions which include, among others:

—information “related solely to the internal personnel rules and practices of said agency.”

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50. A public, citizen-agency exchange can take several forms. See infra, pp. 57 at seq.
—inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subparagraph shall not apply to reasonably completed factual studies or reports on which the development of such policy positions may be based."

Yet, the implications of this kind of system for the average citizen are clear. The burden is on him to go to the agency with a fairly specific document in mind, request it, and very possibly face delay and ultimate refusal. Then, notwithstanding the usual provision that "the burden is on the agency" to sustain its refusal or to explain its application of an exemption to a request for information, the persistant citizen faces the arduous road of administrative appeal and/or judicial review.

Also, the kinds of information exempted from disclosure as delineated above, are most often the very kinds of information which an interested citizen would need (i) to understand even partly the formal communications practices of an agency (much less the informal network which carries most of the significant "policy" dialogue of the agency) and/or (ii) to become informed of a policy process in being, much less to try to influence that process before it results in a decision.

On the federal level the inter- and intra-agency memoranda exemption was included because agencies argued and Congress agreed that

"it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. . .the efficiency of Government would be greatly hampered if. . .Government agencies were prematurely forced to operate in a fishbowl." 53

Yet, citizens and students like myself who would argue that the need is for more information about and private involvement in the policy-making process are unavoidably suggesting that more of the democratic "fishbowl" must be forced upon the administrative process.

Thus, the institutional design problem becomes clear. How are large bureaucracies which work out critical societal policies and which value secrecy of process to function in a society which values democratic participation in that process? It seems clear that the freedom of information procedure, particularly those with exemptions such as that relating to internal policy posturing, even if they are better drafted, 54 must necessar-

52. See Davis, supra note 7 at Chapter 3A.
53. See Davis, supra note 7 at 156.
54. For example, the Mass. Executive order deletes reference to the "party in litigation"
ily work to prevent disclosure of important information about the making of policy. The citizen will still have to rely on the ultimate voluntary disclosure to the public of this information, at a time basically chosen by the agency.

However, a requirement that an agency which is considering critical policy choices concerning a transportation facility must go out to the communities and formally announce at several "briefings" (however informally conducted given proper notice) that it was considering a major policy which potentially affected that community, would at least initiate the process of alerting those citizens who would care about the making of decisions to become involved and to urge others to join with them. Such initial contact and continuing information "briefings" are absolutely necessary for any meaningful citizen-agency dialogue at a later hearing.

Two issues can be mentioned at this point. One is that of "technical assistance" to groups who would desire to participate actively in a planning process. This has been mentioned above. It may be noted here that the "briefing" takes on an important role in alerting the citizens that a certain transportation planning process is beginning and urging those citizens who would desire to become involved to begin the task of persuading others to join with them so that they can demonstrate the requisite representativeness for receiving technical assistance funds.

Second, an issue which relates not just to initial contacts between an agency and citizens but to all public gatherings of any kind is that of sufficient notice. It has become clear that the agency should no longer rely simply on a few notices printed in small type and published twice in a newspaper. There must be an effort to reach local communities, particularly those who speak in foreign languages, by the use of newspapers and other media which reach substantial parts of these populations affected by a proposed facility. More importantly the agency must assume the responsibility of informing agencies and public and private groups who have indicated a desire to receive notice (such as, for example, by placing themselves on a mailing list maintained by the agency) or who "by nature of their function, interest or responsibility," the agency "knows or be-

language of the Federal Act's exemption of internal memoranda (5 U.S.C. § 552(b) (5)), which had the result of creating conflict between the common law of discovery, which balanced private interests in disclosure with interests in confidentiality, and the Act's general declaration that "any person" shall have disclosure unless "specifically" exempted.) See Davis, supra note 7 at § 3A.21. Also, the Mass. exemption allows disclosure of factual reports and studies leading to policy positions although the usual interpretative issues as to what reports are "factual" are considerable.
lies might be interested in or affected by the proposal." The notices should also be specific in advising the public as to what subjects shall be considered at the meeting and when and where relevant documents might be available for inspection and copying prior to the meeting.

In addition to performing an initial contact and continuing informational function, participatory devices conceivably might serve two general purposes. We will outline these here and then discuss to what extent the present hearings process has fulfilled these objectives.

2. Collaboration/influence

Citizen-agency exchange mechanisms might foster collaboration and private influence development. This is the function which the courts have generally acknowledged for the present “public hearing” (amazingly, the same hearing has also been expected to fulfill initial contact and information needs). Procedures used, however, although all “formal”, must include not only the present “town hall” type of hearing but also relatively more informal techniques such as the “community workshop” or conference.

Assuming for the moment a planning situation where it has been agreed that some kind of transportation facility is needed in a loosely defined sub-area of an urban region, the primary objectives of these participatory exchanges would be to involve the various, public and private actors concerned in the on-going process of drafting “alternative program packages” for that sub-area. During this process the interests involved might be able to achieve some consensus on the proposal; however, divergences based on conflicting values and needs would probably also develop, in which case alternative drafts might be advocated.

It is during such collaborations that private groups could attempt to organize and exert influence on the drafting process by using every technical and other resource available, including advocacy planning strategies, to obviate effectively the past practices of many public agencies who

55. See PPM 20-8, supra note 21, §§ 5(a) and 8(a).
56. See infra p. 53 for a brief discussion of the scalar nature of urban transportation planning.
57. As conceived by the Boston Transportation Review, alternative proposals will be considered in terms of “program packages” which are to include “transportation elements” (e.g., expressways, rapid transit, arterial improvements, feeder transit, local circulation, etc.) and also a “wide range of complementary elements designed to alleviate negative impacts and exploit opportunities to improve the quality of life in impacted communities (e.g., economic development, replacement housing, improved community facilities)”. See Boston Transportation Planning Review, supra note 9 at p. II-2.
offered "alternative" plans at a "hearing" held late in the process, which alternatives were ill-conceived "straw men" in light of a favored proposal already committed to by the agency. Citizen influence during this drafting process which functions to surface real alternatives for public debate is absolutely necessary to have any meaningful "citizen participation" in terms of either a later, formal hearing or the transportation planning process as a whole.

3. Private protection function.

However, as this presumably open drafting process moved into its final iterations, when the time for choice by responsible public officials draws closer, and as the alternative proposals for decision become highly specific and the various groups involved can finally see which of these alternatives have the most advantageous and disadvantageous impacts on their interests, all of these actors, but especially those who have been most disadvantaged in the prior planning process, would demand that the process of final decision provide for full and fair consideration of the arguments supporting the alternative drafts developed, and the impacts and costs of each. Even assuming a prior, collaborative process of developing working proposals, it is argued here that there is a need for a participatory mechanism which can perform a third function of protecting the interests involved by guaranteeing as much as is institutionally and politically possible that they have had more than just "ritual" access to the final decision-makers. The failure to provide for such protection via an open and formal participatory forum, conducted in the final phase prior to decision, may move certain groups to attempt a veto strategy, an experience costly for all the parties and a strategy less likely to occur or to be successful in the face of a real and visibly fair hearing which thoroughly examined all the competing considerations with respect to a transportation policy decision.

One problem is how to design this "neutral" protective process. A lawyer might recommend the use of "procedural due process" techniques such as an adjudicatory hearing. Indeed, the central impulse militating in favor of the use of an adjudicatory technique of final decision is that adjudication guarantees a distinctive form of participation in the decision process by the affected parties: that of presentation of reasoned argument and proof to an impartial decision-maker who is disciplined by the obligation for reasoned application to the issues at hand of premises of general applicability appealed to by the parties.\(^{58}\)

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However, Professor Fuller has argued that the fact that adjudication must meet a test of rationality not applied to other decisional techniques is at once both its strength (and appeal to parties seeking a guaranteed, protective form of access) and its weakness as a form of social decision. Its potential weakness becomes manifest when an obligation of "reasoned decision" is imposed on a tribunal which must decide highly complex, diverse, "polycentric" issues which include situations involving interdependent points of influence where judgment on one set of issues affects judgment on another complex set, and so on. Here, there are very few, general premises applicable to like, future cases which can be applied by the deciding tribunal. Clearly, transportation issues involve a high degree of "polycentricity" and to impose on officials an adjudicatory mechanism as the decision process would be to deny the complex adjustments and negotiation which must go on before a transportation facility affecting a myriad of diverse interests can be built.

However, to suggest that adjudication as the exclusive process of decision would be inappropriate is not to argue that certain, adversary techniques could not be employed at a public hearing to expose errors of fact and judgment, to clarify assumptions and value choices implied in a transportation proposal, to recognize impacts of alternative plans for different groups, and in general, to add a healthy, "disciplinary" effect on the presentation of argument and the ultimate process of decision. Hearings procedures which fostered a final, thorough, public scrutiny of the arguments supporting various proposals could serve to aid the final decision maker in evaluating the arguments and (politically) the kinds of groups in support of each and might force him to consider the various impacts involved. It would also provide a final, major formal "event" for the various parties to pull out the stops, generate as much support for their view as possible, and thus place as much pressure on the deciding officials as they can muster. In addition, it may serve to force opposing groups to observe publicly the possible impacts of their own view on others opposed to it.

Specific issues of design of a protective hearing are considered in Section IV.

4. Summary: the current "public hearing".

It is the position of this student that the present hearings process has failed to perform meaningfully any of the functions outlined above. The essential reasons for this dysfunction are summarized here.

a. Incremental decision-making implies that constant effort will be made by an agency responsible for a certain policy area to reduce the number of participants in a given decision situation to the lowest number deemed necessary to reach consensus and implement a decision. Certainly, especially given the fragmented nature of transportation administration, private groups historically outside the decision structure will not voluntarily be invited into that process. This reveals the primary structural rationale for the failure of the public hearing: a transportation agency which itself conducts a hearing perceives no advantage in making it work; indeed, it can see only possible, political disadvantage. Therefore, the hearing generally will not be anything other than a ritualistic charade. The only way that a private group can possibly make a hearing or any other access mechanism meaningful is to get the political currency sufficient literally to invade the bureau's power setting to demand that it must be considered during the on-going process if any decision made is to be implemented successfully.

Incremental decision-making places a premium on secrecy of communication in the internal agency political process. Information about the technical planning process as well as tentative policy positions being considered is an absolute essential if the private group is ever to play a useful role in "informing" an agency, much less influencing it. However, lower income groups and indeed, middle class citizens, find it extremely difficult to pierce bureaucratic secrecy via such mechanisms as the freedom of information technique. Since the "public hearing" is often the first occasion when the sponsoring modal agency clearly reveals its posture with respect to a proposal, prior information requisite for meaningful criticism and dialogue is lacking.

c. The closed nature of the planning process augments the incapacity of especially lower income, inner city residents to engage in the "middle-class" game of political influence wielding. Conversely, the incapacity to exert influence perpetuates the closed nature of the planning process. An analysis which concludes that there is a basic lack of community-regarding "vision" on the part of the lower class is not persuasive, in light of the fact that urban policies including those concerning transportation facility location and design have most disadvantaged inner city residents by disrupting their community life, preventing them from having access to any city-wide community experience, and forcing them even more to dwell on the parochial, "private-regarding" needs of daily
survival. These often predominating individual needs make interacting with an agency in public, formal events such as the hearing almost impossible.

d. Our urban technology is manifest by a broad range of highly technical and complex interrelationships which make policy making increasingly the domain of the "experts." However, this technical/expert character of transportation planning also serves the crucial political function of making the decision process increasingly invisible, thus limiting the range of influences which the agency must actively seek to reconcile. The use of political and planning advocates and other forms of "technical assistance", although not without substantial problems, may be the only mechanism which can provide inner city residents with the political resources necessary to force meaningful dialogue with public agencies and to provide involvement in the ongoing planning process which is essential if devices such as the hearings process are to be more than just charade.

e. Aside from their technical armour, any public transportation agency has several other resources which give it the distinct advantage over a private group in the influence game. The agency is a highly centralized organization driving to achieve a specific goal: implementation of a favored transportation proposal drafted almost exclusively by it and already acceptable to a number of powerful actors who often participate with low visibility in the bureau’s power setting. Also, the agency has the power to regulate to some extent the timing of the public exposure of such a plan. The agency suggests that the hearing is held late in the process so that something “tangible” can be offered for public discussion. Yet, even though concreteness for discussion purposes can be achieved by a range of communications techniques including use of sketch designs, graphic displays, slide presentations, etc., secrecy is maintained so that the process of obtaining “tangibility” is the process of becoming committed to a preferred alternative. Then, at a hearing, the agency sets up its own charts and diagrams arguing the necessity of this alternative (possibly, in some cases offering a few other proposals, which however, are considered "straw men" by the agency staff). The agency itself conducts the hearing. There are no "impartial" hearings officers who might lend a sense of fairness and opportunity to the hearing atmosphere.

f. From the citizen perspective, such formalized “access” to the administrative process becomes a nullity. There have been few, if any, previous, informal, “working” contacts with agency planners/decision-makers. The formal hearing is held too late for the expression of citizen views to affect the completed proposal thrust before the public. Secrecy has bred hostility and suspicion and general misunderstanding as to what effect, legal or otherwise, the hearing reasonably might have on the deci-
sion process. There is the feeling that no matter what the citizens say, there can be no real adjustments to the proposal. The form of plan presentation makes possible only a yes/no comment for the average citizen. And, if that citizen is adversely affected by the proposal, and given that he has nothing to say prior to the hearing, the great impulse in this confrontation with a panoply of agency resources is to register a "no" "vote." Essentially, the closed nature of the decision process has forced the hearing to become a vehicle for a veto strategy. Citizen organizers feel, and justifiably, that at such a "hearing," only an overwhelmingly negative expression of community sentiment can at all operate to alter agency plans. The all too familiar result of this experience is either some after-thought "tinkering at the margins" or, as sometimes happens, the scrapping of the entire, prior process and the development of another process, restudy, etc., etc.

IV. RECOMMENDATION: CITIZEN ACCESS MECHANISMS FOR TRANSPORTATION PLANNING AND DECISION-MAKING

In this concluding section there is offered for discussion a working outline of participatory mechanisms for a "sub-area" transportation planning process. It should be emphasized that I am not a transportation planner and claim no special competence in that field. My general concern has been to take a broad look at transportation administration and to try to strike a balance between needs for an effective decision process and needs for real points of entry for private citizens who seek to inform and to influence that process.

First, there are listed without exegesis the varying kinds of participatory devices which should be employed in the planning process which is concerned about citizen access. Second, there is a discussion of some of the definitions and concepts assumed with respect to the transportation decision process which these mechanisms are designed to support. Finally, there are offered comments and arguments in support of the specific devices suggested.
A. THE MODEL: CITIZEN ACCESS MECHANISMS FOR A “SUB-AREA” DECISION PROCESS.

I. Primary Planning Phase.
   A. Initial contact and information.
      1. Briefings.
      2. Official notices.
   B. Collaboration: the “working draft” process.
      1. Study committee meetings.
      2. Community workshops.
      3. Public meetings.
      4. Publication of tentative “final drafts.”

II. State DOT Recommendation/Evaluation/Decision Phase.
   A. Agency review and comment processes.††
      1. “Clearinghouse” reviews (e.g., “A-95”).
      2. Environmental reviews (federal “§4(f)” and other federal, state reviews where appropriate).
   B. Protective public hearing.
      1. Pre-hearing procedures.
         a. Selection of impartial tribunal; staffing.
         b. Notice process.
         c. Invitation for submission of written briefs/supporting documentation.
      2. Hearings procedures.
         a. Testimony, argument and tribunal questioning.
         b. Record notice.
         c. Argument/rebuttal phases.
      4. Review/comment/rebuttal by parties to hearing.
      5. Submission of items 3 and 4 to Secretary.
   C. Decision by State Secretary of Transportation.

** including statement of findings, evaluation of alternatives considered, analysis of arguments, reasons supporting proposal chosen and reasons for rejection of other alternatives.
†† where required or appropriate and not already in process.
B. Assumptions Concerning the Transportation Planning Decision Process.

1. A scalar process.\textsuperscript{61}

Transportation planning operates on several scales. Planning effectively at one level demands that certain, key decisions be made at a "higher" level. Conversely, decisions made at one level place critical constraints on the planning process which follows at a more specific scale.

Thus, one such scale is the "systems" level which considers metropolitan and regional needs, including intercity transportation coordination. A major problem with this scale is that its long range and general nature has made it relatively inaccessible to substantive citizen involvement at the neighborhood level.

A second scale is that of the "sub-area". Involving a foreseeable time frame of 5-10 years, sub-area planning has a greater specificity, immediacy and reality than systems planning. It is here that critical, political decisions are made in terms of social impacts and inter-modal relationships concerning the need for a facility and its general location within a particular sub-area. It is at this level of intermediate generality that political accommodations, negotiations and consensus are possible and necessary. It is here that "participation" is essential to insure that community and neighborhood valuations and interests are represented in the process of determining need and drafting alternative proposals for the type of facility and its location.

Yet, it is precisely at this scale that citizen involvement/influence is often most lacking. It seems that it is only when an administrative process has made substantial commitments to a tangible modal proposal in a fairly specific location that citizens begin to respond to a perceived threat to their life in their neighborhood. It is at this "project" level where (given decisions on need and location) the planning process moves to consider specific designs, that private groups are moved to react, often by using protest and veto tactics. Yet, it is at this design scale that constructive "citizen participation" with respect to need/location choices has been mooted, with the only options being either "tinkering at the margins" or complete reversal and reworking of the results of the sub-area process.\textsuperscript{62}

\textsuperscript{61} Many of the planning concepts listed here are taken from a discussion with Mr. John Culp, Transportation Consultant, Justin Gray Associates, Cambridge, Mass.

\textsuperscript{62} Effective participation at the project level should involve bargaining with respect to alternative program packages which consider (i) designs of a given, modal facility which least harm the communities affected; and (ii) compensation in terms of "joint development" and community improvement programs.
The model offered for discussion here assumes that the planning process is just beginning at the sub-area level, with sub-areas having been loosely defined for purposes of further analysis by a previous systems study.

2. **A sequential process.**

The process is also "sequential". That is, it not only consists of data collection, analysis, development of alternatives, and selection of one for specific design and construction (the actual "planning" phase now considered by transportation regulations and PPM’s). There is also a pre-planning phase which grapples with several hard, political questions: Who are to be the planners? What are their powers and functions (advisers, negotiators, advocates, arbitrators)? What are the clients' powers? What kinds of communications techniques will be employed?

The model considered here assumes that there will be planners not only for the agencies involved but also for private groups who can demonstrate that they are representative of a substantial sector of community sentiment and who receive technical assistance. These planning groups will assist in the "technical"/political advocacy process which will characterize the model. It is assumed that the various clients involved will offer several, alternative proposals to a public decision-maker for final, governmental decision.

3. **The institutional framework.**

Issues relating to the organization of the decision as well as the planning process must be considered. It will be assumed here that instead of the fragmented, "modal" responsibility for transportation decisions which characterizes the present state and local agency structure, the decision process has been reorganized so that some public official has the powers necessary to legitimate his political accountability for the making of major, transportation policy choices. This essentially means that he must have at least the following powers:

- direct responsibility for strategic analysis and planning
- approval of all budget submissions to the legislature
- approval of major capital investments, whether or not they require legislative approval
- approval of all major contracts
- approval of all non-financial as well as financial submissions to the legislature.
—approval of all applications for federal assistance
—approval of all labor-management agreements

This organization might be achieved by strengthening present metropolitan institutions to the point of creating a strong, metropolitan legislature and executive. Alternatively, if a "metro" strategy is politically infeasible at the present time, state government might be reinvigorated and centralized.

Thus, state government in Massachusetts is presently undergoing a reorganization whereby most state agencies are being brought within nine Executive Offices. These will be headed by Secretaries appointed by the Governor and collectively constituting a Governor's Cabinet. One of these new offices will be the Executive Office of Transportation and Construction who will have administrative, budgetary and planning responsibility for "multi-modal" and "multi-valued" transportation policy making for the state. Within his Office will be placed the "modal" administrations which presently function in Massachusetts.

The model discussed here assumes that such a State Secretary shall make the key decisions coming out a sub-area planning process conducted by his office.

4. Participatory strategy.

Another assumption made here is that in light of the failures of the past, a new effort is being made to involve citizens in the process of decision. The approach will no longer be that of orchestrating "ritual" devices designed to "co-opt" affected neighborhoods into non-resistance to construction of facilities planned solely by a modal agency. Yet, given the diverse, regional and at times, unidentifiable " clientele" to be served by a transportation facility if built, the strategy will not be that of allowing neighborhoods "veto" or "self-determination" with respect to facilities affecting their communities.

Instead, there will be an approach which accepts the need for informed and active contribution by citizens to the kinds of proposals considered, and the need for what may be called equity—the compensation to the greatest extent possible of those who must inevitably suffer harm from facility construction. As unreal as it may seem in 1971, the assumption made here is that an "open" process is truly desired.

63. See REPORT, supra note 1 at p. 8.
C. Specific Participatory Mechanisms.

There are a wide variety of communications techniques available to implement a participatory process highlighted above. Examples of these are listed and discussed here, in an order corresponding to the model outlined in sub-section A above.

1. **Briefings.** These could be held in several neighborhoods within a delineated sub-area. Implying an informal and essentially one-way flow of information from those conducting the planning process (here, a central “study committee”) to those citizens, organized or unorganized, who attend the briefing, this device would serve an “initial contact” function of announcing that sub-areas had been loosely defined for purposes of further study and that a sub-area planning process potentially affecting that community was beginning. For purposes of concrete discussion and impact, graphic displays might be displayed to demonstrate that if analysis supports need for a transportation facility, such projects might take a wide variety of forms in various parts of the sub-area. Questions and comments might be taken and if necessary, forwarded to the central study committee. Information about procedures for applying for technical assistance would be made available. Citizens would be advised of telephone numbers to call to reach members of the study staff who would be available on an informal basis to discuss the status of the process. Participation would be urged.

2. **Official notices.** “Formal” or legal notice not already forwarded might be sent to those federal, state and local agencies and officials who may be concerned with sub-area planning. Also, notice would be sent to those private persons and groups who had previously requested that they be placed on the publicized mailing list maintained by the State Department of Transportation (StateDOT) for issuance of notices/reports. Notice would also be published in various communities via local media.

3. **Committee Meetings.** It is during the on-going “working” meetings of the central study committees that the “collaboration and influence” function will be performed, if at all. It is in this forum that much of the essential work will go on: evaluative criteria are refined, standards and goals are set, facility needs are determined, “sketch plans” are developed, alternative proposals are drafted and debated.

As noted earlier the Boston Transportation Planning Review is now attempting to implement an extremely innovative (and, some say, unworkable) participatory structure, which consists of a “Steering Group” (the “executive” committee of the study, consisting of representatives of the concerned state agencies, cities and towns, and private groups—presently about 45 in number) and a “Working Committee” which was created at the suggestion of the Steering Group, which consists
of selected representatives from that Group, and which is to work intensively with the study consultant staff and with the various planning groups who support private citizens to draft “working documents” for consideration and debate by the Steering Group.

The State Secretary of Transportation, as indicated above, will make the final decisions emanating from the study. However, he has agreed to abide by any consensus that is achieved by the review process. Where significant disagreement is experienced, he will give full consideration to alternative proposals advanced.

4. Community workshops. Another forum to be used in Boston will be a series of workshops generally to be conducted by the Steering Group or its representatives in various communities affected by proposed facilities. These “on-site” forums are designed to provide continuing interaction between the central study staff and various citizens groups concerned with the results of the study.

5. Public meetings. As used here this forum would be more formal than briefings, workshops or committee meetings, yet less formal than a full “protective” hearing. It would serve a “benchmark” function of registering consensus and conflict and surveying the range of interests involved as the study reached key decision points in a multi-phased process leading to a final, sub-area decision on need for a facility. It could be held in several, major communities to arouse direct response to the choices to be made.

6. The protective public hearing. This forum is designed to be the final and most formal citizen entry mechanism in the sub-area decision process. Taking place during the final iterations of the study just prior to the Secretary’s decision, when the stakes became fairly clear to all concerned, this hearing would serve a protective function of offering the public one set of impartial procedures for a searching examination of alternative proposals coming out of the study process.

As noted earlier such a hearing would not be adjudication—there are no “judges” deciding a “concrete case” on the basis of “principles of law” accepted by all the parties. The transportation issues facing the tribunal would be diverse, interrelated policy issues for which there are no, single “right” answers. However, like all decisional procedures which are perceived as being “fair” by the affected parties, an impartial, “record” hearing would offer a guaranteed relationship between all participants and the decision-maker. This relationship would in our case consist of the following:

—the adversaries would have equal access to a tribunal which had not made up its mind prior to the hearing, but which, indeed, was providing a public opportunity for all participants to try to persuade it that one
proposal was more "in the public interest" than another.

—the tribunal would provide a public, political decision-maker with an impartial evaluation of the alternatives considered at the hearing, their assessment of the values underlying each and the impacts on various groups of each.

No procedures for decision can ever guarantee a "right" or "good" decision, especially when the choices to be made are visibly political policy choices for which there are more than one answer to the issues at hand. Yet, some procedures which are deemed "fair" will probably be demanded especially by those who have in the past resorted to extra-process veto tactics to get their points of view before public officials. It is argued here that adversary procedures could be employed so as not to restrict a decision-maker in terms of the kinds of variables he considers, but instead, to insure that he considers a wide range of values never before fully accepted as necessary to a good decision.

Several questions may be raised. First, who is to be the tribunal? My suggestion is that it not be members of the sub-area planning process and that it not be officials or staff to officials involved in the transportation administrative structure. Certainly, it should not be the Secretary himself; to so provide might lock in a political decision-maker who needs freedom to maneuver under tremendous and conflicting pressures from various influence centers. (Such a process would seem to make a politician a "judge" over a process which is inherently unsuited for adjudication). The tribunal should be a group of five or more citizens who are publicly recognized as being capable of impartiality and who are persons whom the Secretary trusts and respects. This hearing board would serve essentially as "staff" to the Secretary, but public staff accessible to affected parties and literally asking those parties to speak to it and to influence it.

Second, what kinds of adversary procedures should be employed? It is suggested here that some of the techniques used in appellate judicial advocacy are relevant. The tribunal could invite written briefs which the board and its staff could examine in preparation for questioning of oralists at the hearing. Invitations could be sent to federal and state agencies responsible for the many review and comment processes which must be sequenced properly into the decision process.

At an initial phase of the hearing, the tribunal could hear oral argument over a period of one, two, three days, etc. It would take any information submitted to it by citizens. A public record would be developed which would be available for inspection and copying. The tribunal would question the witnesses when it so desired. Although it would rely primarily on argumentation, it could, if deemed absolutely necessary, allow
cross-examination where "hard," historical "facts" significant to an alternative proposal were in substantial dispute.

During an interim recess, e.g., 30-45 days, the board and its staff could begin the arduous task of sifting through the argument/documentation with respect to alternatives considered at the hearing. If necessary, it could invite rebuttal argument prior to adjournment.

The tribunal would then draft its recommendation/analysis. The public record made at the hearings would be the exclusive basis for the tribunal's analysis. Such a record proceeding, unlike the more "freewheeling" legislative committee hearing, is essential to insure that the recommending board remain free from "ex parte," secret influences which pervert public confidence in the protection offered by this procedure—its basic rationale.

Finally, what kind of political effect would these procedures have on the political decision process? The tribunal may very well not reach consensus on any one proposal. Their analysis, however, would force the Secretary to consider the arguments publicly made in support of the various alternatives and the impacts of each plan on various sectors of the community. If by some chance the board did reach consensus on a "best" alternative, the Secretary would not necessarily be locked into that option, although, given the stature of the tribunal’s analysis, he would be compelled at least to contend publicly with it if he should choose to reject their recommendation.

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This essay has considered the public hearings process as a device for the attainment of an open, participatory analysis of real alternatives for major, transportation policy decisions. It is argued that the kind of process recommended here is essential if such a goal is ever to be achieved.
GOVERNMENT REGULATION IN CANADIAN CIVIL AVIATION

BY HUGH W. SILVERMAN*

Introduction

Transportation in Canada is under the jurisdiction of the federal and provincial governments, and this split-jurisdiction is of itself a problem when making policy and plans. The efforts of the national federal government in the field of air transportation, which, unlike other aspects of transportation is wholly within federal jurisdiction, to set policy, guide and administer air transportation must be viewed in the special setting of Canada: a large country, sparsely settled, with a national airline which is government controlled and sponsored, and a strong inheritance of British tradition represented by a parliamentary system of government which on the whole manages to avoid the pitfalls and vagaries of a manipulated government (absent the visible lobbyist, and to-the-victor-go-the spoils approach); and finally, add to that picture a heritage of approbation for a national transportation system as a unifying force for all of Canada to withstand the pressures and the pull to the south (it was said that when the C.P.R. was laid out as a national railroad it was two streaks of rust which made Canada into one nation); in the second half of the twentieth century it can be said that Trans-Canada Airlines (now called Air Canada) replaced the C.P.R. as a unifying national force.

The role of the Canadian government in its control and regulation of civil aviation in Canada is revealed in the statutory history surrounding Canadian civil aviation.

Background

In 1931 the Judicial Committee of the Privy Council in the Aeronautics case held “that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion”.  

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1. This study focuses in the main upon government regulation of commercial passenger air carriers up to 1966 which is the date when the reports known as Canadian Railway and Transport Cases (C.R.T.C.) ceased publication with volume number 85. Nevertheless reference is made to some of the recent activities of the Air Transport Committee. A further study of recent decisions and activities of the Air Transport Committee is planned for publication. Generally see, Martial, Government Control of Aviation In Canada, unpublished thesis, Institute of International Air Law, McGill University, Montreal, 1953.

When these words were uttered by Lord Sankey he could not possibly have foreseen their far-reaching effect; and what is puzzling is the strong emphasis of the Judicial Committee placed upon the treaty-making power of the federal government.

Lord Sankey delves into history and informs us that after the 1914-18 war the allied powers (including Canada) signed a convention for the regulation of aerial navigation, dated October 13, 1919, and this "was ratified by His Majesty on behalf of the British Empire on June 1, 1922". The result is that,

"With a view to performing her obligations as part of the British Empire under this convention, which was then in course of preparation, the Parliament of Canada enacted the Air Board Act, c. 11 of the Statutes of Canada, 1919 (1st session), which with an amendment thereto, was consolidated in the Revised Statutes of Canada, 1927, as c. 43, under the title the Aeronautics Act. It is to be noted, however, that the Act does not by reason of its reproduction in the Revised Statutes take effect as a new law. The Governor General in Council, on December 31, 1919, pursuant to the Air Board Act, issued detailed "Air Regulations" which, with certain amendments, are now in force. By the National Defense Act, 1922, the Minister of National Defense thereafter exercised the duties and functions of the Air Board.

By these statutes and the Air Regulations, and the amendments thereto, provision is made for the regulation and control in a general and comprehensive way of aerial navigation in Canada, and over the territorial waters thereof. In particular, s. 4 of the Aeronautics Act purports to give the Minister of National Defense a general power to regulate and control, subject to approval by the Governor in Council (with statutory force and under the sanction of penalties on summary conviction), aerial navigation over Canada and her territorial waters, including power to regulate the licensing of pilots, aircraft, aerodromes and commercial services; the conditions under which aircraft may be used for goods, mails and passengers, or their carriage over any part of Canada; the prohibition (absolute or conditional) of flying over prescribed areas; aerial routes, and provision for safe and proper flying."

Under the provisions of The British North American Act, 1867 (hereinafter called the B.N.A. act) sections 91 and 92, legislative powers are

3. Ibid., p. 63.
4. Ibid.
distributed between the federal and provincial governments, and as expected the provincial governments argued that aerial navigation was within their domain because it falls within property and civil rights and is a matter of merely local and private nature within the provinces. The federal government relied upon the introductory words to Section 91, "peace, order and good government" and the provisions dealing with regulation of trade and commerce, postal services, beacons, and navigation and shipping.

Lord Sankey outlines the obligations which Canada, as part of the British Empire, undertook in the aerial navigation convention; and some of these are — Canada agreed not to permit over-flights except by aircraft of contracting nations; registration of Canadian aircraft; notification to contracting states of prohibited areas; and many other provisions governing flying.

He concludes that the federal government has exclusive jurisdiction over this area because under Section 132 of the B.N.A. Act, Canada "as part of the British Empire" has all the powers necessary to perform her obligations to foreign countries "arising under treaties between the Empire and such foreign countries", and the convention "covers almost every conceivable matter relating to aerial navigation," and also having regard to Section 91, items 2, 5 and 7 (military and naval services), and the peace, order and good government clause; and with almost prophetic words he says:

"Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion."

As a concomitant of government licensing of commercial passenger air carriers, consideration should be given to airports and their control by government; hence, when a local municipality, relying upon a provincial statute empowering it to pass bylaws for licensing, regulation and prohibiting the erection of aerodromes, passed such a bylaw it was struck down in Johannesson v. Rural Municipality of West St. Paul by the Supreme Court of Canada which reiterated the views of the Privy Council that the

5. Items 13 and 16 of Section 92, B.N.A. Act 1867.
6. Items 2, 5, 9 and 10, Section 91, B.N.A. Act 1867.
7. Ibid., pp. 74-76.
8. Ibid., pp. 64, 77.
9. Ibid., pp. 77.
whole field of aerial navigation belongs to the federal government. The court says that the field has been occupied by the Dominion with the enactment of the Aeronautics Act; and although the international 1919 Aviation Convention was denounced by Canada in 1947, Canada became a party in 1944 to the Chicago Convention, hence the Dominion is still active in the aeronautics area. The court states that air navigation is a matter of national importance and concern and falls within the peace, order and good government language of section 91 of the B.N.A. Act.

Estey, J. analyses air navigation, and says that the aerodrome is the place for taking off and landing, hence it is an essential aspect of air navigation and aeronautics.

Since the federal government, Locke J. says, has the power to prescribe aerial routes, it can also prescribe the places for landing and takeoff. He makes it clear that by its nature and its development aeronautics is a matter for national concern when he says:

“...There has been since the First World War an immense development in the use of aircraft flying between the various Provinces of Canada and between Canada and other countries. There is a very large passenger traffic between the Provinces and to and from foreign countries, and a very considerable volume of freight traffic not only between the settled portions of the country but between those areas and the northern part of Canada, and planes are extensively used in the carriage of mails. That this traffic will increase greatly in volume and extent is undoubted. While the largest activity in the carrying of passengers and mails east and west is in the hands of a Government-controlled company, private companies carry on large operations, particularly between the settled parts of the country and the north and mails are carried by some of these lines. The maintenance and extension of this traffic, particularly to the north, is essential to the opening up of the country and the development of the resources of the nation. It requires merely a statement of these well-recognized facts to demonstrate that the field of aeronautics is one which concerns the country as a whole."

From Johannesson we can conclude that local authorities, be they provincial or municipal, cannot pass legislation or regulations in the aeronautics field; hence, even a zoning bylaw (ordinarily the subject of local legislation), cannot supersede federal legislation or invade the field—and in Johannesson that was one of the contentions for the local

11. Ibid., p. 131 (C.R.T.C.).
municipality i.e. that the bylaw was only a zoning bylaw.\footnote{11.1}

Parliament authorized the Governor in Council, giving it unlimited discretion, under the provisions of the Department of Transport Act\footnote{12} to pass regulations for the management, maintenance and use and protection of property under the control of the Minister of Transport; and accordingly at a civil airport which is the property of the Crown in the right of Canada, nobody can carry on a commercial business in contravention of regulations made by the Governor in Council.\footnote{13} Such regulations are valid and effective notwithstanding the provisions of the Aeronautics Act\footnote{13.1} which give the Minister the right to make regulations for the control of air navigation which includes licensing, inspection and regulation of aerodromes—it being the intent, as the Manitoba Court of Appeal has said, that the Aeronautics Act “rather than dealing specifically with airports themselves, their operations, and management . . . deals primarily with the mechanics of flying and the conditions under which aircraft may be operated”.\footnote{14}

\footnote{11.1}{The federal government owns and operates the major Canadian public airports, and in 1968 it disclaimed the right to land use control in the vicinity of airports, except with respect to the height of structures: Rosevear, \textit{Noise in the vicinity of Airports and Sonic Boom}, (1969) 17 Chitty’s L. J. 3, 5. Land use control adjacent to airports is a function of the provincial and municipal governments (see, The Planning Act, R.S.O. 1970, c. 349, sections 29, 35, 38). The Airports Act of the Province of Ontario, R.S.O. 1970, c. 17, permits the province to acquire, lease, operate, maintain and establish airports in Ontario; and in fact the Province of Ontario, using the services of White River Air Services Limited, operates the norOntario airline serving Timmins, Sudbury and Sault Ste. Marie. In the United States all commercial air carriers, pursuant to section 401 of the Federal Aviation Act of 1958, \textit{infra}, footnote 126, must have a certificate issued by the Civil Aeronautics Board, which is declared in section 201 of the Federal Aviation Act of 1958 to be an agency of the United States—all appointments to the Board are made by the President with the advice of the Senate; nevertheless, states have entered into the aeronautics field, albeit in a limited sense: see Caves, \textit{Air Transport And Its Regulators—An Industry Study}, pp. 133-136, Harvard University Press, Cambridge, Massachusetts, 1962, who concludes, at p. 136: “In sum, given the nature of air transportation, the apparent mood of the states, and the comprehensive use of its regulatory powers by the Civil Aeronautics Bord, it seems likely that except for occasional jurisdictional conflicts, all important economic regulatory power will continue to lie with the Civil Aeronautics Board.”

\footnote{12}{R.S.C. 1952, c. 79; now R.S.C. 1970, c. T-15.}


\footnote{13.1}{R.S.C. 1952, c. 2, as amended by c. 302, section 4(1)(c).}

\footnote{14}{Regina \textit{v. Johnson} (1964) 49 D.L.R. (2d) 373, 377. But \textit{cf. Re Colonial Coach Lines Ltd. and Ontario Highway Transport Board}, [1967] 2 O.R. 25 (H.C.J.), 243 (C.A. Laskin, J.A., as he then was, dissenting); 62 D.L.R. (2d) 270 (H.C.J.), 63 D.L.R. (2d) 198 (C.A.) where it was held that when the Government of Canada contracts with a motor transportation service for the carriage of passengers to and from a federally-owned airport, that matters falls outside federal jurisdiction \textit{i.e.} outside the Aeronautics Act.}
While it is not intended to trace step-by-step all of the legislation pertaining to air law, a cursory examination indicates that it has been (and still is to some extent) a morass of complexity and overlapping.

Air legislation goes back to 1919 when the Canadian government passed The Air Board Act, establishing an Air Board, and air regulations were promulgated and published in the Canada Gazette. In 1922 the Air Board Act became known as the Aeronautics Act, and the Air Board came under the Minister of National Defence, and in 1936 the Department of Transport Act put the Minister of Transport in charge. The next step in 1938 when the Transport Act was passed was significant as it established the Board of Transport Commissioners (which was formerly the Board of Railway Commissioners) "with authority in respect of transport by railways, ships and aircraft". The Board's duties included licensing of aircraft and granting of routes.

The Air Transport Board was created in 1944 pursuant to the provisions of the Aeronautics Act, and "it had substantially the same powers over civil aviation as the Board of Transport Commissioners had had" except that it had to make special provision to allow Trans-Canada Air Lines to operate which meant that "the Trans-Canada Air Lines Act would take precedence over the licensing powers of the new [Air Transport] Board;" hence it was required under the provisions of the Aeronautics Act to grant to Trans-Canada Air Lines "a license to operate a commercial air service" and we should note that,

"In 1937, Trans-Canada Air Lines, a subsidiary of Canadian National Railways, began to fly the transcontinental route and Canada's share of trans-border services with the United States. In 1964 its name was changed to Air Canada".

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15. S.C., 1919 (1st sess.), c. 11.
17. Ibid., p. 323.
18. S.C., 1944-45, c. 28.
19. Currie, Canadian Transportation Economics, 393, University of Toronto Press, 1967. Trans-Canada Air Lines changed its name to Air Canada in 1964: see infra, footnote 21. Only in recent times has there been any serious threat to Air Canada for service to major cities, as, for example, the licence which was granted to Nordair Ltd. to service Windsor-Montreal-Ottawa with non-stop restrictions as proposed by Air Canada: Decision No. 3307 of the Air Transport Committee, February 2, 1972.
21. Supra, footnote 19, p. 12. Canada's national air carrier, Trans-Canada Air Lines, T.C.A. became Air Canada by virtue of the Trans-Canada Air Lines Act, S.C. 1937, c. 2, and section 7 of that statute (see now Air Canada Act, R.S.C. 1970, c. A-11, sections 6,
Early aeronautics legislation gives the impression that it was prepared on a patchwork basis; and the effect of this nebulous approach can be seen, for example, in *Attorney-General for Canada v. MacDougall*\(^\text{12}\) where the accused was charged with acting as an aircraft pilot without holding a certificate from the Air Board of Canada contrary to the provisions of the Aeronautics Act, 1919, and Prendergast, C.J.M., who gave the court's reasons notes the following:

1. In 1919 the Air Board Act,\(^\text{23}\) was passed putting aeronautics under the control of the Air Board.
2. In 1922, the National Defence Act,\(^\text{24}\) was enacted providing that the Minister of National Defence was to carry out the functions of the Air Board.
3. The Air Board Act was in substance incorporated into the 1927 Aeronautics Act,\(^\text{25}\) and whenever Air Board had been mentioned Minister of National Defence replaces those words.
4. The Air Board regulations passed under The Air Board Act continued in force because of the provisions of two statutes to that effect,\(^\text{26}\) but they still state that an Air Board certificate is required before one can act as a pilot.

Prendergast, C.J.M., therefore concludes that the "effect of the change made by The National Defence Act, 1922, in the personnel of the administration of the Act, the obligation is now to procure a certificate, not from the Air Board which no longer exists, but from the minister . . . ."\(^\text{27}\) In the result the acquittal was upheld.

Under the present Aeronautics Act\(^\text{28}\) the Minister of Transport has a general supervisory power over all matters concerning aeronautics,\(^\text{29}\) and this includes building and maintaining government aerodromes;\(^\text{30}\) pre-
scribing of aerial routes;\textsuperscript{31} investigation, examination and reporting upon the operation and development of commercial air services in Canada;\textsuperscript{32} and preparing and drafting "for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada . . . and for the control or operation of aircraft registered in Canada wherever such aircraft may be . . ."\textsuperscript{33} The Governor in Council can make regulations to charge owners or operators of aircraft for use of government facilities, and may authorize the Minister to make regulations for charges for facilities.\textsuperscript{34}

Subject to the approval of the Governor in Council, the Minister of Transport can make "regulations to control and regulate air navigation over Canada . . . and the conditions under which aircraft registered in Canada may be operated over the high seas or any territory not within Canada" and such regulations can be for the licensing and regulation of pilots, aircraft, aerodromes, conditions of use of aircraft and for transportation of goods, mail, passengers; prohibition of navigation of aircraft; conditions for aircraft coming from outside Canada; aerial routes and their use and control; navigation safety rules; height, use and location of buildings and structures in or near airports; maximum working hours for pilots, co-pilots, navigators, engineers "employed by any person operating a commercial air service licensed by the Canadian Transport Commission;" to determine air-worthiness of aircraft, the right to enter on aircraft manufacturer's premises for inspection; to preserve, protect, remove, and test aircraft involved in accidents; operation and use of rockets, moored balloons and kites; and investigation of aircraft accidents.\textsuperscript{35} The Governor in Council may authorize the Minister "to enter into a contract with any air carrier for the grant of . . . assistance, financial or otherwise".\textsuperscript{36}

The functions and the personnel of the Air Transport Board were transferred to the Canadian Transport Commission in 1967 under the National Transportation Act.\textsuperscript{37}

\begin{itemize}
  \item \textsuperscript{31} \textit{Ibid.}, section 3(f).
  \item \textsuperscript{32} \textit{Ibid.}, section 3(k).
  \item \textsuperscript{33} \textit{Ibid.}, section 3(1).
  \item \textsuperscript{34} \textit{Ibid.}, sections 4, 5.
  \item \textsuperscript{35} \textit{Ibid.}, section 6(1). Section 6(4)(5) provides penalties for violations of regulations, or orders or directions of the Minister of Transport, and section 16(5) says that even though the Canadian Transport Commission may issue a commercial air service license, the air carrier cannot operate until the Minister of Transport issues a certificate that the carrier is "adequately equipped and able to conduct a safe operations as an air carrier".
  \item \textsuperscript{36} \textit{Ibid.}, section 18.
  \item \textsuperscript{37} S.C. 1966-67, c. 69, sections 14, 82. In addition, the Board of Transport Commissioners, and the Canadian Maritime Commission were incorporated into the C.T.C.
\end{itemize}
Section three of the National Transportation Act\textsuperscript{38} sets out Canada's national transportation policy, and is worth considering in full—it reads:

"It is hereby declared that an economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost is essential to protect the interests of the users of transportation and to maintain the economic well-being and growth of Canada, and that these objectives are most likely to be achieved when all modes of transport are able to compete under conditions ensuring that having due regard to national policy and to legal and constitutional requirements

(a) regulation of all modes of transport will not be such a nature as to restrict the ability of any mode of transport to compete freely with any other modes of transport;
(b) each mode of transport, so far as practicable, bears a fair proportion of the real costs of the resources, facilities and services provided that mode of transport at public expense;
(c) each mode of transport, so far as practicable, receives compensation for the resources, facilities and services that it is required to provide as an imposed public duty; and
(d) each mode of transport, so far as practicable, carries traffic to or from any point in Canada under tolls and conditions that do not constitute

(i) an unfair disadvantage in respect of any such traffic beyond that disadvantage inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved, or
(ii) an undue obstacle to the interchange of commodities between points in Canada or unreasonable discouragement to the development of primary or secondary industries or to export trade in or from any region of Canada or to the movement of commodities through Canadian ports;

and this Act is enacted in accordance with and for the attainment of so much of these objectives as fall within the purview of subject matters under the jurisdiction of Parliament relating to transportation."

The National Transportation Act applies to air transport to which the

Aeronautics Act applies; and the National Transportation Act specifically provides that the Canadian Transport Commission (C.T.C.) is charged with the duty to perform the functions vested in it under the Aeronautics Act "with the object of coordinating and harmonizing the operations of all carriers engaged in transport by railways, water, aircraft" and the Commission is to give to the National Transportation Act and the Aeronautics Act "such fair interpretation as will best attain that object."  

In addition to its functions, duties and powers under the Aeronautics Act the C.T.C. has inter alia the following duties: (1) inquire and report to the Minister of Transport on matters concerning sound economic development of transport; and the relationship between different types of transportation and methods to coordinate their development, regulation and control; and financial assistance for transport; (2) make economic studies and research concerning transportation; (3) create economic standards and criteria for federal investment in transport; (4) inquire and advise the government concerning expenditures of governmental departments or agencies concerning transportation, and for the development of revenue; (5) and take part in national, international and intergovernmental transport organizations.

The Commission which is a court of record is given power to consult with other persons and bodies, and it is to consist of not more than seventeen members appointed by the Governor in Council which ap-

39. Ibid., section 4(b).
40. Ibid., section 21.
41. Ibid.
42. Ibid., section 22(1).
43. Ibid., section 22(1)(a).
44. Ibid., section 22(1)(c).
45. Ibid., section 22(1)(e).
46. Ibid., section 22(1)(b).
47. Ibid., section 22(1)(g).
48. Ibid., section 22(1)(h).
49. Ibid., section 22(1)(i).
50. Ibid., section 6(2).
51. Ibid., section 22(4).
52. Ibid., section 6(1). The members are appointed for ten years, but can be removed for cause: section 6(3); and can hold office until age seventy: section 6(4); and are not to have any conflicts of interest e.g. concerning matters or applicants before the Commission, or by having an interest in an air transport company, or in any device, appliance, machine or patented process which can be used in aircraft, or engage in manufacturing or selling of aircraft: sections 8, 9. Governor in Council is defined in the Interpretation Act, R.S.C. 1970, c. I-23, section 28 as meaning the "Governor in Council" or "Governor General in Council" and means, as the section states "the Governor General of Canada, or person administering
points one of them as president and two as vice-presidents. The Commission has a secretary who keeps records, other officers and employees, and has an office in Ottawa.

The Commission may investigate into any carrier rates or conditions of carriage which anybody believes is contrary to the public interest, as defined in section three, and if it is so found the Commission can order the rate or condition removed or make such order as it considers proper or report to the Governor in Council for appropriate action. The criteria and standards which the Commission are to take into account are set forth in section 23(3):

"23(3) In conducting an investigation under this section, the Commission shall have regard to all considerations that appear to it to be relevant, including, without limiting the generality of the foregoing,

(a) whether the tolls or conditions specified for the carriage of traffic under the rate so established are such as to create

(i) an unfair disadvantage beyond any disadvantage that may be deemed to be inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved, or
(ii) an undue obstacle to the interchange of commodities between points in Canada or an unreasonable discouragement to the development of primary or secondary industries or to export trade in or from any region of Canada or to the movement of commodities through Canadian ports; or

(b) whether control by, or the interests of a carrier in, another form of transportation service, or control of a carrier by, or the interest in the carrier of, a company or person engaged in another form of transportation service may be involved."

the Government of Canada for the time being, acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada." For all practical purposes the Governor in Council is the cabinet, usually acting upon the advice of the Minister involved.

53. Ibid., section 7(1).
54. Ibid., sections 10, 11.
55. Ibid., section 12.
56. Ibid., section 13(1).
57. Ibid., section 23.
To carry out its functions the Commission appoints an Air Transport Committee consisting of at least three commissioners exclusive of the president who is an *ex officio* member,58 and any order, rule or direction of the committee (except as to a specific rate, license or certificate) which is objected to by an operator of another mode of transport on the ground of discrimination or unfairness, may be reviewed by the Commission,59 and government, shippers and consignees can be heard at Commission hearings.60

There is a right of appeal to the Minister of Transport from any final decision of the Commission concerning an application for a commercial air service license under the Aeronautics Act, or any suspension, cancellation or amendment of license, within thirty days from the Commission’s order or decision.61

Where an air carrier plans to “acquire, directly or indirectly, an interest by purchase, lease, merger, consolidation or otherwise, in the business or undertaking of any person whose principal business is transportation” notice must be given to the Commission which publicizes same, and if objection is filed with the Commission “on the grounds that it will unduly restrict competition or otherwise be prejudicial to the public interest” then the Commission is to investigate and may hold a public hearing and may disallow such acquisition “if in the opinion of the Commission such acquisition will unduly restrict competition or otherwise be prejudicial to the public interest” and any such disallowed acquisition to which objection has been made is void.62

Under the provision of section 90 of the National Transportation Act passed in 1967 the regulations, rules, orders and directions of the old Air Transport Board were to continue in force until repealed, replaced, rescinded, amended or varied by the Commission, the Aeronautics Act, or any other federal legislation; and in section 94 the Act repealed segments of the Aeronautics Act, and provided that the word “Commission” was to be substituted for the word “Board” wherever it appeared in the Aeronautics Act.

Under the Aeronautics Act the C.T.C. has the power to inquire into all matters concerning deviations from the provisions of the Act, or regulations, license, permit, order or direction of the Commission, and also

62. *Ibid.* section 27: the intending acquiring air carrier must be one “to which the legislative jurisdiction of the Parliament of Canada extends”.
regarding matters of public interest, with the power to make mandatory enforcing orders, and has jurisdiction to determine all matters of law and fact in this connection. The C.T.C. is to advise the Minister of Transport concerning all civil aviation matters and make recommendations to him concerning any investigation or survey made by it; and it can make regulations inter alia for the classification and form of licenses which are issued, their terms and conditions including renewals and restrictions; dealing with records and accounts to be kept by carriers; requiring carriers to file returns showing assets, equipment and similar information; furnishing of information regarding ownership, control, transfer, consolidation, merger or lease of commercial air services; establishing fees for licenses, minimum insurance requirements, classification or groups of air carriers, traffic, tolls, tariffs, penalties; exclusion of any carrier or commercial air service from all or part of this legislation or any regulation, order or direction made thereunder; and designating examiners to make investigations.

One must read together with the aforesaid provisos, the provisions of section 16(2)(3) of the Aeronautics Act which permit the C.T.C. to issue licenses for the operation of commercial air services, provided it is in “the public interest” and the C.T.C. “is satisfied that the proposed commercial air service is and will be required by the present and future public convenience and necessity”. With certain exceptions (such as a scheduled commercial air service operating wholly within Canada) the Commission can exempt a carrier or commercial air service in whole or in part from the public convenience and necessity provision. The C.T.C. can prescribe the routes and areas to be served, and can impose conditions concerning schedules, places of call, carriage of passengers and freight, insurance, and the carriage of mail (subject to the Post Office Act), and “may

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73. *Ibid.*, section 14(1)(g).
77. *Ibid.*, section 16(6).
suspend, cancel or amend any license or any part thereof where, in the opinion of the Commission, the public convenience and necessity so requires"; and likewise when "in the opinion" of the Commission any conditions attached to a license have been violated by an air carrier the Commission may cancel, or suspend the license. A valid and subsisting license is required to operate a commercial air service, and violation can lead to severe penalties.

In the result the C.T.C. licences commercial air carriers, and the Minister of Transport makes regulations concerning the operations of air carriers, and licensing and regulation of all appurtenant matters (e.g. pilots, aerodromes, etc.).

Licensing

Professor Currie tells us that prior to 1938 "there was practically no official regulation of commercial aviation except the licensing of aircraft and pilots"; and as the functions of the Board of Railway Commissioners passed to the Board of Transport, in the result "the Board was not a success in its administration of civil aviation. It was too bound by precedent, too railway-minded, and too inclined to deal only with the controversies brought to its attention. In other words, it was incapable of planning the future development of a rapidly growing industry".

Before we pass to an examination of the Board's decisions so that we can assess these critical comments made by Professor Currie, we should remember that distilled out of all the legislation mentioned, the hierarchy in civil aviation in Canada today reads like this: to be strictly accurate we should begin with the Parliament of Canada, followed by the Governor in Council; next come the Minister of Transport, C.T.C. and the Air Transport Committee. The A.T.C. has two branches, the Operations

78. Ibid., section 16(8).
79. Ibid., section 16(9).
80. Ibid., section 17: Up to $5,000.00 or imprisonment for a term not exceeding one year or both upon summary conviction. There is a twelve month limitation period from the time an offence is committed for instituting a prosecution: section 22. This appears to conflict with section 72(2) of the Canadian Criminal Code R.S.C. 1970, c. C-34, which provides for a six month limitation period for summary conviction proceedings, as to which see Jorgenson v. North Vancouver Magistrates (1959) 28 W.W.R. 265, and The Queen v. Machasek [1961] S.C.R. 163.
81. Supra, footnote 19, p. 392.
82. A Canadian government handout given to the author states: "The functions of the Air Transport Committee extend to the licensing of persons to operate commercial air services; the regulation of air carriers; making investigations and surveys as required on the operation and development of commercial air services in Canada; advising the Minister in
Branch which in turn has Fares, Rates and Services, Operations Analysis, and the Licensing and Inspection Division; and the Economics and Accounting Branch (research, analysis, audit, finance); and finally there is a Secretary and Assistant Secretary called the Secretariat. The C.T.C. provides the A.T.C. with legal services from its Legal Services Branch.

Canadian air carriers are granted licenses to operate, which amount to the same thing as the certificates issued to American air carriers by the Civil Aeronautics Board (C.A.B.).

The year 1938 marks so-to-speak the official genesis of the period of regulated national air transportation in Canada; and this was governed by the Transport Act\(^8\) which provided for the creation of The Board of Transport Commissioners for Canada, to replace The Board of Railway Commissioners of Canada. In section 3(2) it was stated that the Board, pursuant to the provisions of the Transport and Railway Acts, is to carry out its duties “with the object of co-ordinating and harmonizing the operations of all carriers engaged in transport by railways, ships and aircraft and the Board shall give to this Act and to the Railway Act such fair interpretation as will best attain the object aforesaid”. In section 4 provision was made for incorporation of the practices and procedures set forth in the Railway Act.

Section 5 of the Transport Act outlined the requirements for licenses, and it is worth reading in full:

“5. (1) Before any application for a license is granted for the transport of goods and/or passengers under the provisions of this Act, the Board shall determine whether public convenience and necessity require such transport, and in so determining the Board may take into consideration, inter alia,—
(a) any objection to the application which may be made by any person or persons who are already providing transport facilities, whether by rail, water or air, on the routes or between the places which the applicant intends to serve on the ground that suitable facilities are or, if the license were issued, would be in excess of requirements, or on the ground that any of the conditions of any other transport license held by the applicant have not been complied with;
(b) whether or not the issue of such license would tend to develop the complementary rather than the competitive functions of the different forms of transport, if any, involved in such objections;

\(^8\) S.C. 1938, c. 53.
(c) the general effect on other transport services and any public interest which may be affected by the issue of such license;

(d) the quality and permanence of the service to be offered by the applicant and his financial responsibility, including adequate provisions for the protection of passengers, shippers and the general public by means of insurance.

(2) Notwithstanding anything contained in subsection one of this section, if evidence is offered to prove,—

(a) that at any time during the period of twelve months next preceding the coming into force of the relevant Part of this Act on, in or in respect of the sea or inland waters of Canada, or the route between specified points or places in Canada or between specified points or places in Canada and specified points or places outside of Canada, or the part of Canada to which the application for the license relates, the applicant was bona fide engaged in the business of transport, whether in bulk or otherwise, and

(b) that such ship for which such license is sought was at any time during the period of ten years next preceding the coming into force of this Act used for the transport of goods other than goods in bulk, and

(c) that the applicant was during such period using ships or aircraft, as the case may be, for the purpose of such business,

the Board shall, if satisfied with such proof, accept the same as evidence of public convenience and necessity and issue a licence accordingly: Provided, however, that a ship temporarily out of service during the period of twelve months aforesaid shall nevertheless be deemed to have been in use during such period.”

Section 5(2), commonly called the “grandfather clause”, is similar to section 401(a) of the American Civil Aeronautics Act of 193844 which, as Professor Andreas Lowenfeld has noted, created and fostered an “irrational network” consisting of the “Big Four”, American, United, T.W.A. and Eastern which have “dominated commercial aviation within the United States” since 1938.85

One must keep in mind that there are basically two major airlines in Canada, Air Canada and Canadian Pacific Airlines (C.P.A.). C.P.A. in 1942 bought up most of the bush flyers who were operating in northern

84. 52 Stat. 977.
Canada.\(^{86}\) Also, it should be remembered that Canada, unlike the United States, does not have a government whereby the executive, legislative and judicial branches are split and operate on a checks-and-balances basis; judicial review of legislative acts, in the American sense, is not present; and although it is a federal confederation, the national government at Ottawa operates upon the British parliamentary system i.e. the elected government chooses its Prime Minister (usually the party leader) and cabinet (Governor in Council) who are the “executive” branch, but wholly responsible to Parliament; legislative acts of the federal and provincial governments may come under the scrutiny of the courts to ascertain whether they are intra or ultra vires the particular government, as encompassed within sections 91 and 92 of the B.N.A. Act.\(^{87}\) Two other differences between Canada and the United States are worth noting: there is nothing in Canada comparable to the American Administrative Procedure statute;\(^{88}\) and the American position that there a presumptive right to a judicial determination of administrative action\(^{89}\) is not necessarily the Canadian position where judicial review by way of certiorari, prohibition and mandamus (even in the face of privative clauses which are “shown little respect”\(^{90}\)) may be used provided the administrative agency exercised a judicial and not an administrative function.\(^{91}\)

What was the record of the Board of Transport from 1938 to 1944 in its governance of civil aviation in Canada? Again we turn to Professor Currie, whose seminal works\(^{92}\) in the Canadian transportation field de-

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\(^{86}\) Currie, supra, footnote 19, pp. 556-560.

\(^{87}\) It is of interest to note that the Supreme Court of Canada is itself a creature of federal statute, Supreme Court Act, R.S.C. 1970, c. S-19.

\(^{88}\) 80 Stat. 378 (Public Law 89-554, September 6, 1966; Title 5, United States Code).


\(^{92}\) See also Currie, Economics of Canadian Transportation, 550, U. of Toronto Press, 2nd ed., 1959. There are of course other Canadian publications worth noting, such as, for
serve the highest praise, and in his view the Board of Transport Commissioners was not a success in the administration of civil aviation. 93

Some of Currie's criticisms are: (1) Until C.P.A. came in the Board permitted too many carriers in the north, but it may be that "the Board's hands were tied by the legal requirements of the grandfather clause which prevented it from eliminating services not required by public convenience and necessity." 94 (2) It granted licenses with restrictions which were not in line with government policy, and had to revoke these licenses. This development, Currie explains, happened like this: 95

"Licensing services to the United States raised a number of issues, chiefly associated with the right of an airline to carry passengers by circuitous routes in competition with airlines which had licenses to fly by direct routes. For instance, the Board granted a license to American Airlines to fly between Toronto and Buffalo 96 on condition that it not carry passengers between Toronto and New York via Buffalo.

Similarly on approving the Toronto-Detroit license, the Board prohibited the American company from carrying traffic from Windsor to Buffalo via Toronto. Simultaneously it forbade Trans-Canada to carry passengers between Windsor and New York via Toronto." 97

The Board revoked these licenses because they offended government policy because, he continues, 98

"... it was not justified in assuming that it had the exclusive right, subject only to the Transport Act and to any agreements with other countries, to determine the conditions under which a license was to be granted. It also ran into unexpected criticism in connection with


93. Surpa, footnote 19.
94. Supra, footnote 92, p. 548.
95. Ibid., pp. 549, 550.
98. Ibid.
the Vancouver-Victoria\textsuperscript{99} and the Edmonton-Yukon-Alaska route.\textsuperscript{100}

In defence of the Board it must be said that the Transport Act was not "sufficiently detailed" nor did the Canadian government make its policies clear although it did favor Trans-Canada Airlines thereby raising charges of monopoly.\textsuperscript{101} With the emergence of C.P.A. as a major line, T.C.A. was threatened as Canada's national airline, hence the government set up the Air Transport Board in 1944, and made a divestment order requiring surface carriers to divest themselves of air affiliates one year after the end of the European war (Canadian Pacific Railways as owner of C.P.A., and Canadian National Railways as controller of T.C.A. would be directly affected); however, this order was cancelled in 1946 \textit{qua} C.P.R. and C.N.R.\textsuperscript{102}

With the foregoing as background let us examine some of the reported decisions of the Board of Transport Commissioners.

\textbf{The Board of Transport Commissioners}

In the United States the C.A.B. operates by having a civil servant, an examiner, hear the presentations of interested parties by way of briefs and oral presentations, and he then makes a report to the C.A.B. which renders a decision written by its opinion writers (if objection is filed then the C.A.B. will hear the presentation of "objection" briefs). From a reading of the reports it appears that the Board of Transport Commissioners held hearings at different places in Canada, in the presence of the applicants and objectors with their counsel; counsel made statements on behalf of their clients; \textit{viva voce} evidence could have been heard, with the right of cross-examination; and the Board then rendered a written decision.

Hence when M & C Aviation Co. Ltd. applied in 1939 under section 5(1) of the 1938 Transport Act for a license to transport passengers and goods from Prince Albert, Saskatchewan to Flin Flon, Manitoba, the hearing took place in Saskatoon and Regina, and Mr. Garceau rendered the written opinion of the Board.\textsuperscript{103} He says that there was much public


\textsuperscript{100} \textit{Ibid.}, citing \textit{Canadian Aviation}, March 1942, p. 90; June 1942, p. 50; Canada, House of Commons, \textit{Debates}, 1944, p. 4035.

\textsuperscript{101} \textit{Ibid.}, pp. 550, 551.

\textsuperscript{102} \textit{Ibid.}, pp. 551, 552.

\textsuperscript{103} \textit{Re M & C Aviation Co., Ltd. & Canadian Airways Ltd.}, (1940) 50 C.R.T.C. 338.
agitation for the granting of the license; the position of Canadian Airways Ltd. which opposed the application was anomalous; the applicant, although it did not put in evidence a statement of revenue and expenses, had been operating unprofitably since 1932 on this run, and further it was asking to hold its application in abeyance until after the war. The application was dismissed, and the only basis for doing so, on a reading of the report, appears to be on the ground that these particular places had not been specified for air services by the Governor in Council under section 15(1) of the Transport Act.

Applications by three opposing air carriers, under section 5(1) of the Transport Act, for a license between Winnipeg and Flin Flon were dismissed after a hearing in Winnipeg in 1939. The Board’s reasons were rendered by Mr. Garceau who, after setting out the provisions of section 5(1), catalogs the arguments and positions of the applicants, and one objector (the C.N.R., which claimed adequate service was being provided by it) and concludes, with no analysis or exposition that the public convenience and necessity does not indicate this transportation is needed.

In another application heard in 1939 two competing air carriers applied for a license under section 5(1) of the Transport Act to provide service between Peace River and Yellowknife, N.W.T., opposed by a third air carrier. In the reasons rendered by Chairman Stoneman he points out that the two applicants have been operating at a loss, but one of them is in a sounder financial position, has the required aircraft and insurance coverage (which the other applicant does not have), and as the intervenor’s objection was without merit (there was sufficient volume of traffic transported between the points mentioned in the application), hence the license was granted to the more solvent carrier and the application of the other applicant dismissed.

As we can see from the foregoing the Board of Transport Commissioners was busy with applications for air transport licenses in 1939, albeit by small carriers. Two other such applications are worth mentioning: where an applicant for license to serve different points in Manitoba was unable to show that it had any traffic to some of these points, and such a service would duplicate existing air service and would be for the benefit of a sparsely settled area, the application was dismissed, without preju-


105. This is one of those instances when the headnote is better than the reasons in its pointed clarity and statement of the situation.

106. *Peace River Airways Ltd. & Mackenzie Air Service Ltd. v. Canadian Airways Ltd.* (1940) 50 C.R.T.C. 349. The written reasons reproduce a portion of the viva voce evidence tendered by one of the applicants.
dice to the applicant’s right to apply in a separate application for a license under the grandfather provision;\textsuperscript{107} accordingly, the same air carrier applied for a license under the grandfather provision which was granted, and then made application for extended service to other points, which was denied because the carrier had little evidence to prove necessity, never operated between these points at anytime, could not show how traffic would be developed, and nobody asked for such a service.\textsuperscript{108}

To bring oneself within the grandfather provision, the applicant had to show, in accordance with the Transport Act provisions “that at some time” as Mr. Cross of the Board stated in \textit{Re Peace River Airways Ltd.}\textsuperscript{109} that “during the period of twelve months next preceding the first day of July, 1938, in respect of the route between the specified points or places to which its application relates, [that] the applicant was \textit{bona fide} engaged in the business of transport whether in bulk or otherwise, and was using aircraft for the purpose of such business.”\textsuperscript{110}

The reasoning of the Board of Transport Commissioners in 1941 in \textit{Re Northeast Airlines, Inc.}\textsuperscript{111} is illuminating. Northeast applied for a license for service between Moncton, New Brunswick and Bangor, Maine. The application was sent through diplomatic channels, and was accompanied by an order of the C.A.B. including said points in the carrier’s certificate. The Board refers to the 1940 Convention made between Canada and the United States whereby any new service between these particular points was allocated to an authorized American carrier, for a stipulated period of time; that “its consideration of the application is confined solely to the statutory provisions of the \textit{Transport Act}, 1938. The Board is not a Department of the Government and derives its powers only from the legislation entrusted to its administration.”\textsuperscript{112}

The Governor in Council must name points and places as this was an international air service, and as it had done so it was “compulsory that any transport by air between said points be conducted only under a license from this Board.”\textsuperscript{113} No objections were filed, and in “considering whether public convenience and necessity require an air service between points where no such service is presently given, [the Board is] admittedly faced with a difficult task.” The Board says that as the applicant received

\textsuperscript{107} \textit{Wings Ltd. v. Arrow Airways Ltd.} (1940) 50 C.R.T.C. 359.
\textsuperscript{108} \textit{Re Arrow Airways Ltd.} (1940) 50 C.R.T.C. 364.
\textsuperscript{109} (1940) 51 C.R.T.C. 358, 365, 366.
\textsuperscript{110} As the applicant could not prove that its application was dismissed.
\textsuperscript{111} \textit{Supra}, footnote 97.
\textsuperscript{112} \textit{Ibid.}, p. 282 (C.R.T.C.).
\textsuperscript{113} \textit{Ibid.}, p. 283, pursuant to the provisions of Part III of the \textit{Transport Act}, 1938, sections 14(1), 15(1) (a).
a certificate from the C.A.B. it is unnecessary to restate the facts upon which the applicant relies. The license will be for international traffic, and the Board says it must consider matters of public interest, hence—

"It is a matter of common knowledge that public interest in national defence is keenly aroused. We believe that the development of regular air transport service between these points would tend to further that interest at this time to the mutual advantage of both countries. While this one factor does not essentially override all other considerations, it is, we believe, an appropriate one to take into consideration at this time."\textsuperscript{114}

The Board is impressed with the fact that Northeast already has a license to serve between Boston and Montreal and "its performance thereunder has been satisfactory, as is also its financial position and insurance protection."\textsuperscript{115} Public convenience and necessity have been proven and the license was granted for a one year period.

The year 1941 was a busy one for the Board in its work considering a variety of applications for air transport licenses; but we will see that it really did not have to work too hard in preparing its reasons. In \textit{Re Western Air Lines, Inc.}\textsuperscript{116} an American carrier, Western Airlines, applied for a license between Great Falls, Montana and Lethbridge, Alberta with an intermediate point of call at Cut Bank-Sherby, Montana. The Board uses the same language as it used in the \textit{Northeast} case, adapting it to suit this application; it is almost as if the Board had a form type of judgment which a clerk would be asked to fill in making appropriate changes, except for one minor change, namely, that instead of stressing the national defence issue the Board says that this route will be "to the mutual advantage of both countries" and also it "will complete a protected inland air route along the east side of the Rocky Mountains to Yukon and Alaska."\textsuperscript{117} A one year license was granted.

If we stop at this point to consider the reasons rendered by the Board so far in these air transport license cases, we can conclude the following:

1. The Board contented itself with the use of cliches, platitudes and talesmanic sounding phrases in defining public interest, convenience and necessity.

2. It showed little or no imagination in its reasons which left much to be desired in delineating all of the considerations applicable to the case.

\textsuperscript{114} \textit{Ibid.}, p. 284.
\textsuperscript{115} \textit{Ibid.}
\textsuperscript{116} (1941) 52 C.R.T.C. 380.
\textsuperscript{117} \textit{Ibid.}, p. 384.
before it; and in fact it adopted a pat formula type of judgment, using exactly the same language in similar type cases.

3. Anybody appearing before it with an application, and aware of the foregoing would certainly not be impressed with its performance.

American Airlines is the subject of two Board reports. In the first one, made on June 13, 1941,118 in many ways the Board’s reasons read like those in the *Northeast* and *Western Air Lines* cases—the pat formula judgment was hauled out of the desk and tailored to the immediate situation confronting the Board. The differences here are that the Board said that with respect to this application for a license between Buffalo and Toronto the Board could not consider mail transportation as that was not within its jurisdiction; Trans-Canada was granted licenses for Toronto-Buffalo and Toronto-New York services, but the C.A.B. approved of only the latter; the U.S. and Canada agreed that Toronto-New York would be granted to a Canadian carrier, and Toronto-Buffalo to an American; the T.C.A. license for Toronto-Buffalo expired and was not renewed because of the aforesaid agreement. The Board says that as American was selected by the C.A.B. it accepts its findings, and as no objections were filed a one year license was granted.

The Board then goes to great pains to explain the obligations of the licensee, and says that on the Toronto-New York service T.C.A. has the exclusive transportation rights, and similarly with American on the Toronto-Buffalo run. “Consequently,” the Board explains, “in granting a license to the applicant between Buffalo and Toronto it is not authorized to engage in the transportation of passengers and goods between points where other licenses are in force, such as Toronto-New York.”119

In a note added on to the judgment the Board also explains that the Governor in Council rescinded the naming of Toronto and New York under the Act, hence their comments concerning these two points no longer apply.

On June 14, 1941 the Board gave judgment in the other American Airlines case.120 This was a license application to transport passengers, goods and mail between Windsor and some fifteen American places. Again, the Board followed its stereotyped judgment formula, except that here it again pointed out it cannot deal with a mail application; set forth verbatim the C.A.B. reasons in granting its certificate; all of which was sufficient, for the granting of a one year license. The Board explained that although American has Buffalo-Windsor and Buffalo-Toronto it cannot

go on the Toronto-Windsor run since that belongs exclusively to T.C.A.; and although T.C.A. has Toronto-New York and Toronto-Windsor, only American can fly New York-Windsor.

Among the reported decisions of the Board of Transport commissioners, *Re Canadian Colonial Airways Ltd. and Quebec Airways Ltd.* is refreshing as it presents a logical and concerted effort by the Board, including the dissenting member, to analyse the pertinent facts presented by the competing applicants, and avoids the hackneyed approach adopted by the Board which we have already seen. Colonial and Quebec Airways competed for service between Montreal, Three Rivers and Rimouski, points named by the Governor in Council in an Order in Council thereby making it necessary (pursuant to the Transport Act) for service to these points to be executed only by a licensed carrier.

Airways already had a license for these points granted to it under the grandfather provision, but because of war conditions (the applications were heard in 1940) it was only providing a monthly service, and was not going into Three Rivers because of lack of airport facilities. Mr. Cross in rendering the majority reasons emphasized that Airways had fulfilled its obligations, and after the presentation of briefs and hearing evidence permitted Airways to add Three Rivers to its license and dismissed the Colonial application.

Mr. Cross mentions the railway’s presentation that there is adequate rail service to these points; and mentions the geographic location of Three Rivers, on the route between Montreal and Quebec (and that there is water service and a highway between these points) and seems to indicate that he does not think too much of the argument that the travelling time to-and-from airports nullifies the benefits of such an air service.

With respect to Colonial’s application Mr. Cross properly indicates that it had the burden of proving public convenience and necessity, and it failed to do so. Colonial had a license to operate between Montreal and New York, and stressed that it could give continuous service which would have access to the larger American market. It said its flight would come from New York, and provide through service direct to Quebec, with stops at all the said points, but Mr. Cross was not impressed with the fact that passengers would have to change planes at Montreal if Colonial did not get the license. Mr. Cross appears to adopt Airways’ position that the granting of a license to Colonial (which asked that Airways’ license be cancelled) would provide service exceeding public need.

In his dissent Mr. Garceau emphasized that Airways was flying only

121. (1942) 53 C.R.T.C. 303.
once a month between Montreal and Quebec, as it admitted in its filed material, so that it could retain its license. This was insufficient, in his view, to allow them to retain this license. Added to which he says that Three Rivers is in a growing area; Airways has no plans to provide a regular service; and has not utilized the possibilities; Colonial can provide regular service, with connections into the United States; there is water and rail service to Three Rivers, but this does not preclude air service; if Colonial is given the license Quebec and Three Rivers would be directly connected with New York and Montreal, and indirectly through T.C.A. with Ottawa and Toronto.

Mr. Garceau's dissent, which is telling answer to the majority (are we dealing here with competition between a Canadian and an American-based firm, and is the Board waving the Canadian maple leaf?) says that Airways

"... can only operate between Montreal, Three Rivers and Quebec. This airline is too short to be operated with financial success, for it is a matter of common experience that the longer the route, the greater the revenue per plane." 122

Continuous service which Colonial can provide, and the admission by Airways that it is conducting a monthly service only to retain its license, coupled with the fact "that Quebec and Three Rivers should be given the advantage of airway connection with the outside world" 123 militates, Mr. Garceau says, in favor of Colonial and against Airways. In his reasons Mr. Garceau appears to be more knowledgeable about the area involved, and presumably this acquaintance is based upon the evidence presented plus his personal information; and if this is so, this would indicate that one of the considerations in selecting members for boards involved with issuing air licenses should be regionality i.e. members should be picked from different areas of Canada.

At a hearing in 1940, the Board was called upon to explain the application of section 5 of the Transport Act in a case where a complaint was lodged by one carrier that another carrier was not qualified under section 5 (2), the grandfather clause, to serve certain places. 124

The Board explained the operation of section 5 in this way:

1. Section 5 applies to all licenses (water, air), but for air carriers one must look specifically to Part III of the Act.

122. Ibid., p. 315.
123. Ibid., p. 317.
124. Wings Ltd. v. Canadian Airways Ltd. (1942) 53 C.R.T.C. 64.
2. Under section 5 (1) an applicant for a license must prove a public convenience and necessity requirement for the transport.

3. Once this is established, section 13 of Part III applies and it permits the Board to license aircraft for the transport of passengers and/or goods between specified points or places within Canada, or between such specified points or places in Canada and specified points or places outside Canada.

4. There is, the Board says, “nothing in this section [13] that makes any reference whatsoever to any ‘part of Canada’ or area. The license must be issued between specified points or places, and insofar as any reference in Part III to ‘route’ is made, it is only that the Board may prescribe the route, and, . . . this means identifying it by specifying the points and places, and by number or some such means, and providing for the schedule of services.”

Under the provisions of section 401 of the Federal Aviation Act of 1958 the C.A.B. issues certificates for air transportation, and subsection (c) (1) states that “Each certificate . . . shall specify the terminal points and intermediate points . . . between which the air carrier is authorized to engage in air transportation . . . .” Subsection (c) (2) deals with certificates for foreign air transportation which shall “designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed.” And in section 401 (e) (4) it is provided: “No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add or to change schedules, equipment . . . except that the Board may impose such terms, conditions, or limitations in a certificate for supplemental air transportation. . . .”

When the Arbitration Tribunal rendered its decision in 1963 in the United States-France dispute it made reference to the C.A.B. Docket No. 855 of June 1, 1945 which stated that in issuing certificates for foreign transportation general route patterns need only be specified rather than point-to-point patterns. The Canadian Board of Transport Commissioners, although they were dealing only with a domestic case, made it clear that they must specify points and places; and note that unlike the C.A.B. they are concerned with the schedule of services as well.

125. Ibid., p. 68.
5. Part III of the Transport Act, in section 15 provides for the naming of points and places by the Governor in Council "as a condition precedent to the issuing of the license". 129

The Board states that the Act is regulatory in nature; the fact that a point is on or approximate to the route between terminal points in a license, or is in that part of Canada to which the license relates is not sufficient to give the carrier rights to transportation for those places, notwithstanding the words "that part of Canada" used in the grandfather provision (section 5 (2) ) which if interpreted broadly and liberally would give it too wide a scope and meaning; and moreover the Board is required under the Railway and Transport Acts to give those statutes "such fair interpretation . . . as will best attain the co-ordinating and harmonizing of the operation of all carriers engaged in transport by railways, ships and aircraft" and to say that the words "that part of Canada" could include "anything from a whole province down to a mining district" 130 would nullify the said requirement for fair interpretation. Furthermore, the Board concludes, a licensee under the grandfather clause cannot add or include points approximate to its own route without showing public convenience and necessity under section 5 (1).

The contestants in the aforementioned case continued their conflict, and Wings Ltd. made an application for leave to appeal to the Supreme Court of Canada on a point of law. 131 The Board states that in the previous hearing involving these contestants 132 all that the Board did was to refuse to vary the license with respect to one point as granted to Canadian Airways under the grandfather provision, and it was not a grant of a license; and as there was no point of law involved the application was dismissed.

In the David and Goliath case, 133 when Canadian Airways Ltd. took on T.C.A., represented by I. C. Rand, K.C., later Mr. Justice Rand of the Supreme Court of Canada, the result was Solomonic. T.C.A. applied to extend its trans-continental service to Victoria, B.C., and it was granted this right, except that Canadian Airways was allowed to retain the local Victoria-Vancouver run. This is one of the better reported deci-

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129. Supra, footnote 124, p. 68. In the United States of America section 401(e)(1) of the Federal Aviation Act 1958 states that each certificate which is issued "shall specify terminal points and intermediate points". See Lowenfeld, supra, footnote 85, "Who Makes Aviation Policy And Why", Chap. IV, IV-5.

130. Ibid., p. 70.

131. Wings Ltd. v. Canadian Airways Ltd. (1942) 53 C.R.T.C. 253 (section 4 of the 1938 Transport Act and section 52(3) of the Railway Act).

132. Supra, footnote 124.

133. Re Trans-Canada Air Lines (1944) 56 C.R.T.C. 120.
sions of the Board in terms of delineation of issues and pertinent facts. The Board details the available transportation facilities for Victoria; discusses the difficulties Canadian Airways was having in providing mail service for Victoria which is "a substantial element of public convenience and necessity," the airport facilities at Victoria, the equipment of Canadian Airways and its objection to the application. One could easily have predicted the outcome of this contest on the basis of T.C.A.'s ability to provide a national through service from coast to coast by adding Victoria.

Chief Commissioner Cross who gave the majority reasons in the T.C.A. application concerning Victoria, B.C., also rendered the majority reasons in Re Quebec Airways Ltd. Whether the Board was improving with age and experience, or it was a personal quality of Mr. Cross, or both, this decision is worth reading as it touches all bases. Quebec Airways had been operating an unlicensed service to Saguenay, and was applying to extend its license to that point and others.

Chief Commissioner Cross gives us the objections filed by the C.N.R. and Canada Steamship Lines which say that they are providing adequate transport facilities, and adding Quebec Airways would create unnecessary competition and deprive them of traffic and income (the diversion argument).

Let us proceed with Mr. Cross's analysis: the Saguenay Airport is adequate; and local manufacturing interests would benefit; the rail service takes many hours, and the steamship service is limited to certain seasons; the air service would be faster, in spite of the time getting to-and-from airports; no other airline is involved; Quebec Airways has had a brisk business to Saguenay, and it has the mail contract too; and he outlines the equipment they use; testimony of witnesses was in favor of the additional service; as the C.N.R. charges less for transportation of passengers and goods this reduces the competitive feature, and the proposed service will probably not adversely affect the railways, hence the application was granted.

When two airlines and a railway met head-on in a fare reduction dispute in 1941, the Board gave the matter careful consideration. The Board stated it must be mindful of its obligation under section 3 (2) of the Transport Act which provides that it shall coordinate and harmonize

134. Ibid., p. 129.
135. (1944) 56 C.R.T.C. 203.
136. It would be interesting to study this aspect in the light of conditions today.
137. Re Canadian Airways Ltd., Mackenzie Air Service Ltd. and Northern Alberta Railways (1941) 52 C.R.T.C. 321.
the operations of all carriers (water, air, rail) and give the Railway and Transport Acts a "fair interpretation" to achieve that object; and it refers to Part IV of the Transport Act which in general provided that tariffs and tolls shall be filed with the Board, and undue or unreasonable preference or advantage should not be given to anybody, nor should the tariffs and tolls be unreasonable or discriminatory having regard to the interests of the public.\textsuperscript{138}

The Board states that its "functions under the Railway Act are strictly remedial and not managerial . . . managerial discretion has remained with the carriers . . ."\textsuperscript{139} The railways have a right to meet competition, but tariffs and tolls must be reasonable and not destructive.\textsuperscript{140}

\textit{Air Transport Board}

As we have seen this Board which came into being in 1944, had licensing power, subject to the approval of the Minister of Transport (to whom appeals could be made, subject to the right of appeal to the Supreme Court of Canada on matters of law or jurisdiction), with a specific authorization to favor T.C.A. so that it could execute its agreement with the government, and thereby avoid the possibility of competition which it faced, for example, in the dispute concerning air transportation between Victoria and Vancouver.\textsuperscript{141}

Professor Currie tells us that this situation was not without its critics. He says:\textsuperscript{142}

"The extensive powers given the Minister were denounced by the Opposition. They accused Mr. Howe of setting himself up as a dictator. In the United States the Civil Aeronautics Board carries on without interference from the President, although it derives its authority from his executive powers. To be sure, he countersigns every order relating to services between the United States and other countries but he does this only to ensure proper co-ordination be-

\textsuperscript{138} Cf. with section 404 of the Federal Aviation Act of 1958 which provides that just and reasonable fares should be charged, and no undue or unreasonable preference or advantage should be given to anybody. See also Re Tariff Regulations of Air Carriers (1940) 50 C.R.T.C. 289 and Re "Discounts from Monthly Transportation Accounts" and "Contract Rates" (1940) 50 C.R.T.C. 295, where the Board of Transport Commissioners held that undue preferences and discriminatory rates could not be allowed; the reduced rates solely for the purpose of attracting competitors traffic are in that category.

\textsuperscript{139} Supra, footnote 137, p. 330.

\textsuperscript{140} Ibid., p. 340.

\textsuperscript{141} Supra, footnote 133.

\textsuperscript{142} Supra, footnote 92, p. 554.
tween the Board and the Departments of State and National Defense. Yet Canadian legislation apparently puts the entire direction of civil aviation in the hands of one man, the Minister of Transport. 143

Bearing in mind that "Canada is the largest country in the western hemisphere" but "she has a comparatively small population" and "acquired her wings" with the advent of World War I 144 we must remember that Canadian government policy favored the establishment and growth of T.C.A. (whether out of national pride and/or pure economic necessity). Hence in 1956 the Minister of Transport announced that C.P.A. would be given the Pacific area, and T.C.A. would be left with the Atlantic and Caribbean. 145

With this as a background it is not untoward to speculate that the possibilities for major confrontations between Canada's two major carriers were avoided, and many possible difficulties were avoided for the Air Transport Board.

As for the activities of this Board it is worth repeating the comments of Professor Currie: 146

"In one controversial case which came before the Air Transport Board, three companies formed by ex-servicemen applied to operate a local service between Vancouver and Lethbridge. The Board re-

143. Ibid., see sections 801, 802 of the Federal Aviation Act of 1958; as an example of Presidential meddling see The Transpacific Case 20 C.A.B. 47, 48 (1955); 26 C.A.B. 481, 486 n. 10; 32 C.A.B. 928 (1961); C.A.B. Order 22625, 2 CCH Av. L. Rep. 21, 576.02 (Sept. 3, 1965); C.A.B. Order No. 68-12-105, 2 CCH Av. L. Rep. 21, 833 (Dec. 18, 1968). Professor Currie's statement about the role of the President is too all-embracing. For a critical analysis of his role see Lowenfeld, supra, footnote 85, Chapter IV, "International Aviation and the Role of the President", 1V-96 to IV-126; and see also the Note entitled Section 801 of The Federal Aviation Act—The President And The Award Of International Air Routes to Domestic Carriers: A Proposal For Change, (1970) 45 N.Y.U. L. Rev. 517 where it is suggested that section 801 should be amended so that the decision-making for routes involving overseas flights for American carriers should be left to the President, and the carrier selection left to the C.A.B. because of past abuses e.g. in the days before the enactment of the 1938 Civil Aeronautics Act selected carriers met in "spoils conferences" and agreed to a division of government mail contracts which carried with them subsidies (see Note, op. cit., p. 517), and the controversial Transpacific Route Investigation (see Note, pp. 527-533) in which two Presidents "were charged with "cronyism" and one allegedly acceded to the wishes of one of the competing carriers" (ibid., p. 532).


145. Ibid., p. 130.

146. Supra, footnote 92, p. 555.
jected all these applications because the traffic potential was low, rail and bus service was satisfactory, weather conditions were bad for flying, and no one type of aircraft could be used for regular and efficient operation. The Post Office offered to pay 22 1/2 cents per planemile for the carriage of mail but this, even with anticipated revenue from passengers and express, was insufficient to prevent heavy losses.

When the case originally came before the Board, Canadian Pacific Air Lines could not apply for this route because of the divestment order. Later when the order was partially rescinded, it received the license. The Air Transport Board felt that a large company would be able to absorb initial losses and wait for a profitable volume of traffic. It owned the different kinds of aircraft which were needed and so could fly the route regularly and at lower cost than if one type of plane had to be used over the entire distance with its varying terrain and weather."

Under the provisions of section 402 of the Federal Aviation Act of 1958 every foreign carrier must apply and obtain a permit from the C.A.B. which could result in a hearing and opposition from other carriers; however, in Canada the Board (and now the Commission) must exercise its powers "subject to any international agreement or convention relating to civil aviation to which Canada is a party". A public hearing is usually not held and "if the carriers concerned are well known for their competence in international services", Mr. Rosewar tells us, "there is usually a short delay only between the time the agreement takes effect and the inauguration of the air services". In spite of the fact that Canada and the United States have a bilateral agreement, it is necessary for a Canadian carrier wishing to go into the United States to obtain a permit from the C.A.B. Hence it was possible for an American carrier, Colonial Airlines, which had a monopoly on the Montreal-New York run, to stall and delay T.C.A. in obtaining a C.A.B. permit for this run. The stalling technique adopted by Colonial Airlines is illustrated in Colonial Airlines, Inc. v. Adams where Colonial sued the defendants alleging they unlawfully conspired to grant Trans-Canada Airlines a permit to maintain a line in competition with theirs. The majority held that an injunction could not be granted, and that the C.A.B. could constitutionally issue such a permit with Presidential approval. Colonial backed-off after Canada

148. Supra, footnote 144, p. 133.
150. See also The Lufthansa Case, being Pan American—Grace Airways, Inc. v. C.A.B.,
brought pressure to bear upon the American government. 151

A suggestion has been made (which may be open to doubt) that the A.T.B. was “primarily an advisory body”152 because the Aeronautics Act uses phrases indicating that the Board “may make recommendations” and similar ones, hence it was not a semi-judicial body like the Board of Transport Commissioners. The license-granting power was given to the A.T.B., albeit subject to the approval of the Minister, and this presumably included the necessity for holding hearings when required. There is no doubt that the Board of Transport Commissioners, A.T.B., and now the Canadian Transport Commission operated and operate subject to the control and discretion of the Minister of Transport; accordingly, government policy is most likely to prevail and predominate over any step taken by any one of these bodies during its history. The A.T.B. did advise the government about airports, runways, tariffs; surveyed Canadian passenger travel; was a participant in international flight negotiations; and one chairman resigned because of the government’s failure to delineate air policy.153

Canadian Transport Commission

Presumably to avoid the sort of criticism which has been levelled at the C.A.B.—administrative inefficiency, lack of criteria and standards, non-judicial behavior, excessive delay in arriving at decisions154—the National Transportation Act was passed which sets out national transportation criteria (albeit somewhat generally) and creates one national Canadian Transport Commission which in turn establishes committees for rail, air, water, motor vehicle, commodity pipeline transportation. The Air Transport Committee is one of these, and it operates within the framework of the National Transportation and Aeronautics Acts. There was some fear that the new Commission in its work of coordinating the regulation of all national transport “might become a bureaucratic monster”.155

Unlike its predecessor, the A.T.C. has been studying regional air policy; and has studied international charter regulations; studied air services in the Northwest Territories; in 1969, in accordance with government

342 F. 2d 905 (D.C. Cir. 1965), discussed in Lowenfeld, supra, footnote 85, “Regulation of International Air Transportation”, II-98 to II-101.
151. Supra, footnote 144, pp. 133, 134.
152. Supra, footnote 19, p. 393.
153. Ibid.
155. Supra, footnote 19, p. 397.
policy permitted C.P.A. to increase its transcontinental service; approved special half-fare rates for C.P.A. and Air Canada on domestic routes for young persons and senior citizens on a standby basis; and negotiated new international bilateral agreements. In 1969 the C.T.C. was involved in a variety of international negotiations, and directed its attention to the development of regional air carrier services.

In line with declared government policy for regional air development, the C.T.C. in 1970 continued its program of granting licenses on that basis; gave regional carriers access to cities served by Air Canada; was involved in international negotiations concerning bilateral agreements, and held consultations and review meetings with Mexico and the United States. In 1968, 1969, and 1970 the C.T.C. (it was in fact the A.T.C. which acted in these matters) held public hearings upon a variety of license applications.

An examination of some of the decisions of the A.T.C. in 1971 are revelatory:

1. On an application for service between Kingston, Ontario and Toronto the A.T.C. examined the travel demand; existing alternative transportation; the material filed in support; the objections of intervenors; and decided that in spite of the previous unsatisfactory attempts to establish this service, the applicant "should be afforded an opportunity to test the market" especially as this will provide a regular service between a small community and a large one.

2. When an application was brought to the C.T.C. to review one of its orders on the basis that public notice of the proposed transfer was not given, the C.T.C. stated that it feels "bound to observe in its proceedings the principles of natural justice, and that the rule Audi alteram partem forms part of these principles. The opportunity for a party to present his case does not, however, mean in all instances in open court". The Commission and its Committees must conduct its business "for the speedy despatch of business". The applicant was aware of the proceedings and made numerous representations, therefore its application must be dismissed.

3. In their decisions the A.T.C. specifies the insurance coverage which a carrier must have, and this includes international carriage with reference to each of the Warsaw Convention and Hague Protocol.

159. Decision No. 3172, May 11, 1971 (application by Paul F. Little).
161. See, for example, A.T.C. order No. 1971-A150, June 10, 1971, Vercoa Air Service.
In the United States the C.A.B. members are appointed by the President with the advice and consent of the Senate (section 201 Federal Aviation Act of 1958), and save for the exercise of presidential prerogative under section 801 with respect to international service, it operates free of all other governmental direction. The C.T.C. is appointed by the Canadian cabinet and is under the direct aegis of the Minister of Transport, and must carry out declared governmental air policy.

International carriers may obtain licenses in conformity with the international agreements entered into by Canada. After a C.A.B. decision or ruling, except possibly concerning matters under section 801, the parties may apply to the court for judicial review, but on the Canadian scene the appeal in the first instance is to the Minister of Transport, and then to the cabinet; and on matters of law or jurisdiction to the Supreme Court of Canada. From the foregoing it appears that the C.A.B. is an independent regulatory agency—subject to consideration of the Hector complaints, and except for the provisions of section 801 already mentioned—whereas the C.T.C. (and accordingly the A.T.C.) are directly under and subject to governmental influence, direction and guidance. Presumably since the C.T.C. is concerned with all of Canada’s national transportation, it escapes the Hector criticism of the C.A.B. to the effect that the latter in effect operates in vacuo (except to some extent for international travel).

While American courts will not hesitate to review a C.A.B. order or decision, in Canada there was only one appeal from an A.T.B. order, and the cabinet overruled the Board. There have been few appeals from the regulatory bodies, and where the appeal has been to the cabinet (which does not hold a public hearing, although there has been press coverage of these) generally speaking the cabinet has not reversed, save that on rate appeals it has sent the matters back for rehearing. Save for presidential

Inc., international non-scheduled charter commercial air service from Danville, Illinois to points in the Province of Quebec.


163. Supra, footnote 19, p. 402; C.P.A. was prevented from competing with T.C.A. on flights between Montreal, Vancouver and intermediate points.

164. Supra, footnote 19, pp. 402-405. Professor Currie in footnote no. 23, at p. 694 says: “Of the roughly 2,300 formal cases before the Board from its inception in 1904 to 1950, only 79 were appealed to the Supreme Court of Canada and 54 to the Governor-in-Council. The Board’s judgment was reversed in 16 cases by the Court and 3 by the Cabinet. In addition, the Board itself referred 7 cases to the Supreme Court. In the 1940’s and 1950’s two appeals on general rates went to the Supreme Court which rejected one on leave to appeal and in C.P.R. v. Alberta (1949) 64 C.R.T.C. 129, [1950] 2 D.L.R. 405, S.C.R. 25 scolded the Board for not carrying out its function as required by law. Almost every general rate case was carried to the Cabinet with varying results . . .”
approval required under section 801 the C.A.B. need not concern itself with the possibility of direct governmental intereference in its decision making.

Court delineation of the powers of the A.T.B. may provide a useful basis to assess the powers and role of the C.T.C. (and the A.T.C., and the Minister of Transport too). In *Samuels and Charter Airways Ltd. v. Attorney-General for Canada and Air Transport Board*166 the court upheld an order adding the A.T.B. as a party defendant where it was alleged that the Board in making an order was biased, and being a quasi-judicial body it took into account a report which the plaintiff had not seen. It was argued that it was not the Board which should be added, but the individuals comprising it, but the court rejected that saying that the orders are that of the Board and not the individuals.

In *Regina v. Klootwyck*,168 Munroe, J. held that a regulation made by the Minister requiring licensed commercial aircraft have a safety certificate, is a valid regulation made under the provisions of section 4 of the Aeronautics Act, and is *intra vires* his powers for the regulation and control of air navigation over Canada.

Two other decisions dealing with the A.T.B.'s power are *Regina v. North Coast Air Services Ltd.*167 and *North Coast Air Services Ltd. v. Canadian Transport Commission.*168 In the first mentioned decision the court considered a blanket A.T.B. order of general application to the entire body of commercial air carriers in Canada which (with some exceptions) prohibited commercial air carriers from carrying traffic between points specified in licenses issued to certain classes of commercial air carriers. Tysoe, J. A. in rendering the court's reasons says that while the Board may attach conditions in a license, and it can order air carriers to maintain service at regular intervals according to a published schedule, that does not give it power to make the instant order. He explains the operation of section 4 of the Aeronautics Act:169

“Section 4 [since rep. & sub. 1964-65, c. 22, s. 7] of the Act empowers the Minister of Transport, with the approval of the Governor in Council, to make regulations to control and regulate air navigation over Canada including, *inter alia*, regulations with respect to aerial routes, their use and control. Broadly speaking the Board is empowered to administer the Act and the ministerial regu-

165. (1956) 73 C.R.T.C. 330 (Alberta Supreme Court, Appellate Division).
lations and, with the approval of the Governor in Council, to make
detailed regulations for this purpose. Subject to the approval of the
Minister, the Board may issue licenses to operate commercial air
services and prescribe the routes that may be followed or the areas
to be served and may attach to each license such conditions as the
Board may consider necessary or desirable in the public interest.
Counsel for the Crown properly conceded that the powers of the
Board are only those conferred upon it by the Act."

In the second-mentioned case the Supreme Court of Canada took the
same position as the British Columbia Court of Appeals did in the first
mentioned case, and held that the A.T.B. cannot make such general
orders without approval by the Governor in Council; and likewise the
A.T.C. cannot validate such general orders made by the A.T.B., without
approval by the Governor in Council.

Conclusion

In Canada all air navigation is under the aegis and control of the
federal government; and in the forefront the government-controlled air-
line Air Canada occupies a preferred position.

The major public airports are run by the federal government which
passes regulations for their control. All commercial aircraft must be
licensed, and this too is done by the federal government which sets policy,
and has the final word if it so wants. There is no problem of many
competing airlines as in the United States; and no problem of appearing
to control aeronautics by an independent regulatgy agency such as the
C.A.B.; the federal government runs the show, and there is no inde-
pendence to be considered. Perhaps in a sense, in a large country, with a
tenth of the American population, constantly under pressure from the
south both economically and culturally, it may be sound politics to put
aeronautics into the firm hand of the federal government as part of a
broad national policy of survival and growth. If the airlines suffer the
same fate as the railways did which resulted in the formation of the
C.N.R., then there is ample justification in history for tight government-
controlled aeronautics in Canada. It could be argued that this will stifle
competition. Perhaps that is so, to some extent; but, having regard to the
large costs involved in operating and running airlines, it is not likely that

170. For a discussion of the criteria which the C.A.B. considers in granting certification
see Richmond, Regulation and Competition in Air Transportation. Chapters VIII and IX,
there will be a stampede of air carriers competing to take over from Air Canada. Undoubtedly there is a place for regional carriers, and they have established themselves with a firm toehold. Professor Currie sums it all up when he says,171

"A fundamental and persistent problem in the history of Canadian transportation is the interplay of two radically different concepts: straight business principles on the one hand and such matters as national unity, the movement of trade through Canadian parts, the opening up of new areas, defence, and avoiding the ruination of national credit on the other."

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171. Supra, footnote 19, p. 3.

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THE IMPACT OF THE NATIONAL ENVIRONMENTAL POLICY ACT ON THE MOTOR CARRIER INDUSTRY

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The plethora of recent environmental legislation is having a profound impact on many industries, particularly industries tightly regulated by the Federal Government. The environmental legislation with the most impact on such industries is the National Environmental Policy Act of 1969 (NEPA).

It is only now, after at least 50 decisions construing NEPA have been written, that the full impact of NEPA is beginning to come into focus. For NEPA is, in the words of Judge Friendly, "so broad, yet opaque, that it will take even longer than usual fully to comprehend its import." Clearly, NEPA is a blessing. To undertake major Government action without considering its long term effects on the environment is obviously folly. However, contrary to the views of some writers, this author shares the opinion that NEPA is a mixed blessing.

The purpose of this article is to examine the impact of NEPA on a typical closely regulated industry, the motor carrier industry, and to catalogue the resulting benefits and difficulties. Section I is a general description of NEPA, and Section II is a description of the motor carrier industry as it is regulated by the Interstate Commerce Commission (ICC). Section III is an integration of the two previous sections and examines NEPA's impact on the motor carrier industry.

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I. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA)

NEPA is composed of two titles. Title II of NEPA serves two functions. Section 201 requires the President to transmit to Congress an annual Environmental Quality Report, and Section 202 creates the Council on Environmental Quality (CEQ).

Title I of NEPA, the more important of the two titles, also serves two purposes. It first declares a national environmental policy in broad general terms. For example, Section 101(b) provides that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy," to promote environmental goals. Section 102 then "authorizes and directs that to the fullest extent possible: (i) the policies, regulations, and public lands of the United States shall be interpreted and administered in accordance with the policies set forth in this Act . . . ." The courts have interpreted this language from NEPA to mandate that "every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment."10

To insure that every federal agency has considered environmental factors along with other relevant aspects of any proposed action, Section 102(2)(c) provides:

". . . To the fullest extent possible . . . all agencies of the Federal Government shall . . .(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

9. CEQ serves primarily in an advisory capacity to the President. Its duties and functions are set forth in Section 204 of NEPA.
11. "By compelling a formal 'detailed statement' and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place. . . " Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971). See also, the CEQ's interim guidelines, published April 23, 1971 stating that "the objective of section 102(2)(c) of the Act and of these guidelines is to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action. . . ." 36 Fed. Reg. 7723, 7724.
II. **INTERSTATE COMMERCE COMMISSION REGULATION OF THE MOTOR CARRIER INDUSTRY**

Part II of the Interstate Commerce Act\(^\text{12}\) divides into two groups persons commercially transporting passengers or property by motor vehicle in interstate or foreign commerce. The Act provides for comprehensive regulation by the ICC of “motor carriers,”\(^\text{13}\) but exempts the other group, “private carriers,”\(^\text{14}\) from all regulation except that dealing with safety.\(^\text{15}\)

The Act defines the term “motor carrier” to include both common carriers and contract carriers.\(^\text{16}\) A “common carrier” is a person who offers standardized for-hire carriage to the general public.\(^\text{17}\) On the other hand, a “contract carrier” is a person who enters contracts only with specific shippers to supply the shippers specialized for-hire carriage.\(^\text{18}\)

The Act then creates a separate regulatory scheme for common carriers and for contract carriers. However, the regulatory schemes are very similar and result in the comprehensive regulation by the ICC of all phases of both common and contract carriage.\(^\text{19}\)

Thus, entry into the market by additional common or contract carriers is regulated by the ICC. No person can operate as a common carrier unless he is issued a certificate of public convenience and necessity by the ICC.\(^\text{20}\) In issuing such a certificate, the ICC has statutory authority\(^\text{21}\) to

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13. The term “motor carrier” is defined in the text accompanying notes 16-18, infra.
14. The term “private carrier” is defined to be any person not included in the term “common carrier” or “contract carrier” who “transports . . . property of which such person is the owner, lessee, or builder, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.” 49 U.S.C.A. § 303(a) (17).
15. 49 U.S.C.A. § 304(a)(3). The purpose of this article, as stated in the text accompanying note 7, supra, is to examine the impact of NEPA on the motor carrier industry. Thus, the article will not further discuss private carriers.
16. 49 U.S.C.A. § 303(a)16.
17. 49 U.S.C.A. § 303(a)14.
18. 49 U.S.C.A. § 303(a)15. In actual practice it may be very difficult to determine whether a given motor carrier is a common carrier or a contract carrier. See National Transportation Policy and the Regulation of Motor Carriers, 71 Yale L.J. 307 (1961).
19. The Act specifies a number of exemptions from all ICC regulation, except that pertaining to safety, for certain common and contract carriers. 49 U.S.C.A. § 303(b). The two most important exemptions are for carriage by agricultural cooperatives and for carriage of certain commodities.
20. 49 U.S.C.A. § 306(a)(1). The certificate is entitled a “certificate of public convenience and necessity” because the ICC is required to grant it if “the applicant is fit, willing, and able properly to perform the services proposed and . . . the proposed service, to the
specify: the term of the certificate; the routes to be followed; and the service to be rendered, including the commodities to be carried and the class of shippers to be served.

In like manner, no person can operate as a contract carrier unless he is issued a permit by the ICC authorizing such contract carriage. The ICC possesses statutory authority, in issuing such a permit, to specify the business of the contract carrier, including the shippers to be served and the commodities to be carried, and the routes to be followed.

Procedurally, the ICC renders a decision on an application for a certificate or permit only after conducting an adjudicatory proceeding. Such proceedings are full evidentiary hearings. However, if there is an urgent need for either common or contract carriage and no such carriage exists, the ICC may, without a hearing, grant temporary authority for such extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity.”

The statutory condition for granting a certificate, that it be required by the “present or future public convenience and necessity,” is exceedingly vague. However, this phrase has been given a very definite meaning by the courts. See, e.g., Dixie Highway Express Inc. v. United States, 242 F.Supp. 1016 (S.D. Miss. 1965) and Nashua Motor Express Inc. v. United States, 230 F.Supp. 646 (D. N.H. 1964).

26. 49 U.S.C.A. § 309(a)(1). The ICC is required to grant such a permit if “the applicant is fit, willing, and able properly to perform the service of a contract carrier...and the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act...In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shippers and the changing character of the shipper’s requirements.”

27. 49 U.S.C.A. § 309(b).
common or contract carrier service for a period of up to 180 days.\textsuperscript{33} The grant of such temporary authority does not create any presumption that corresponding permanent authority will subsequently be granted.\textsuperscript{34}

Once an applicant is granted a certificate or permit, it cannot in most cases be summarily withdrawn.\textsuperscript{35} It can be revoked only upon his application or after notice and a hearing, for

"willful failure to comply with any provision of this chapter (49 U.S.C.A. Chapter 8), or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license."\textsuperscript{36}

After an applicant receives a certificate or a permit, he may operate as a motor carrier. However, he is still subject to tight regulation by the ICC of the rates he may charge. All common carriers have a duty to charge reasonable rates.\textsuperscript{37} Correspondingly, upon complaint or its own initiative, the ICC may, after a hearing, fix a reasonable rate or the maximum and minimum reasonable rates that a common carrier may charge.\textsuperscript{38} The ICC may also determine after a hearing whether any new rate proposed by a common carrier is reasonable.\textsuperscript{39} Pending such a hearing and decision, the ICC may temporarily approve the proposed new rate or suspend the proposed new rate for up to seven months beyond the time it would otherwise have gone into effect. If no decision has been

\textsuperscript{33} 49 U.S.C.A. § 310a(a). For a description of the accelerated procedure used by the ICC in granting a common or contract carrier temporary authority see 39 C.F.R. Part 1131 (1972).

\textsuperscript{34} 49 U.S.C.A. § 310(a)(a).

\textsuperscript{35} Those instances in which the ICC may summarily withdraw a certificate or permit are noted in 49 U.S.C.A. § 312(a).

\textsuperscript{36} 49 U.S.C.A. § 312(a).

"Provided, however, that no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in Section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder." 49 U.S.C.A. § 312(a).

\textsuperscript{37} 49 U.S.C.A. § 316(a) and (b). Every common carrier must file with the ICC and keep open to public inspection tariffs showing all of its rates. 49 U.S.C.A. § 317(a). No common carrier may charge rates different from those contained in such tariffs. 49 U.S.C.A. § 317(b).

\textsuperscript{38} 49 U.S.C.A. § 316(e).

\textsuperscript{39} 49 U.S.C.A. § 316(g).
issued after seven months have elapsed, the proposed new rate becomes effective. 40

Contract carriers are also subject to rate regulation. All contract carriers have a duty to observe reasonable minimum rates. 41 Thus, the ICC may prescribe a reasonable minimum rate if after a hearing it determines that the rate in force contravenes the national transportation policy declared in the Interstate Commerce Act. 42 Also, whenever any contract carrier proposes a reduction in its rates, the ICC may after a hearing determine the lawfulness of the proposed rate. 43 Pending such a hearing and decision, the ICC may temporarily approve the new rate or suspend the new rate for up to seven months beyond the time it would otherwise have gone into effect. 44

In summary, all motor carriers are subject to regulation by the ICC in five primary areas:

1. The grant of a certificate or permit,
2. The revocation of a certificate or permit,
3. The grant of temporary operating authority,
4. The setting of reasonable rates, and
5. The temporary approval of proposed new rates. 45

III. THE IMPORTANCE OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) TO THE MOTOR CARRIER INDUSTRY

The major substantive provision of NEPA mandates the filing of environmental impact statements. "To the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation for legislation or other major Federal actions significantly affecting the quality of the human environment," 46 a detailed environmental impact statement. Thus, to examine the impact of NEPA on the motor carrier industry, it is necessary initially to identify which of the five types of action by the ICC in regulating the motor carrier industry constitute "major federal action" significantly affecting the environment, and therefore require the filing of an environmental impact statement.

40. Id.
41. 49 U.S.C.A. § 318(a). Every contract carrier must, with certain limited exceptions, file with the ICC and keep open to public inspection schedules containing the actual rates it charges. 49 U.S.C.A. § 318(a).
42. 49 U.S.C.A. § 318(b).
43. 49 U.S.C.A. § 318(c).
44. Id.
45. See text accompanying notes 16-45, supra.
46. See text accompanying note 11, supra.
The first step then is to look at the construction of the phrase "major federal action" by the courts. In *City of New York v. United States*, the court held that the ICC was required to file an environmental impact statement before approving the abandonment of a 1.8 mile long railroad. The ICC's approval of abandonment of this minute railroad was held to be "major federal action." Moreover, there is no reason to limit the phrase "major federal action" only to ICC approval of the cessation of operations and not approval of the start of operations. Thus, ICC approval, by granting a certificate or permit, of the start of operations by a motor carrier is also "major federal action." Moreover, federal action need not be permanent, such as the grant or revocation of a certificate or permit, to be "major federal action." In *SCARP v. United States*, the court was faced with ICC approval of a temporary railroad rate increase. The court held the ICC's action was "major federal action:

"Nor is the Commission's (ICC's) order disqualified as a 'major federal action' because it is only temporary in nature. . . ."40

Thus, ICC grant of temporary operating authority to common or contract carriers is also "major federal action."

*SCARP v. United States* also stands for the proposition that the approval of rate changes by the ICC constitutes "major federal action." Thus, ICC approval of rate changes, either permanently or temporarily, is "major federal action." It should be noted that the court in *Port of New York Authority v. United States* held that ICC approval of a temporary rate increase did not require the filing of an environmental impact statement because the ICC was required to decide upon the temporary rate increase quickly. It is not clear whether the rationale for the court's decision was that federal actions that must be taken quickly cannot be "major federal action." In any case, such a rationale is not defensible. As the court in *SCARP v. United States* subsequently stated:

"The Commission seems to take the position that temporary rate increases are not major federal actions because they must be decided upon quickly and do not lend themselves to the sort of reflective deliberation which NEPA requires . . . THE PORT OF NEW YORK AUTHORITY v. UNITED STATES, SUPRA. It seems

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48. 4 ERC 1312 (D.D.C.), stay pending appeal denied 4 ERC 1369 (Circuit Justice Burger), probable jurisdiction noted Case No. 72-562, 41 U.S.L.W. 3346 (December 18, 1972).
49. Id. at 1319.
50. 451 F.2d 783 (2nd Cir. 1971).
clear, however, that these considerations are not relevant to the importance of the action undertaken. The Commission’s position appears to rest on the non sequitur that because an action is taken quickly it is therefore unimportant. Yet it hardly requires argument to demonstrate that some of the most important federal actions in our history have also been taken with great alacrity. To the extent that the need for speed is relevant at all, it goes not to the importance of the federal action, but to the provision in NEPA which requires compliance only ‘to the fullest extent possible.’ See 42 U.S.C. § 4332.”

Thus, ICC regulation of the motor carrier industry either by grant or revocation of a certificate or permit; grant of temporary operating authority; or by approval of permanent or temporary rate changes constitutes “major federal action.”

Having concluded that such regulation by the ICC of the motor carrier industry is “major federal action,” the next question is whether it is action “significantly affecting the quality of the human environment.” The CEQ’s interim guidelines provide that any action in which “there is potential that the environment may be significantly affected” or in which the environmental impact is “likely to be highly controversial” is an action “significantly affecting the quality of the environment.” Thus, one three judge District Court has concluded that “whenever the action arguably will have an adverse environmental impact,” it is for purposes of NEPA an action significantly affecting the environment.

Arguably, ICC action granting a certificate or permit or temporary operating authority will have an adverse impact on the environment by diverting traffic from barges and railroads. The increased use of trucks in place of railroads and barges will arguably increase air pollution. Such action may also be detrimental to the environment by increasing consumption of limited supplies of gasoline, as opposed to other petroleum products in greater supply. On the other hand, ICC action revoking a certificate or permit or approving either permanent or temporary rate changes is arguably harmful to the environment because it will cause increased use of aircraft for transportation, resulting in greater pollution of the upper atmosphere.

51. 4 ERC at 1319 (footnotes omitted, emphasis added). For a discussion of the meaning of the phrase “to the fullest extent possible” see the text accompanying notes 57-59, infra.
53. SCRAP v. United States, 4 ERC at 1320 (emphasis by the court).
55. See City of New York v. United States, 4 ERC 1646, 1651-52 (2nd Cir. 1972).
Moreover, one court has ruled that a temporary railroad rate increase, as applied to recyclable goods, significantly affected the environment because it would increase the cost of shipping recyclable goods, thereby aggravating the disparity of shipping costs between these goods and primary goods and discouraging the use of recyclable goods. Presumably, the same argument can be made for an approval by the ICC of a motor carrier rate increase. However, the actual examples are not important. The point here is that all of these actions by the ICC in regulating the motor carrier industry are actions "significantly affecting the quality of the human environment."

Thus, whenever the ICC regulates the motor carrier industry by granting or revoking a certificate or permit, by granting temporary operating authority, or by approving a permanent or temporary rate change, the ICC must "to the fullest extent possible" file a detailed environmental impact statement. The ICC in SCRAP v. United States argued that the phrase "to the fullest extent possible" allowed it to consider administrative difficulty or delay in deciding whether a given action required a detailed environmental impact statement. However, the Senate and House conferees who wrote the "fullest extent possible" language into NEPA, had stated:

". . . The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in . . . [Section 102(2)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. . . ."

Therefore, the court in SCRAP v. United States rejected the ICC's argument and concluded:

"We must stress as forcefully as possible that this language ["to the fullest extent possible"] does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by

56. SCRAP v. United States, 4 ERC at 1313.
57. 4 ERC at 1319.
the reviewing courts.’ CALVERT CLIFFS’ COORDINATING COMMITTEE v. U.S. ATOMIC ENERGY COM’N, SUPRA, 449 F.2d at 1114 [2 ERC 1779].”

Hence, the ICC is required, without regard to administrative difficulty or delay, to file a detailed environmental impact statement before performing any of the regulatory actions here in question.

Mere pro forma compliance by the ICC with the requirement for filing a detailed environmental impact statement is not sufficient:

“Thus a purely mechanical compliance with the particular measures required in § 102(2)(c) [the requirement for an impact statement] and (d) will not satisfy the Act if they do not amount to full good faith consideration of the environment.”

What then is required of the ICC to demonstrate “full good faith consideration of the environment?”

Procedurally, the ICC may not merely prepare an environmental impact statement at the last step of the decision making process. Section 102(2)(c) requires that a draft environmental impact statement must “accompany the proposal through the existing agency review process.” Moreover, such a draft statement must be prepared by the ICC itself and not by the applicant.

Furthermore, in its consideration of the environment, the ICC may not rely on certification by other agencies that their environmental standards are satisfied. The AEC has taken the position that with regard to water pollution, the AEC role is restricted to assuring itself that an applicant for a nuclear reactor license has procured the appropriate approval from the federal, state and regional agencies primarily concerned with water quality. However, the court reviewing the AEC’s position rejected it. The court stated:

“Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem:

59. 4 ERC at 1319.
60. Calvert Cliffs’ Coordinating Committee v. United States Atomic Energy Commission, 449 F.2d 1109, 1113 (D.C. Cir. 1971) (emphasis by the court). See also text accompanying note 11, supra.
61. See Greene County Planning Bd. v. FPC, 455 F.2d 412 (2nd Cir. 1972) (The court required the FPC to prepare its own draft statement rather than rely on that prepared by the applicant).
the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. Their certification does not mean that they found no environmental damage whatever. In fact, there may be significant environmental damage (e.g., water pollution), but not quite enough to violate applicable standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action—the agency to which NEPA is specifically directed. 62

It is also clear that for those actions requiring hearings the ICC cannot merely rely on the opinion of its staff as to environmental issues, even those not raised by a party, and not pass on such issues at the hearing. The court in *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, rejecting the AEC's reliance on such staff opinions, stated:

"Compliance to the 'fullest' possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental and non-environmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs." 63

Thus, when the ICC holds an adjudicatory hearing to consider granting or revoking a certificate or permit or approving a rate change, it must examine the adequacy of the staff review of environmental issues, whether or not they are raised by a party at the hearing, and independently consider "the final balance among conflicting factors that is struck in the staff's recommendation." 64

However, the major theme that emerges from the recent cases construing NEPA "is that in an adjudicatory proceeding, the agency, here the ICC, itself must balance the economic and technical advantages against the environmental costs of each proposed action to ensure an optimum

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63. *Id.* at 1118.
64. *Id.*
result." 65 Thus, in the Calvert Cliffs decision the court appears to require the agency to undertake "a rather finely tuned and 'systematic' balancing analysis in each instance." 66 In this balancing, the agency is required to examine a wide range of issues to arrive at its determination. The court in Calvert Cliffs stated:

"NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values . . . . The part of the individualized balancing analysis is to ensure that, with possible alteration, the optimally beneficial action is finally taken." 67

An indication of the range of the issues that must be considered can be gathered from the decision of the Court of Appeals in National Resources Defense Council v. Morton. 68 In that case the court sustained the agency's refusal to examine alternatives not technologically available. However, the court rejected the agency's allegations that there was no need to consider alternatives that were beyond the power of the agency to effectuate.

The requirement that the ICC make an independent determination of each issue coupled with the wide range of issues that must be considered presents a serious difficulty. As one observer of the administrative process stated:

"If an administrator, each time he is faced with a decision, must perforce evaluate that decision in terms of the whole range of human values, rationality in administration is impossible. If he need consider the decision only in the light of limited organizational aims, his task is more clearly within the range of human powers. The fireman can concentrate on the problem of fires, the health officer on problems of disease, without irrelevant considerations entering . . . . If the fire chief were permitted to roam over the whole field of human values—to decide that parks were more important than fire trucks, and consequently to remake his fire department into a recreation department, chaos would displace organization, and responsibility would disappear." 69

65. See Murphy, supra, note 6 at 973.
66. 449 F.2d at 1113 (footnote omitted).
67. Id. at 1123.
68. 458 F.2d 827 (D.C. Cir. 1972).
69. H.A. SIMON, ADMINISTRATIVE BEHAVIOR 13 (1957) quoted in Murphy, supra note 6.
In every hearing before the ICC regarding the grant or revocation of a certificate or permit or the approval of a rate change there are, conceivably, countless issues. If no standards are binding on the ICC in its determination of these issues, its task is immeasurably complicated.

Thus, NEPA clearly has a major adverse impact on the ICC as it regulates the motor carrier industry. But what does NEPA's adverse impact on the ICC mean to the motor carrier industry? The most noticeable effect of NEPA on the motor carrier industry will be the delays motor carriers encounter when seeking to take any action requiring ICC approval. As we have seen, before granting or revoking a certificate or permit, granting temporary authority, or approving a permanent or temporary rate change the ICC must make an independent determination of each one of a great number of issues. Such determinations will take time, especially for those actions requiring hearings by the ICC.

Moreover, such hearings may be further delayed by other factors. It is no surprise to anyone familiar with the field that "there are some environmentalists who do not want hearings to end." To such environmentalists any delay in granting a certificate or permit is an environmental victory. Thus, they may be tempted to try to further expand the environmental issues to be considered in any hearings conducted by the ICC.

Another effect of NEPA on the motor carrier industry will be the motor carriers' need to become more sophisticated in environmental issues. It is only by becoming sophisticated in environmental matters that the motor carriers can present their case to the ICC in the most favorable light. Moreover, motor carriers will need such sophistication to assist agencies in giving proper consideration to all environmental issues. "Otherwise, (the motor carrier) industry will suffer from costly delays resulting from judicial reversal of an overly acquiescent agency."

Obviously, the need for environmental sophistication and the delays suffered by motor carriers will also cause the motor carriers to incur increased costs. Many of the smaller, less profitable motor carriers may well be unable to absorb such increased costs and may be forced to close their doors.

To this point, NEPA's impact on the motor carrier industry appears to be wholly adverse. What are the benefits of NEPA, if any, to the motor carrier industry? Motor carriers will probably not reap any unique benefits from NEPA because of their status as motor carriers. However, as a part of society, they will clearly participate in the beneficial aspect of

70. Murphy, supra note 6 at 981.
NEPA, and the benefits of NEPA to society as a whole are large in magnitude. NEPA is a long overdue step in reordering national priorities. Many federal agencies, including the ICC, had become absorbed in the agency's special mission and its special constituency. Such isolationism and parochialism are partially displaced by NEPA. Now all federal agencies must place every proposed action in the larger perspective of the national policy to avoid degradation of the environment. And, as we have seen, the vigilance of the federal courts in implementing the requirements of NEPA insures that they will not be undermined by an observance of form that fails to grapple with the underlying environmental issues. Thus, the benefits of NEPA to society are the lower levels of air, water, and other pollution resulting from the good faith consideration of environmental factors by all federal agencies.
AMTRAK REVISITED

The 1972 Amendments to the Rail Passenger Service Act

WILLIAM E. THOMS*

Since May 1, 1971, most of the intercity rail passenger trains in the United States have been operated by the National Railroad Passenger Corporation, better known as AMTRAK. This corporation is not a nationalized entity but a for-profit private corporation which has received much government financial support. AMTRAK was established by the Rail Passenger Service Act of 1970, which was intended to call a halt to the decline of this means of travel throughout the nation, and to suspend the jurisdiction of the Interstate Commerce Commission over train discontinuance petitions. The corporation was severely underfunded and its first act was to cut the number of passenger trains operating in the United States in half. Many large cities such as Dallas, Cleveland, Little Rock, Toledo, Tulsa, and Mobile, as well as entire states such as Maine, Alaska, New Hampshire, Hawaii, South Dakota and Arkansas, are not served by the new system.

The initial year of operation produced rather disappointing results. It took a long while to get passenger train service built up from such a low estate as that to which it had sunk. Time was required to build a staff, set up operating systems, and define objectives as well as to make the public aware that the new corporation was in the passenger business.

The initial moves of the corporation were very cautious and did not bring forth dramatic results. AMTRAK has not yet attempted to operate its own trains with its own personnel, but has instead chosen to rely upon contracts with the railroads. This resulted in the immediate freeing of railroads from their passenger deficits and the creation of a cost-plus subsidy, with no incentive to the operating railroads to control costs.

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3. Thoms, AMTRAK: Rail Renaissance or Requiem?, 49 Chi-Kent L. Rev. 29, 49 (1972).
After a year of operation, AMTRAK's initial funds had run out and the Corporation was living off the buy-in payments from railroads, which had been required of participating carriers as a consequence of being relieved of the passenger burden. This left nothing for capital expenses, which were necessary in order to modernize service. AMTRAK, through its president, Roger Lewis, requested Congress for an additional $170,000,000 to get the Corporation through the period ending June 30, 1973. From that date, the Corporation was free to petition the Interstate Commerce Commission for discontinuance of trains within the Congres-

Although AMTRAK had felt it needed at least $250 million to cover operating expenses, the Office of Management and Budget assumed that since the route structure was going to be reviewed in mid-1973, no program should be planned that would have to be revised at that date. OMB told President Lewis to apply for $170 million, thus forcing AMTRAK to pour its capital funds into the operating account. This decision was backed by Daniel Hofgren, chairman of NRPC's Financial Advisory Board, who admitted this was a "special case" but that since AMTRAK was undergoing an "experimental period" he would recommend the minimal grant. Lewis went along with the charade, spurning Congressional largesse in a rare example of corporate asceticism. When asked why the Corporation sought such a relatively small amount, AMTRAK's president replied, "I think we've got to get far surer about what sort of passenger service is needed than we are." Lewis later told the Wall Street Journal that not only did AMTRAK not need the additional funds which the Senate had voted it, but he could not possibly find a way to spend it until 1974, should the funds be, in fact, appropriated to AMTRAK. This was too much for Senator Lowell Weicker (R.-Conn.) who demanded on the floor of the Senate Lewis' resignation. "Either Mr. Lewis is a fool or he's fronting for someone in the administration or the private railroad industry," Weicker declared.

The legislation which finally emerged from Congress on June 22, 1972, was not only an appropriation bill, but a second-thought of the AMTRAK concept, with tighter controls by Congress, as well as a vote of no-confidence in AMTRAK's management. Section 1 of the new Act

10. BUSINESS WEEK, April 15, 1972, at 75.
11. PASSENGER TRAIN JOURNAL, Spring 1972 at 33-34.
provides that no officer of the Corporation will receive more than the compensation for cabinet-level officers (currently $60,000 per year). The act goes on and says no present officeholder shall have his salary reduced while in service, except that the amount over $60,000 must come out of corporate profits. Since profits are neither at hand nor just around the corner, the current president has had to accustom himself to a cut of over 50% of his original salary.

Lack of Congressional satisfaction with AMTRAK's handling of the passenger system is also responsible for Section 2 of the statute, which directs AMTRAK to, insofar as practicable, directly operate and control all aspects of its rail passenger service, and to take such actions as may be necessary to increase its revenue from the carriage of mail and express.

The amendments of 1972 authorized the secretary to grant up to $225,000,000 for maintenance, repairs, research and development, demonstrations, and capital improvements and further authorized an annual appropriation of $2,000,000 per annum for service between points in the United States and Montreal, Canada; Vancouver, Canada; and Nuevo Laredo, Mexico. Such routes were to be considered to be within the "basic system", that is, the states involved would not have to pay for them, and they could not be discontinued until after July 1, 1973, and then only with the approval of the Interstate Commerce Commission.

Service under this Act did not begin immediately. The first Congressionally-mandated train, from Seattle to Vancouver, began operations over the Burlington Northern on July 17, 1972. The train is run on a slow 4 1/4-hour schedule (competing buses take three hours) but it does make convenient connections with AMTRAK and Canadian National trains at both ends of the route. The Pacific International replaces a service discontinued on April 30, 1971. Establishment of service to Montreal was a more complicated business. Until May 1971, Penn Central and Delaware & Hudson had operated a through service between New York and Montreal via Albany. However, such a service would serve only New York State with no large cities north of Albany. In addition, the line terminated at a dead-end at New York's Grand Central Terminal. The Corporation thereupon chose to restore service to a route via Springfield, Mass. and White River Jct., Vt., which would permit a through routing through

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Penn Station to Washington, and incidentally include Vermont in the system. (Trains pass through parts of New Hampshire but stop at Vermont stations across the river.) The route is quite circuitous and time consuming (58 miles and 3 hours longer than the Albany line) and the run takes twice the time needed for competitive buses via the New York Thruway and Northway. It appears that AMTRAK tends to run trains where the votes, rather than the passengers are. Population in New England is higher than in northeastern New York and the trains have been active this past winter with the ski trade. The route from Washington to Montreal via New England had not been utilized since 1966—AMTRAK's first example of selecting a route not operated by passenger railroads in 1971. In addition, the service called for the cooperation of the Boston & Maine, Central Vermont, and Canadian National Railways, none of whom are AMTRAK participants. As a result, north of Springfield the trains are operated under contract between AMTRAK and the nonparticipating railroads, which had operated only freight service for the last six years. Neither of the Canadian trains has yet been designated a "passenger train service" subject to the regulatory authority of the Canadian Transport Commission, and thus are not eligible for Canadian subsidies. Nor is CTC permission necessary to discontinue Canadian operations.\(^{16}\) The first *Montrealer* commenced operations on Sept. 29, 1972.\(^{17}\)

AMTRAK's Mexican service was even later in appearing. When the Office of Management and Budget impounded funds for the service, AMTRAK had to abandon its plan for a St. Louis-Nuevo Laredo train which would restore passenger service to the state of Arkansas and to Dallas, in favor of a through service to Mexico, connecting with the *Texas Chief* at Temple, Texas. This plan proved to be impractical, since border authorities, fearful of drug smuggling, refused to permit through cars to cross the Rio Grande. In addition, if a train were to make reasonable connections with the Texas Chief it would miss by a few hours the scheduled departure of the *Aguila Azteca*, premier train of the Ferrocarriles Nacionales de Mexico, and vice versa. Finally, the decision was made to forget the U.S. connections, and to run a tri-weekly shuttle train from Fort Worth to Laredo, Texas via Santa Fe and Missouri Pacific, incidentally restoring service to Austin. At Laredo, passengers are transported by bus across the border to a connection with the train to Mexico City.

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The *Inter-American* began its not-quite-international run on January 27, 1973.\(^{18}\) Connecting passengers were subject to an 18-hour layover in Fort Worth or anything from 7 to 35 hours delay in San Antonio.

Other provisions of the 1972 amendment provide that AMTRAK may promote special fares for military and blind persons, and that government agencies shall authorize train travel on the same basis as travel by other modes.\(^{19}\) The amendments also provide for monthly reports by AMTRAK concerning revenues, expenses, passenger loads and on-time performances to Congress and annual reports by the Secretary of Transportation and the ICC.\(^{20}\) The new law provides that the Corporation will be subject to the Freedom of Information Act.\(^{21}\) The amended law also directs the ICC to rule upon an application by AMTRAK to use railroad tracks and facilities within 90 days, and provides that the ICC may in emergencies such as floods, strikes and wrecks require a railroad to make its tracks and facilities immediately available to NRPC for the duration of the emergency.\(^{22}\)

AMTRAK has authority to establish "experimental" services at any time. The services may be withdrawn if they prove unsuccessful. The new law establishes criteria for establishment of additional routes: current and future population, economic conditions, adequacy of alternate modes and the cost of adding the service.\(^{23}\)

The remainder of the 1972 amendments deal with including terminal company employees in the category of displaced employees to be protected under the Act, and directing AMTRAK to take such actions necessary to see that railroad employees eligible to receive passes on April 30, 1971 are allowed to travel on such a basis by AMTRAK. The railroads, which had promised these workers free transportation as a condition of employment, must compensate AMTRAK on such terms as are agreed to by the parties or arbitrated by the ICC.\(^{24}\)


\(^{19}\) 45 U.S.C. 546 (a) (1972).


\(^{25}\) 45 U.S.C. 565 (1972). By order of December 20, 1972, corrected on December 21, 1972, the ICC found AMTRAK's space-available policy of free transportation on the worker's "home" railroad and half-rate transportation on "foreign" railroads to be substantially in compliance with the requirements of this law. The Commission found AMTRAK's costs incurred in transporting deadhead passengers to be a mere $0.0079 per passenger mile, which would result in a New York-Washington "cost" of 7 cents and New York-Chicago "cost" of 72 cents. The ICC further ordered that the revenues received from reduced-rate
In addition, the Secretary of Transportation was authorized to guarantee loans to AMTRAK up to an aggregate of $150,000,000 through June 30, 1973, and up to $200 million thereafter for improvements in roadbeds, rolling stock and other corporate purposes.\textsuperscript{28} The language here used expressly gave the Secretary power to issue such notes, thus eliminating a technical defect under which the banks were unwilling to lend AMTRAK more than $45 million of the $100 million previously guaranteed.

A new section was added at the end of the bill, providing that the Secretary of Transportation must by March 15, 1973, report to the Congress on the effectiveness of AMTRAK and recommendations for the future course of the system. Such a report shall include:

1. Recommendations for the operation by AMTRAK directly of all aspects of passenger service.
2. An assessment of how fairly AMTRAK's board represents the interest of passengers and, if necessary, recommendation for change in the composition of the board.
3. Estimates of potential revenues from the transportation of mail and express on passenger trains.
4. Analysis of on-time performance with recommendations as to the elimination of delays due to freight interference.
5. Recommendations with respect to the establishment of the optimum intercity passenger system after July 1, 1973, as to which lines should be included and which discontinued.
6. Recommendations for improvement of track and roadbeds.

In addition, recommendations may be made "for legislative enactments or administrative actions which would enable the Corporation, after July 1, 1973, to discontinue more rapidly and efficiently those routes which do not meet the criteria recommended by the Secretary. . . ."\textsuperscript{27} This amendment was added by the House of Representatives, and many observers felt this was reflective of the House's relative lack of sympathy for continuance of money-losing runs. Under union pressure, a section which would recommend work-rule changes which might preserve passenger service was dropped.\textsuperscript{28} It is submitted that this was an unfortunate pass transportation should be credited against the railroads obligations, which would reduce these obligations to zero. ICC Finance Docket No. 27194, Determination of Cost Reimbursement under Section 405(f) of the Rail Passenger Service Act of 1970, as Amended (1972). AMTRAK is presently appealing this decision.

move, since this is one area where real savings could be made. Although management and labor are coming to agreement concerning work-rules in freight and yard service so as to maximize economic operations, the same does not hold true for passenger trains. Since there is a cost-plus factor in AMTRAK service, management and labor have no incentive to eliminate unnecessary positions, for the bill can be passed on to AMTRAK and eventually the taxpayer. It is conceivable that a railroad could trade-off productivity gains and work force reduction in freight service for overmanning in passenger service, which would be ultimately supported by the public purse. On the other hand, it is well to remember that organized labor is the only politically potent group supporting the AMTRAK concept, and without its assistance there might be no American rail passenger service at all.29

Although Congress had allocated $227,000,000 for AMTRAK in the years 1972-1973,30 the separate appropriation bill limited the Corporation to $170,000,000, the amount originally requested by AMTRAK.31 In September 1972, President Lewis went back to Congress to ask for the additional $57,000,000 to be used for purchasing Turbotrains and the upgrading of roadbeds as well as for establishing Chicago-Laredo service through Arkansas.32 However, Congress only appropriated an additional $9,100,000 for international service through Dallas and Little Rock and for losses on Washington-Montreal, Seattle-Vancouver, and Washington-Parkersburg, W.Va. services, plus the establishment of an additional route between Oakland and Bakersfield, California.33 These funds have since been permanently impounded by the Office of Management and Budget.34

By the end of 1972, AMTRAK had made some substantial progress. The long-term decline of passenger patronage had been reversed, and passenger loadings were up 11%. Revenues had increased and losses reduced, thus dramatically changing a secular trend which had been indicated since the Second World War.35 AMTRAK had acquired its own

locomotives and cars, ordered new *Turbotrains* from Canada and France, simplified tickets and improved reservations procedures, and measureably bettered on-train services under direct AMTRAK supervision.  

On March 15, 1973, the Department of Transportation filed its report and recommendations with Congress, as required by Section 806 of the amended Act. The report cited the above improvements, but concluded that many of the changes were not yet apparent to the traveling public, would take additional time to implement, and that it was not possible “at this time to assess with any finality the success of the effort to revitalize intercity rail service. There are some notable gains, which support the general assessment that AMTRAK has made progress toward improving intercity rail service.”

The recommendations of the Secretary were generally favorable to the AMTRAK experiment. The Transportation Department favored the continuance of the program along present lines and recommended further loans and grants to the Corporation. It recommended further passenger input into the decision-making process through the establishment of an advisory committee, continuance of the present programs in obtaining mail and express traffic and expenditure of funds for track renovation.

With regard to route structure, the report urged AMTRAK to slightly retrench its system. Examining the long-haul route structure, the Department identified the following as “problem” routes with estimated allocated deficits of more than 2.5¢ per passenger-mile in fiscal year 1975:

- Chicago-Houston
- Chicago-Florida
- Chicago-Washington/Newport News
- New York/Washington-Kansas City

The report recommended that the Chicago-Florida and New York/Washington-Kansas City routes be dropped, that Chicago-Houston trains be combined with Chicago-Los Angeles trains in off-peak periods between Chicago and Newton, Kansas, and that the route segment between Richmond and Newport News be abandoned. Service between Chicago and Florida would be rerouted via the Chicago-Richmond and New York-Florida routes, thus preserving service for through travel-

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38. *Supra* n. 36 at 3.
39. *Id.* at 4.
40. *Id.* at 69.
ers but ending all AMTRAK service in Alabama, as well as to the important cities of Louisville and Nashville. AMTRAK later announced that the Texas Chief to Houston would be rerouted to run through Dallas, restoring service to that city which had lost all passenger trains in 1969. The rescheduling would effectuate a connection with the Inter-American at Fort Worth.

The short-haul picture looked more optimistic, with only two routes: Chicago-Milwaukee and Washington-Parkersburg, estimated to have deficits greater than 2¢ per passenger mile in fiscal year 1975. It was recommended that Turbotrains be initiated on the Chiago-Milwaukee run to boost patronage and lower costs, and that the Washington-Parkersburg service be discontinued as hopeless. Since this latter run was an “experimental” service, established unilaterally by the corporation under Section 403(a) of the Act as a result of political pressures, no regulatory approval was needed for discontinuance of this train, which AMTRAK removed from service on May 5, 1973.

Four recommendations were made for further amendments to the Rail Passenger Service Act. The first proposed amendment would change Section 404(b)(3) of the Act to eliminate the ICC’s jurisdiction to investigate and suspend discontinuance of trains in AMTRAK’s basic system, thus leaving AMTRAK free to discontinue trains at will, subject only to the right of State and local agencies to request continuation of service on a reimbursable basis.

The second proposed amendment would exclude from the ICC’s jurisdiction over adequacy of passenger service those aspects “relating to scheduling, frequency of service, and consist of trains.”

The third proposed amendment would change sections 601 and 602 of the Act to provide open-ended appropriation authorization, without fiscal year or dollar amount limitations, and extend the limitation of loan guarantees to $500,000,000.

Finally, the Secretary proposed changing the date of AMTRAK’s an-

41. Id. at 79-91.
43. Supra n. 36 at 93-94.
44. 45 U.S.C. 563 (a) (1972).
46. 45 U.S.C. 564(b) (1972).
47. Supra n. 36 at 104-108.
50. Supra n. 36 at 109-110.
tual report to March 15, to coincide with the reporting date of the Trans-
portation Department and the Interstate Commerce Commission.\textsuperscript{51}

It is submitted that the final amendment is administratively desirable
and the third financially unobjectionable, adoption of the first two pro-
posed amendments would be unwise. AMTRAK was founded “for the
purpose of providing modern, efficient, intercity passenger service.”\textsuperscript{52} To
attain this goal, Congress directed the Secretary of Transportation to
establish a “basic system” of routes over which AMTRAK should oper-
ate.\textsuperscript{53} What emerged was a skeletal system, viewed as the absolute mini-
mum of train service acceptable to the nation, for a base upon which to
build. AMTRAK has already cut back service on its experimental routes
and reduced frequency within the basic system. It has applied for discon-
tinuance with the Commission of the routes mentioned in the Secretary’s
report. There is nothing in the history of AMTRAK to indicate that the
Corporation has been particularly bold or energetic in its efforts to obtain
a greater share of the passenger trade.

Under these circumstances, who is to say that AMTRAK might not
use unlimited power to cut back all service to one or two profitable routes,
were it given the opportunity to contract at will? This has been the expe-
rience under private management, and this was the evil which the Rail
Passenger Service Act was intended to remedy. The powers of the Corpo-
rations are sufficiently broad and general to allow it to enter into any
business, provided it is somehow connected with rail passenger opera-
tions.\textsuperscript{54} Although the Interstate Commerce Commission has generally
been no friend of the railroad passenger,\textsuperscript{55} the present procedure at least
acts as a balance against a precipitate withdrawal of service motivated
by excessive concern with profits and lack of concern for the traveling
public.

The first two years of AMTRAK operations give cause for cautious
optimism about the future of railroad passenger service. No doubt the
impending fuel shortage in the United States will compel policy-makers
to seriously consider shifting the bulk of intercity travel from gas-
hungry automobiles to more efficient and less fuel-consuming modes

\textsuperscript{51} Id. at 110. The proposed change would amend 45 U.S.C. 548(b) (1972).
\textsuperscript{52} 45 U.S.C. 501 (1972).
\textsuperscript{53} 45 U.S.C. 521 (1972).
\textsuperscript{54} 45 U.S.C. 545(a) (1972).
also Thoms and Laird, Derailling the Passenger, 36 ICC Prac. J. 1118 (1968), Laird and
such as bus and railway. AMTRAK can make a positive contribution by relieving congestion on other modes and by reducing the resource and environmental burden on transportation.

57. L. Fray et al., The Role of Intercity Rail Passenger Service, parts IV and V passim (1973).
DUAL MODE TRANSPORTATION: EMERGING LEGAL AND ADMINISTRATIVE ISSUES

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1. Introduction

The time has passed when new technology could be deposited on society's doorstep and unashamedly left there with the expectation that others would devise piecemeal solutions for each development's collateral consequences. The need for early assessment of the implication of new technology has received considerable attention in the past few years. Nuclear energy fueled power plants, the SST, snowmobiles, and other recent major technological innovations all carry with them significant implications which hindsight, and the commentators, tell us we should have anticipated and objectively evaluated. This essay is a first step in the assessment of administrative, legal, and social policy issues raised by proposed dual mode transportation systems. A dual mode system is defined as "a system of ground vehicles which can operate either under manual control over existing streets and roadways or under automatic

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1. See, e.g., Symposium—Technology Assessment, 36 Geo. Wash. L. Rev. 1033 (1968); Huddle, Political Adaption to a Technology Surfeited Society, 47 Denver L. J. 629 (1970). In his introduction to the Symposium, Harold P. Green writes that:

The problem of social control over technology is by no means a new one. Technological advance has typically produced social problems. In the past, these social problems have been met and dealt with primarily on an ad hoc basis. The first phase of societal response to such social problems has usually been the extension and application of old legal principles to the new problems. Our judicial system has worked out on a step-by-step, trial and error basis new rules of law to mesh new technologies into the fabric of our overall societal structure. When these rules of law have seemed to our legislative bodies to be inadequate, or to be developing too slowly for protection of society, our legislative bodies have superimposed statutory standards of conduct and liability or provided for outright government regulation.

This approach to social control over technology has typically represented a process of response to problems which have become apparent, and not infrequently in the case of the legislative response it comes only after some major crisis or catastrophe has occurred. As Congressman Duddario points out, we may no longer be able to enjoy the luxury of merely responding to demonstrated adverse social effects. The population explosion, coupled with the powerfully destructive agents of modern technology, makes it much more difficult for society to tolerate even the temporary existence of technological hazards.


Instead of prognostication, we tend to react with after-the-fact restrictions on the use of new technology. See, e.g., Exec. Order No. 11644, 37 Fed. Reg. 2877-78 (1972) in which President Nixon announced Federal controls on the use on public lands of off-road recreational vehicles—motorcycles, minibikes, trail bikes, snowmobiles, dune buggies, etc.
control over a network of guideways. ... using either self-contained power or power derived from the guideway." Such systems would increase the flow of vehicles between heavily traveled points linked by restricted-access dual mode automated guideways. Vehicles would leave the guideway at exits in the vicinity of their destinations to travel the rest of the way under manual control on existing streets. No dual mode system or prototype has yet been constructed. The dual mode transportation system concept is one of several new systems currently being developed and evaluated by the U.S. Department of Transportation. The Department's goal in developing and demonstrating entirely new transportation systems is "to apply the best of advanced technology to urban mass transportation service." Other new technology systems include personal rapid transit systems (PRT) which would provide express transportation service from origin to destination in small automated vehicles over a guideway system, demand-responsive transit systems, which would provide door-to-door service in response to customers' telephone requests, and the urban tracked air cushion vehicle (TACV), designed to provide high speed transportation in highly congested corridors.

It is the purpose of this essay to identify potential difficulties in the establishment and operation of a dual mode system, and to suggest alternative solutions. Because it represents only a preliminary analysis, it should neither be considered a comprehensive catalogue of issues, nor a complete compilation of solutions.

II. What is a Dual Mode Transportation System

To facilitate preliminary feasibility studies of the dual mode transportation concept, the Dual Mode Study team of the Transportation Systems Center, a part of the U.S. Department of Transportation, has selected four archetypal systems for in-depth analysis: a pallet system, a dual

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4. Hearings before the Subcommittee on Department of Transportation and Related Agencies Appropriations of the House Committee on Appropriations, 92d Cong., 2d sess., pt. 2 at 824 (1972).
5. Id. at 826. Models of four PRT systems were to be displayed at the U.S. International Transportation Exposition at Dulles International Airport in late May, 1972.
6. Id. at 828.
7. Id. at 831.
8. Omitted from this discussion, for example, are issues relating to the financing of dual mode systems. Should they be paid for out of general tax revenues, special purpose bonds, a trust fund supported by user charges, etc.
mode bus, a dual mode version of the private automobile, and a dual mode rental vehicle. These systems are described below to the extent necessary for this analysis.

A. Dual mode pallet system

In a pallet system conventional automobiles would operate in the manually-controlled mode on existing streets as they do now. Automobiles would become automated vehicles by being driven aboard individual automated pallets which would then move along a guideway carrying vehicles, their drivers and their passengers to their destinations. A forerunner of such a dual mode system now in existence is the railroad's "piggyback" flatcar service, in which truck trailers are driven to rail terminals, placed on railroad flatcars for long hauls, then driven off the flatcar onto conventional roadways. (Each dual mode pallet would probably be operated and be controlled independently, however, rather than as part of a train.) Another example is "Autotrain" service, in which trains containing passenger lounge cars and auto-carrying flatcars transport vehicles and drivers between Washington, D.C. and Florida. Of course neither piggyback nor Autotrain service qualifies as a true dual mode system because pallets (flatcars) must be linked together in trains, do not move under automatic control, and because drivers and passengers do not remain in their vehicles.

B. Dual mode bus system

A dual mode bus may be a bus of any convenient size controlled by a driver while operating on existing streets, but which also functions automatically upon its restricted guideway. Once the dual mode bus entered the automated guideway, its driver would become superfluous, and would probably be required to leave the bus to perform other assignments. When the bus arrived at its terminal, perhaps after making intermediate stops at fixed stations along its guideway, a second driver would board to resume manual control for off-guideway operations.

C. Dual mode private and rental vehicle systems

In a dual mode privately owned vehicle system, all vehicles would be owned by private individuals, just as automobiles are now owned. The

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9. For a description of "Trailer-on-flatcar" (TOFC) service, see 49 C.F.R. § 1090 (Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service).
system differs from a dual mode rental vehicle system only in the identity of vehicle owners: in a rental system one or a relatively few entities would own all vehicles and rent them to drivers for various lengths of time. Both rental and privately owned vehicles would resemble contemporary automobiles, and would be capable of automated operation on restricted-access guideways and manual operation on the existing street network. Once a vehicle entered the guideway approach ramp all control over it would vest in the guideway operator. Drivers would not regain control until their vehicles exited at preselected stations.

III. NATIONAL REGULATION v. LOCAL CONTROL

A preliminary issue in the establishment of any dual mode transportation system is the necessary degree of centralized control over system design, construction, or operation.11 If a uniform nation-wide system were envisaged, a greater degree of centralized control over design and operation would be required than if several discrete systems were planned.

A. The need for uniform nation-wide control

In general, the need for uniformity in both design and operation of a dual mode system is determined by the number of separate guideway networks on which a vehicle is expected to operate, and by the degree of interaction between vehicle and guideway in a particular system. For example, it is most unlikely that a dual mode bus would operate on a guideway configuration other than its own system’s, and so there would be little need for uniformity among all dual mode buses and their guideways. On the other hand, dual mode automobiles could be expected to operate on guideways anywhere in the country, and therefore vehicle and guideway design and operation should be uniform nationwide. If a dual mode system required only that vehicles ride passively on a moving guideway, a pallet system, for instance, vehicles would need to meet only minimal design standards (e.g., wheel base, axle length, height, etc.). But if vehicles must interact actively with the guideway in the automatic mode, all dual mode vehicles must be standardized throughout the system.

Policy arguments exist for and against uniform design and centralized operation of dual mode systems. First, production of uniform vehicles

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11. It is assumed throughout this essay that the Federal Government would exercise control over a uniform national dual mode system either directly, through a Federal administrative agency, or indirectly, through a Comsat-like public-private corporation, or through detailed regulation of private industry.
and guideways should result in scale economies and rapidly provide a large body of knowledge on the workings of that system. It can be argued, however, that only through installation of demonstration systems of various designs can it be known which system, or which combination, is best. Second, centralized control may exclude States and localities from control over this new system: this would represent a departure from other Federally-assisted transportation construction and operation programs, which have heavily involved the States. Federally aided highway projects, for example, are initiated, planned, and developed by the States. States supervise project construction and assume responsibility for maintaining completed projects; the Federal role is limited to technical review of project plans and disbursement of funds. Urban Mass Transportation projects are likewise initiated and planned by States and local public bodies, subject to Federal approval. Furthermore, complete Federal dominion of dual mode bus systems seems particularly inappropriate for local collection-and-distribution route determinations. Federal control is also inconsistent with current administration policies favoring local autonomy and revenue sharing with States and localities to fund transportation improvements.

12. The four Federal-aid highway systems are the primary, secondary, Interstate, and urban systems. 23 U.S.C.A. § 103(a).
17. 23 U.S.C.A. §§ 120, 121.

The hard fact is that the best mixture of transportation modes is not something that remote officials in Washington can determine in advance for all cities, of all sizes and descriptions, in all parts of the country. Nor do the Federal officials who grant money for specific projects understand local needs well enough to justify their strong influence over how local projects should be planned and run. . . .

Community organizations, concerned individuals and local units of government should not have to shout all the way to Washington for attention. Community standards and community transportation goals are changing and some of those who only five years ago welcomed the prospect of a new highway or airport are now protesting in front of bulldozers. Transportation planning and appropriations mechanisms must be flexible enough to meet the challenge of changing community values. This flexibility can best be achieved by concentrating more decision making power in the States and the localities.
B. Requirements for centralized control

If system-wide operational uniformity were required, it would probably entail detailed control far exceeding existing regulation of ground transportation vehicles and guideways. The sophisticated electronic equipment necessary for safe automatic operation of dual mode systems would be much more complex than, say, mandatory safety and air pollution emission equipment now required on automobiles.20

To regulate vehicle design, the dual mode central administrator could issue detailed specifications for vehicles to be constructed by private manufacturers.21 As long as vehicles conformed to these requirements, they could be built in various models differing only in non-essential features. If more control were needed, the administrator could create limited monopolies by licensing qualified producers to make standardized vehicles. Only vehicles built by licensed manufacturers could then be allowed on the dual mode guideway. Or, the administrator could fabricate vehicles himself. Parallel degrees of control are available to regulate guideway construction. The administrator could issue detailed guideway construction standards which States must follow,22 or personally direct guideway construction.

C. Precedents for national regulation

Current Federal transportation regulatory and aid programs supply


See also, National Emissions Standards Act, 42 U.S.C.A. § 1857-f, authorizing establishment of exhaust emission standards for new motor vehicle engines.

21. See, e.g., 32 C.F.R. § 255 (Department of Defense Policies and Procedures for Assuring the Quality of Production of Complex Supplies and Equipment): "Complex supplies and equipment must be produced under regulated conditions if adequate assurance of quality is to be realized. Systematic control of manufacturing processes by the producer is an essential prerequisite for assuring the quality of such items. Likewise, it is essential that the Government verify systematically that such control is, in fact, established and exercised by contractors." 32 C.F.R. at § 255.3.

22. The Secretary of Transportation now has authority to establish minimum guideway standards for other transportation modes. See, e.g., Natural Gas Pipeline Safety Act of 1968, 49 U.S.C.A. §§ 1671-1684. Section 1672(b) requires the Secretary to adopt minimum Federal safety standards covering "design, installation, inspection, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities."

See also, 23 U.S.C.A. § 109(b), authorizing the Secretary of Transportation to set geometric and construction standards for the Interstate highway system.
precedents for various degrees of centralized (Federal) control of specific transportation modes. Federal control of civil air transportation provides one example of extensive centralized control of facilities design and operation (but not necessarily the most appropriate administrative method for exercising control). That control, exercised by the Civil Aeronautics Board and the Federal Aviation Administration over private industry and individuals, determines terminal and intermediate cities,\(^23\) reviews tariffs,\(^24\) regulates air traffic,\(^25\) prescribes minimum design, materials, performance and maintenance standards for aircraft,\(^26\) establishes pilot certification requirements,\(^27\) and in all other aspects assures the safe and efficient utilization of the airspace.\(^28\) The dual mode central administrator could be given comparable authority over the dual mode system. The Federal highway aid program presents a model for regulation of a dual mode system with less centralized control. As described above, States carry out Federally aided highway construction projects in compliance with minimum Federal technical standards (e.g., geometric configuration, capacity to handle predicted traffic volume, construction techniques, and regulatory, informational, and safety markings).\(^29\) States control the basic matters of project location and design, project construction, and maintenance.\(^30\) Finally, if nationwide design and operational uniformity for dual mode systems were not necessary, Federal participation could be limited to construction of a variety of dual mode system demonstrations. Local governments could then decide whether or not to construct a dual mode system, where to put it, and which one suits their needs.

IV. RONUTINE OPERATIONAL ISSUES

Operation of a dual mode system will pose several administrative problems. First, who should be allowed access to the automated portion of the system? Ideally, a dual mode system should be accessible to any licensed driver possessing minimal driving skills. If entry were at all complicated, however, safe and efficient operation would dictate that vehicle operators be trained to bring their vehicles into the system properly. This issue is of particular importance in systems open to large

\(^{24}\) 49 U.S.C.A. § 1373.
\(^{25}\) 49 U.S.C.A. § 1348(c).
\(^{26}\) 49 U.S.C.A. § 1421(a).
\(^{27}\) 49 U.S.C.A. § 1422.
\(^{28}\) 49 U.S.C.A. § 1348(a).
\(^{30}\) 23 U.S.C.A. §§ 105 (planning), 106 (design), 114 (construction), and (maintenance).
numbers of potential vehicle operators, for example, systems involving some variant of today’s automobile. If the system were national in scope, a nationwide driver training and licensing program should probably be required. Training should be given to all persons above a minimum age, or at least to all persons holding licenses to drive today’s manually-controlled automobiles.

Before vehicles are permitted to enter the automated portion of the system, they should be required to conform to necessary safety standards. (This requirement could be relaxed in pallet dual mode systems, where vehicles would be passive and would not interact with the guideway.) If dual mode vehicles were under the control of the system administrator, as dual mode buses and rental vehicles would be, it should not be difficult to maintain and inspect them periodically. Coercing private owners of dual mode vehicles to maintain them and have them inspected might present a problem, however. Automated pre-entry electrical and mechanical inspection of all vehicles would provide an incentive to adequate maintenance of privately owned vehicles. Any vehicle failing this inspection would not be permitted on the guideway. (To avoid becoming clogged with rejected vehicles, entrance ramps should provide alternative routes for vehicles failing inspection.) In addition to this quick check, more frequent vehicle inspections than the one or two per year required for automobiles may also be necessary. These inspections should include complete checkout of the dual mode mechanism, as well as testing of conventional safety features—brakes, tires, etc. Inspectors could attach computer-coded stickers to each vehicle complying with inspection standards.

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32. Firms renting automobiles now follow elaborate vehicle inspection procedures to avoid liability for accidents involving their cars. See, e.g., Clarkson v. Hertz., 266 F. 2d 948 (C.A.5, 1959); Stevenson v. Hertz Corp., 356 Mass. 723, 252 N.E. 2d 212 (1969); Anno.: Liability of bailor of automotive vehicle or machine for personal injury or death due to defects therein, 46 ALR 2d 404, 443-46 (1956).

standards to indicate the date of the inspection, thoroughness (i.e., was it a major or minor inspection), possible trouble areas to be watched, etc. Vehicles without proper inspection stickers, detectable by the central computer as they enter the automated portion of the system, could be barred from the guideway, or even made subject to criminal sanctions, just as violators of existing auto inspection regulations now are. A system-wide network of maintenance (and inspection) stations would be necessary to check dual mode vehicles regularly. To insure mechanics' and inspectors' qualifications, the dual mode system administrator could supervise training these personnel and either license maintenance and inspection stations or operate them himself to insure necessary quality standards.

V. Non-Routine Operations: The Cost of Accidents

Thus far the discussion has assumed routine operation of the dual mode system. Indeed, system designers assure that fail-safe computers will minimize the possibility of accidents. While the possibility of an accident may be remote, should one occur, it could impose enormous dollar costs on the operators and occupants of the high-speed, close headway, automated dual mode vehicles involved. Planners should therefore evaluate alternative accident liability and compensation schemes appropriate for each type of dual mode system; schemes which would compensate accident victims for their losses, deter future accidents, satisfy social needs to penalize wrong-doers, all without deferring use of the dual mode system. Without such policy guidance, courts in each jurisdiction in which a dual mode system operates will be forced to allocate accident costs on a case-by-case basis, adapting and applying traditional legal theories. As courts grope for a satisfactory body of law to apply to dual mode accident litigation, their missteps may result in grossly inequitable accident cost distributions in individual cases. Furthermore, the particularistic nature of the case law system is at best a form of 'incremental planning' with minimum integration into general rules that can guide the future actions of individuals, industries, and government agencies. The fol-


35. See, Harper and James, The Law of Torts 743 (1956 ed.).

36. Green, supra note 1 at 1036.

following discussion applies alternative accident compensation schemes to the four types of dual mode systems, and evaluates their efficiency as allocators of accident costs.38

A. Accident compensation schemes for bus and pallet dual mode systems

1. Accident cost allocation under the fault system

To recover accident costs under existing common law principles of fault and negligence, an injured bus or pallet passenger must initiate a law suit against persons who may be legally liable to him. Candidates for liability include the dual mode system operator, who is responsible for automated operations and perhaps for vehicle and guideway design and construction, the bus or pallet manufacturer, the guideway builder, electronics fabricator, or makers of component parts for any of these manufacturers. The injured plaintiff must prove the following elements of his action to establish each defendant's liability: (1) A legal duty or obligation requiring the defendant to conform to a certain standard of conduct (in general, to act reasonably); (2) Defendant's failure to conform to that standard; (3) A causal connection between the conduct and plaintiff's injury; and (4) Actual losses.39 Injured passengers on dual mode buses or pallets would most certainly sue the dual mode system operator, the only entity they have dealt with directly in connection with dual mode operations. Because pallet and bus dual mode systems provide passenger service to the public akin to existing passenger common carrier service,40 dual mode accident victims may take advantage of several special rules.

38. Much of the discussion which follows relies on analysis developed by Professor Guido Calabresi of Yale. See Calabresi, Some Thoughts on Risk Distribution and The Laws of Torts, 70 Yale L. J. 499 (1961); Calabresi, The Decision for Accidents: An Approach to Nonfault Allocation of Costs, 78 Harv. L. Rev. 713 (1965); Calabresi, Fault, Accidents and the Wonderful World of Blum and Kalven, 75 Yale L. J. 216 (1965).


40. A "common carrier by motor vehicle" is defined by the Interstate Commerce Act, 49 U.S.C.A. §303(a)(14), as "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers. . . ." A bus or jitney is a common carrier. 13 Am. Jur. 2d Carriers §14 at 570.
of law designed to facilitate accident victims' recovery from common carriers of passengers.

(a) Duty of care. Instead of the duty to act reasonably which the law imposes on most individuals, common carriers of passengers are held to a higher standard of care. Passenger carriers holding themselves out to serve the general public owe their patrons the highest duty of care consistent with operation of their service.\(^{41}\) If courts applied this rule to dual mode bus or pallet system operations, it could be argued that the absence of a driver or attendant aboard the bus or pallet in the automated mode constituted evidence of negligence. The system operator could respond to this argument by contending that his dual mode system was designed to maximize safety without the need for human interference, and that a driver aboard the vehicle would be unable to respond to emergencies quickly enough to be of use. The presence of a human driver would therefore constitute a safety hazard, the system operator would conclude. Plaintiffs could respond that the failure to provide for human control was evidence of negligence itself.

(b) Defendant's failure to conform to his duty of care. Establishing the precise manner in which a defendant common carrier's conduct deviates from the duty owed can be a difficult or impossible burden on an injured plaintiff. He lacks information as to proper modes of operation, proper maintenance methods, etc. To overcome this problem of proof, plaintiffs may employ the doctrine of \textit{res ipsa loquitur} ("the thing speaks for itself") to establish a common carrier's liability. Under this doctrine, the occurrence of an accident involving an instrumentality within the defendant's control and without plaintiff's active participation creates a presumption (or at least permits a jury to infer\(^{42}\)) that the accident re-

\(^{41}\) The generally rule has been summarized as follows:

A majority of courts uphold an instruction to the jury which exacts of a common carrier of passengers for hire toward the passenger, the highest degree of care and forethought consistent with the practical operation of the business.

[Footnotes omitted.]

Harper and James, \textit{op. cit. supra} note 30, at 947, and cases there cited. See also, 14 Am. Jur. 2d Carriers \$916 (1964).

\(^{42}\) In some jurisdictions, the \textit{res ipsa loquitur} doctrine merely allows a trier of fact to \textit{infer} a defendant's negligence, but does not require a finding for the plaintiff when defendant offers no rebuttal evidence. In other jurisdictions, \textit{res ipsa} creates a presumption of negligence which requires the trier of fact to find for the plaintiff unless the defendant rebuts the presumption. Even in those jurisdictions in which \textit{res ipsa} otherwise creates an inference, however, a special rule may obtain in common carrier cases which increases \textit{res ipsa}’s effect to create a presumption. See McCoid, \textit{Negligence Actions Against Multiple Defendants}, 7 \textit{Stan. L. Rev.} 480, 483-5 (1955); but see, Note, \textit{Torts—Application of \textit{Res Ipsi Loquitur} to Carrier-Passenger Cases}, 38 \textit{Marq. L. Rev.} 278, 280 (1955).
sulted from the defendant’s negligence. The burden then shifts to the defendant to prove he was not negligent. “The conditions usually stated in America as necessary for the application of the principle res ipsa loquitur are as follows: (1) The event must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) It must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) It must not have been due to any voluntary action or contribution on the part of the plaintiff.” Automated dual mode bus and pallet operations appear to satisfy these prerequisites: automated operation of buses and pallets would be under the system operator’s complete control, with no control in passengers. According to representations of system designers, accidents are most unlikely to occur; if one does happen, it seems reasonable to presume it was caused by negligence. Further, the system operator would have easy access to technical information concerning the system to rebut the presumption (or inference) created by res ipsa.

Despite the availability of these special plaintiff-serving rules, it is difficult to predict the outcome of plaintiff’s suits against the system operator. On the one hand, application of the common carrier standard of care and the res ipsa loquitur doctrine should facilitate accident victims’ recovery from the system operator. If the injured plaintiff can point to a specific action by the system operator which caused his injury, he should have little trouble establishing that the action breached the high duty of care owed by the system operator as a passenger common carrier. (As passengers gain experience with use of the system, they should become adept at spotting specific deviations from standard practice, excess speed or too-rapid acceleration, for example.) Difficulties in proving adherence to the common carrier’s high duty of care with respect to each of the myriad possible accident causes within the system operator’s control should make it difficult for the system operator to rebut the res ipsa presumption (or inference). On the other hand, actual litigation experience in the airline industry indicates that any plaintiff’s advantage created by the common carrier standard of care and by res ipsa may be fleeting. Courts and juries are often quick to find that airline accidents resulted from weather phenomena or other uncontrollable causes for which defen-

43. Historically, the presumption of liability established by res ipsa loquitur was available only in actions by passengers against a common carrier. Harper and James, op. cit. supra note 31, at 1083-84.
44. Prosser, op. cit. supra note 35, at 214.
45. See note 38, supra as to the effect of the res ipsa doctrine on the allocation of the burden of proof.
dant air carriers are not liable regardless of the high duty owed. Procedural rules in some jurisdictions require plaintiffs to base their case either on *res ipsa* or to allege a specific act of negligence but will not permit plaintiffs to use both concurrently.  

46 If a plaintiff suing an airline elects to rely on *res ipsa*, "The evidence adduced by the airline...tends to nullify whatever advantage the doctrine might afford the plaintiff. The defendant airline presents an elaborate display, consisting of maintenance, inspection and pilot experience records, which usually convinces the jury that there could not have been a failure to exercise reasonable care and that this must have been one of those 'mysterious mishaps of the air.'"  

47 No doubt dual mode system operators would be capable of amassing similarly impressive displays shortly after their systems began operations.  

Instead of suing the system operator, an injured plaintiff (or the system operator) could choose to bring suit against the manufacturer of the dual mode vehicle, the guideway fabricator, or perhaps the makers of component parts for alleged defects in their respective products. Cases now hold that "the seller of any product who sells it in a condition dangerous for use is strictly liable to its ultimate user for injuries resulting from such use, although the seller has exercised all possible care, and the user has entered into no contractual relation with him."  

48 Problems of proof, how-


48. Increased public familiarity with dual mode transportation systems could result in a more critical, less awestricken attitude on the part of jurors to defendant system operators' evidentiary displays, giving renewed value to *res ipsa loquitur*. See, Note, Liability of Airlines for Injuries to Passengers, supra note 43, at 324.

49. Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1112 (1960).

The rationale behind this rule of strict liability for defective products has been explained as follows:

Since the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. As long ago as 1266 there were enacted special criminal statutes imposing penalties upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied "corrupt" food and drink. In the earlier part of this century this ancient attitude was reflected in a series of decisions in which the courts of a number of states sought to find some method of holding the seller of food liable to the ultimate consumer even though there was no showing of negligence on the part of the seller. These decisions represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract. In the beginning,
ever, may make such suits difficult for plaintiffs to win. First, plaintiffs would have trouble identifying defective products after the accident occurs. A defendant could argue that the accident rendered its product defective, and that it was in satisfactory condition prior to the accident. Even if a product were shown to have been defective, it could be difficult to show the defect caused the accident. Plaintiffs could not use *res ipsa* because these products would not be under a single defendant's control.

Instead of attempting to establish liability based on defendants' fault, an injured plaintiff could choose to proceed on a contract legal theory by charging defendants with breach of an implied warranty of merchantability and fitness required of sellers of goods by nearly all states' law. Because the fields of liability-based-on-fault and contract law shade into each other in this area of liability for defective products, plaintiffs may experience many of the same problems of proof described in the preceding discussion. For example, a plaintiff would still have to establish which

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these decisions displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case. . . .

Recent decisions, since 1950, have extended this special rule of strict liability beyond the seller of food for human consumption. The first extension was into the closely analogous cases of other products intended for intimate bodily use, where, for example, as in the case of cosmetics, the application to the body of the consumer is external rather than internal. Beginning in 1958 with a Michigan case involving cinder building blocks, a number of recent decisions have discarded any limitation to intimate association with the body, and have extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Restatement (second), Torts 346-50 (comments to § 402A) (1965).

50. Uniform Commercial Code § 2-314. The Uniform Commercial Code has been adopted in all states except Louisiana.

51. It is beyond the scope of this essay to denote the niceties and limitations of each body of law as applied to products liability. See, e.g., James, Product Liability, 34 Texas L. Rev. 44, 192 (1955); Franklin, When Worlds Collide, 18 Stan. L. Rev. 974 (1966).
defendant breached its implied warranty by selling a defective product. Employing a contract liability theory carries with its own drawbacks. Although the requirement is slowly being abandoned, some states still require plaintiffs to show "privity of contract," that is, a contractual relationship between plaintiff and defendant. Even when the privity requirement is relaxed, courts could still limit plaintiffs' actions against remote suppliers of component parts.  

How well would the liability-based-on-negligence fault system satisfy the purposes of an accident compensation scheme? To the extent that injured plaintiffs lost their lawsuits, the fault system would not provide compensation for accident losses. (As indicated above, it is difficult to predict what portion of plaintiffs will or will not recover.) The fault system would provide incentives toward accident cost avoidance: The costs of defending lawsuits and the cost of lawsuits lost should induce the dual mode system operator and product manufacturers to curb activities which contributed to their legal liability. Balanced against this accident deterrence effect, however, is the possibility that dual mode product manufacturers might absolutely refuse to participate in the system rather than risk being held liable for all costs of an accident. Holding the system operator or product manufacturers liable for those accidents for which he is proven to be "at fault" should satisfy social needs to punish wrongdoers. But, to the extent that the operator or manufacturer escapes liability due to difficulties of proof in cases in which one or another is believed to be "at fault," the fault system would frustrate this social need. (If the system operator were to escape liability on too many occasions, a legisla-
tive judgement could be made to “sock it to him” for all his wrongs “once and for all” by closing the system, or by imposing a system of enterprise liability (discussed below) on its operation.)

2. Enterprise liability as an accident cost allocator

Dual mode bus and pallet system operations could be held liable for accident costs in all cases through application of enterprise or strict liability, parallel legislative and judgemade legal theories which have grown alongside the traditional liability-based-on-negligence fault system. These doctrines recognize that many beneficial activities will inevitably cause accidents, and that the costs of these accidents may prove catastrophic to individual victims who cannot protect themselves against them. Rather than leave these costs where they lay, or where the fault system redistributes them, enterprise liability requires the activities themselves to bear their accident costs.54 Placing the burden of these costs on the enterprise is thought to provide incentives to reduce accident cost-producing activities. The enterprise is generally prohibited from bringing lawsuits to pass on accident costs to related activities which otherwise might be liable for them. Accident costs which cannot be eliminated are distributed by the enterprise in the form of higher prices so that all users share these costs equally.55 The statutory scheme found in most states for compensating victims of work-related accidents, workmen’s compensation, is an example of enterprise liability. “The basic philosophy of such legislation is that loss from these [job related] accidents is a cost of the enterprises that entail them, and should be borne by the enterprises or their beneficiaries.”56 Strict liability for defective products, mentioned earlier,57 is a case law doctrine which results in holding manufacturing activities liable for their accident costs.58 And a similar result is obtained in non-manufacturing areas through the theory of strict liability for ultra-hazardous or “abnormally dangerous”59 activities: “One who carries on an abnormally dangerous activity is subject to liability for harm to the

55. For refutation of these policy justifications, see, Plant, Strict Liability of Manufacturers for Injuries Caused By Defects in Products—An Opposing View, 24 Tenn. L. Rev. 938 (1957).
56. Harper and James, op. cit. supra note 31, at 731.
57. See text at note 45.
58. See Prosser, supra note 45.
59. This change in terminology is recommended by the drafters of the second Restatement of Torts. Restatement (second), Torts, Tentative Draft No. 10 at 56 (Reporter’s note to § 520) (April 1964).
person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent such harm.\textsuperscript{60}

If the rationale underlying enterprise and strict liability and the result they produce appear to make these theories desirable methods for allocating dual mode bus or pallet system accident costs, they could be implemented directly, by legislation, or gradually, as accident victims press the courts to extend strict liability to the sale of dual mode transportation services. (It would seem unfortunate for dual mode system operators if courts branded their systems “ultrahazardous activities” to justify imposing strict liability. In its early days, aviation was included within the category of ultrahazardous activities.\textsuperscript{61}) If the latter case-by-case approach were followed, however, it could be some time until courts were persuaded to hold the system operator strictly liable for accidents without proof of negligent acts. And, under strict liability, the system operator could still attempt to redistribute this liability by initiating his own breach-of-warranty actions against dual mode equipment makers whose products appeared to have caused the accident.

Enterprise liability appears to satisfy the requirements of an accident compensation scheme better than the fault system. First, it would provide compensation to all dual mode bus or pallet accident victims. Individuals should be more willing to become dual mode bus or pallet passengers because they would not face the risk of unreimbursed accident costs. Enterprise liability would impose accident costs on the system operator who would be in the best position to change equipment, conditions, and procedures to avoid future accidents. Requiring the system operator to pay accident costs should not deter his operation of the system.\textsuperscript{62} The system operator could self-insure or purchase insurance to cover the cost of unavoidable accidents, and distribute these costs to all users in the form of increased fares.\textsuperscript{63} Further, making the system operator bear accident costs should satisfy the need to punish the wrongdoer because,

\textsuperscript{60} Restatement (second), Torts, Tentative Draft No. 10 at 52 (§ 519(i)) (1964).
\textsuperscript{61} See, Note, Tort Liability in Aircraft Accidents, 4 Vand. L. Rev. 857, 861 (1951), and cases there cited.
\textsuperscript{62} If the system operator did act to curtail dual mode activities, his judgment implicit in such actions should induce critical re-thinking of the viability of the system.
\textsuperscript{63} The system operator may wish to arrange for Federal reimbursement of accident costs which exceed a certain minimum level during the system’s first years of operation. Such an arrangement would assure that an especially costly accident in the early days of dual mode service did not bankrupt the system. A few years’ operation should provide the system operator with sufficient data to calculate the amount of insurance necessary, and to adjust rates accordingly. See generally, Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 Yale L.J. 554 (1961).
as between accident victims and the system operator, the latter more likely would be the cause of accidents.

Placing accident costs on the system operator through strict liability would produce results which, on balance, make it somewhat less satisfactory than legislated enterprise liability as an accident cost allocator. While permitting the system operator to sue his suppliers could induce them to produce better products, it could also intimidate them from participating in the system. With enterprise liability, on the other hand, such lawsuits could probably be barred by the enabling statute; the system operator would then be limited to economic pressures against suppliers to obtain accident-free products. The system operators' search for better (i.e., accident-cost-reducing) products under enterprise liability should induce new manufacturers to enter dual mode markets; the risk of bearing redistributed accident costs under strict liability could serve to eliminate them.

3. An aside on procedural problems incident to fault and strict liability accident compensation systems

Both liability-based-on-negligence and strict liability require persons injured in accidents to initiate lawsuits to recover their accident costs. Procedures governing these legal actions could be modified to reduce administrative costs and time delays. For example, all accident victims could be required to join together to litigate defendants' liability instead of subjecting each defendant to multiple lawsuits. Once liability were established, victims' recoveries could be as broad as permitted under present law—pain and suffering, lost earnings, lost earning capacity, medical expenses, property damage, and incidental expenses. Or, legislation could limit recovery to a percentage of each of these expenses, or could deny recovery altogether for certain expenses. Alternatively, a judicial arbitrator or damages adjuster agreed to by the parties could fix

64. See discussion on page 20, supra.
65. If a system of enterprise liability for dual mode operations were established by legislation, the statute should include an administrative mechanism for making payments to accident victims. See generally, Note, Workmen's Compensation, 56 Mich. L. Rev. 827 (1958).
67. See generally, Harper and James, op. cit. supra note 31, at 1299-1360.
68. Massachusetts has taken the lead in limiting personal injury recoveries in automobile accidents. No person may bring suit for pain and suffering unless his medical expenses exceed $500, or unless he suffers specific types of injuries. Mass. Gen. Laws c.231, § 6D. Recovery for lost wages is limited to 75% of the victim's average wage. Mass. Gen. Laws c. 90, § 34A.
each victim's loss according to a predetermined compensation formula. Standards from workmen's compensation statutes could be used to supply the basis for computation of dual mode accident victims' recovery. 69

4. Social insurance accident compensation plans

Social insurance—direct payments to accident victims from general tax revenues—constitutes the last and least satisfactory method for allocating the accident costs of dual mode bus or pallet operations. The prime advantages of this scheme would be that it would compensate accident victims, and would certainly not discourage either the system operator, dual mode product manufacturers, or individual passengers from selling or purchasing dual mode transportation services. Social insurance would not, however, provide direct economic incentives to reduce accident costs, because neither the system operator nor product manufacturers would be liable to pay for them. Only if these costs skyrocketed to a politically unacceptable level would the system operator receive exhortations to reduce accident-causing activities from anxious politicians, concerned about high expenditures or the number of constituents injured by dual mode operations. In addition, social insurance would not punish the moral wrongdoer behind each accident. Unless dual mode accident costs were or were expected to be so high that the other schemes described above could not accommodate them, and/or unless dual mode bus or pallet transportation appeared so socially desirable that all society should bear its accident costs, social insurance is an unsatisfactory method of accident compensation.

B. Accident compensation schemes for privately-owned dual mode systems

1. Accident cost allocation under the fault system

A system for optimal allocations of costs resulting from accidents on the automated portion of a private vehicle dual mode system is more difficult to develop than one for allocation of dual mode bus or pallet

system accident costs. This difficulty arises because of the increased number of active participants in private-vehicle systems. The increased complexity which these participants add to the liability determination necessary under the existing case-law fault system makes that system a poor choice for accident cost allocator for this dual mode system. The fault system, it will be recalled, requires an injured accident victim to bring suit against persons who may be liable to him, and to prove liability by showing the duty of care owed, a breach of that duty, causation, and damages.

Of these elements, plaintiffs should probably find it easiest to prove their damages resulting from the accident. Choosing defendants from among the many actors involved in the operation of a privately owned vehicle on the dual mode guideway would be quite difficult. Potential defendants might include the guideway operator, the vehicle manufacturer, the manufacturers of specific vehicle components, a supplier to the component maker, the mechanic who last serviced the vehicle, the most recent vehicle inspector, the vehicle in front, the vehicle behind, etc. The decision to sue a particular defendant should be based on that defendant’s actions which proximately caused the accident. Given the complexity of the system and the shambles accident-damaged vehicles and guideway may be in after an accident, it would be very difficult to identify either a defective product or a specific negligent act. Even if a defendant’s product were found to have been defective, or a defendant were found to have acted negligently, plaintiff must still prove that the defect (or negligent act) actually caused the accident. Plaintiffs would not be able to use the res ipsa loquitor doctrine to create a presumption of negligence because no single defendant would have sufficient control to justify the doctrine’s application.


71. If the accident were caused by a defective product, say, the vehicle or a vehicle component, plaintiff could employ the doctrine of strict products liability to hold the manufacturer liable for damages. If, however, the accident were caused by a defendant’s action, perhaps the guideway operator’s act or another vehicle owner’s act, plaintiff would also have to prove that the act violated the standard of care to which that particular actor must adhere. The novelty of dual mode private vehicle operations might result in case-by-case development of either a higher standard of care (equivalent to that owed by a passenger common carrier), or a lower standard (equivalent to that owed a guest occupant of an automobile).

The net effect of the fault system's post-accident legal obstacles to injured plaintiffs' accident cost recovery most likely would be to block plaintiffs' attempts at cost redistribution. How well does this succeed as an accident compensation system? Plaintiffs' failure to win lawsuits would leave losses where they fell after the accident, on the dual mode vehicle owners involved. Vehicle owners would have to insure against these losses. Occasionally, perhaps almost randomly depending on jurors' vicissitudes, one or more accident victims would succeed in pinning liability on a particular defendant, with disastrous consequences for that defendant. The bill for all costs of a major dual mode accident could bankrupt all but very wealthy defendants, and could exceed the limits of most vehicle owners' liability insurance policies. The risk of bearing this liability, no matter how remote, may deter individuals from using the dual mode system and manufacturers from building dual mode vehicles, components, and guideways. The allocation of accident costs to injured owner-victims or to an occasional damned defendant would create no effective incentives toward future accident deterrence. Individual vehicle owners have neither sufficient bargaining power to compel manufacturers to build better dual mode vehicles, nor adequate expertise to discover on their own, defects in vehicle design, construction or maintenance. The burden of accident costs could not produce better driving habits in vehicle operators because operators would have no control over vehicle movement during routine automated operation. (Even if emergency devices were provided in the vehicle, chances are that an accident would occur before a human operator could accomplish even reflexive movements.) If the risk of liability did not deter manufacturers from the dual mode market altogether, they might well find it cheaper to invest in lawyers' services after an accident than to take elaborate precautions beforehand to reduce the chance of accidents. Finally, leaving accident costs where they lay would not serve to punish wrongdoers.

2. Enterprise liability and private vehicle dual mode systems

Enterprise liability—the legislative decision to hold an activity liable

73. The guideway operator would incur accident costs to the extent the guideway is damaged in an accident. If he sought to redistribute these costs through fault or breach-of-contract litigation, he would face the same problems as other injured parties. The risk of liability for these costs should provide some incentives to accident cost reduction through better guideway design, improved maintenance, etc.

74. Owners' lack of bargaining power vis-a-vis large manufacturers is demonstrated by automobile purchasers' inability to compel auto makers to build safer cars, or to eliminate unwanted annual model changes.
DUAL MODE TRANSPORTATION

for its accident costs—would also be more difficult to apply to private vehicle dual mode systems than to bus or pallet systems because of the increased number of activities involved: vehicle ownership, guideway operation, vehicle manufacture, all of which could be under separate control. The question is, which activity should be held liable.\textsuperscript{75} Since no candidate for liability stands out, it is necessary to estimate how well accident compensation goals would be satisfied when different dual mode activities are held liable.

If each vehicle owner were held liable for his own accident costs, the result for accident cost distribution would be similar to that obtained in the fault system when plaintiffs lose their cases. While victims could insure themselves to cover their accident costs,\textsuperscript{74} this solution would pro-

\textsuperscript{75} The problem is akin to that raised by railroad grade crossing accidents, or auto-pedestrian accidents: See, Blum and Kalven, Public Law Perspectives on a Private Law Problem—Auto Compensation Plans, 31 \textit{U. Chi. L. Rev.} 641, 699 (1964).

\textsuperscript{76} Vehicle owners could be made liable for their own accident costs by requiring them to participate in a compulsory insurance scheme comparable to “no-fault” automobile insurance. See, e.g., Mass. St. 1970, c. 670, found constitutional in \textit{Pinnick v. Cleary}, Mass. ___ (1971 Adv. Sh. 1129). A no-fault insurance accident compensation scheme for private vehicle dual mode systems could pose administrative problems. Vehicle owners may be required to purchase two types of insurance — one covering automated operation on the guideway and a second covering non-automated operations. If there were a single no-fault system covering all vehicles, whether equipped for dual mode operations or not, rates would have to be adjusted so that neither dual mode vehicles owners nor non-dual mode vehicle owners subsidized each others’ insurance premiums. With single insurance coverage, rates for frequent users of the automated portion of the system should be relatively lower than rates set for infrequent users because of dual mode automation’s predicted increases in safety. Each privately-owned dual mode vehicle could be equipped with meters to register miles traveled in each mode, or the guideway computer could keep track of each vehicle’s operations in the automated mode. Rates would then be based on total miles driven, and miles driven in each mode. Such a rate determination process could become extremely burdensome to administer, however. And, if monitoring patrons’ usage resulted in detailed computerized records of trip origins, destinations and times of travel, the fear of unauthorized disclosures of trip details could induce potential users to shun automated operations.

If owners of dual mode equipped vehicles were required to purchase two insurance policies, one covering automated operations and the other non-automated operations, when will one coverage begin and the other end? Unless clear and easily applied principles resolved this issue, both insurers could deny liability in close cases. One solution would require the automated operations insurer to assume liability as soon as the vehicle crossed an arbitrary entrance point, perhaps upon passing through an electronic beam at an entrance ramp. The electronic entrance registering device would record the vehicle’s entry, and its record would be deemed conclusive evidence of the vehicle’s entry into the system. Alternatively, no vehicle could be considered to have begun automated operations until the dual mode central computer noted and recorded its presence on the guideway. The computer’s record would again be considered conclusive as to when coverage began. As with single insurance coverage, combined automated and non-automated insurance premiums for vehicles usually
vide little or no deterrence of future accidents because victims could not bargain effectively for improved vehicles or guideways.\textsuperscript{77} This cost distribution might also deter individuals' use of the system for fear of incurring accident costs. In addition, the result produced by this allocation would not satisfy social needs to punish wrongdoers (except in rare instances in which an owner's error in maintenance or operation actually caused an accident).

A legislative decision to hold the guideway operator liable for accident costs would produce a more satisfactory result: victims would receive compensation for accident costs from a source well placed to deter future accidents. The guideway operator could self-insure or purchase insurance to provide funds for compensation of accident victims.\textsuperscript{78} His control over the automated right-of-way would put him in a good position to reduce the possibility of future accidents.\textsuperscript{79} He could, for example, improve accident-prone sections of the guideway. If he had the authority, the guideway operator could license or establish vehicle inspection and maintenance stations and permit only qualified vehicles to enter the guideway. If the experience of several accidents and near-accidents indicated that certain vehicles were accident-prone, the guideway operator could increase the rates charged those vehicles for guideway use. This increased toll should deter purchase of accident-prone vehicles and create economic pressure on these vehicles' manufacturers to improve their products. The guideway operator could be further empowered to set vehicle specifications and allow only complying vehicles on the guideway.

Placing liability on vehicle manufacturers should result in some combination of accident-cost-reducing vehicle improvements and higher vehicle prices to reflect the burden of unavoidable accident costs; the precise mix would depend on manufacturers' monopoly power. Vehicle makers could decide to establish maintenance networks to extend their control over

\textsuperscript{77} See text at note 74, supra.

\textsuperscript{78} For a discussion of administrative issues in connection with victim compensation, see text at note 65, supra.

\textsuperscript{79} Instead of using his authority to reduce accident costs, the guideway operator could choose instead merely to increase all toll rates charged for use of the guideway to cover these costs. This result is especially likely if the guideway operator occupied a monopoly position, with little possibility that other guideway operators would arise to compete with him by lowering their rates to reflect their reduced accident costs. A monopolist guideway operator whose position was established by law, for example, could easily develop an entrenched bureaucracy unwilling to initiate accident-cost-reducing changes (except, of course, when pressed by politicians controlling the monopoly).
vehicle-related accident causes. This allocation of accident costs would not deter accidents resulting from defective guideways. While it would be in their interest to persuade the guideway operator to reduce his accident-causing activities, vehicle manufacturers would probably lack leverage to compel changes in guideway operations. Holding vehicle makers responsible for accident costs could also deter potential entrants from the vehicle market, or quickly bankrupt the maker of inferior (accident-prone) vehicles.

This discussion indicates that an enterprise liability system in which the guideway operator is held liable for all accident costs best satisfies dual mode private vehicle accident compensation requirements. Unlike the fault system, enterprise liability would provide reimbursement to all vehicle owners and drivers for accident costs. The guideway operator could distribute these costs to maximize economic pressures to reduce accidents and to minimize dislocations resulting from unavoidable accidents. This allocation of accident costs should discourage no one from participation in dual mode operations because no single individual—driver, owner, or manufacturer—would bear all costs of an accident. (If costs exceeded cash reserves or insurance, the guideway operator could be permitted to tap general tax revenues to pay all accident victims.) Finally, placing responsibility for accident costs on the guideway operator should tend to discourage the wrongdoing in most cases: the guideway operator could have, after all, avoided or pressed others to avoid the accident.

C. Accident compensation alternatives for rental vehicles dual mode systems

The analysis developed for bus, pallet and private vehicle dual mode systems can also be applied to rental vehicle systems. The effectiveness of alternative accident compensation plans for this type of system will depend on the specific characteristics of the rental system: the identity of vehicle lessor(s) and the guideway operator (are they one and the same entity?), the rental time period, and lessor's control over the vehicle during the rental. Under the fault system, for example, if the vehicle lessor were also the guideway operator, and if only short-term rentals were allowed, it could be argued that the lessor-operator was in effect a passenger common carrier vis-a-vis vehicle lessees. Lessees injured in accidents while on the automated portion of the guideway could then use the special rules applicable to passenger carriers to facilitate their recovery.80 The

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80: Lessees could also employ breach-of-implied-warranty arguments to hold lessors liable for defects in the rental vehicle. See text at notes 50-53, supra.
risk of liability for accidents could result in substantive improvements in vehicles, guideway maintenance, and so on, or in higher rental or toll rates to cover accident costs. The pressure to avoid accident costs rather than merely redistribute them through increased tolls and rental charges would then depend on the extent of the lessor-guideway operator's monopoly power. If the lessor-guideway operator contracted with lessees to assume liability for all accidents, a result equivalent to strict liability of the lessor-operator would obtain.

To change assumptions, suppose now that lessors and the guideway operator were independent of each other, or that long-term vehicle leases exempted lessors from vehicle maintenance and inspection. Plaintiff-lessees would now face both the difficult decision, which person to sue — vehicle lessor, guideway operator, maintenance man, lessor of another vehicle, etc., and the problems of proof of liability discussed earlier.81 Plaintiffs' chances for recovery would decline correspondingly with these additional complexities. Applying the fault system to rental vehicle dual mode systems designed around these assumptions would therefore yield an unsatisfactory accident cost distribution in most cases. If injured lessees failed to recover their accident costs in lawsuits, they would be forced to bear their own accident costs. Even worse from the perspective of an individual lessee would be the possibility of being held liable for another renter's accident costs. This possibility could deter persons from renting dual mode vehicles, and would provide little effective deterrence of accident-producing activities. Lessees could be permitted to shift the burden of accident costs to vehicle lessors by purchasing accident liability insurance from lessors. But, if lessors were relatively small independent businessmen, the fear of being held liable for all costs of a single accident could altogether deter their participation in the vehicle rental business, instead of stirring them to avoid future accidents through purchase of better vehicles, improved maintenance, etc.

The analysis could continue, changing assumptions about the rental vehicle system and applying the different systems of accident compensation (fault, enterprise liability, social insurance) described earlier.

D. Summary

This discussion of dual mode accident cost allocation suggests that goals of an accident compensation scheme could be satisfied for most dual mode systems when accident costs are distributed to the system operator (in bus or pallet systems), or to the guideway operator through

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81. See text at notes 70-72, supra.
an enterprise liability plan. The system or guideway operator should have, through purchased insurance or self-insurance, adequate resources to compensate accident victims. His control over automated operations places him in a good position to reduce future accident costs by requiring safer vehicles, guideway and operating procedures. Assessing accident costs against the system or guideway operator should not discourage system utilization, because neither passengers, vehicle owners, vehicle lessees, or dual mode product manufacturers would face the crushing burden of accident costs. If fear of accident costs intimidated potential system or guideway operators from engaging in dual mode transportation activities, a social insurance plan could be employed to distribute society-wide accident costs exceeding a predetermined level. 82

VI. SOCIAL AND ENVIRONMENTAL IMPLICATIONS OF DUAL MODE OPERATIONS

Several issues concerning dual mode construction and operation still remain. While not necessarily “legal” questions, these issues could arise in legal contexts as individuals seek administrative and judicial relief from proposed construction or operation of dual mode facilities.

A. Who is dual mode for?

A strong argument can be made by opponents of dual mode systems that dual mode transportation would primarily benefit the middle and upper economic classes, those who could afford to purchase dual mode services and who lived in suburban areas (where dual mode guideways are likely to be installed). Their reasoning would run as follows: dual mode transportation will likely be expensive transportation. The complex electronic hardware with which private dual mode vehicles would be equipped would probably result in vehicles costing at least as much as expensive conventional automobiles. The high cost of this equipment would also be reflected in rental fees for dual mode rental vehicles and in higher fares on dual mode bus and pallet systems. Dual mode opponents would therefore conclude that poor persons would not have effective access to a self-supporting system of dual mode transportation.

Increased utilization of dual mode systems could result in lower per person costs, thus bringing dual mode costs to within the economic reach.

82. A mixed compensation system such as this would require, of course, a collective decision that dual mode transportation should continue despite its anticipated accident costs.
of the poor. In addition, the Federal government could subsidize capital and operating expenses, much as it now subsidizes the capital costs of state-of-the-art mass transportation investments.\(^8\) (Proposals to underwrite operating expenses, however, would require departure from current transportation aid policies. Operating subsidies for dual mode bus and pallet systems, for example, would have to overcome the requirement that public transportation recover at least its operating costs;\(^9\) subsidies for the purchase or rental and operation of dual mode vehicles would conflict with current notions about private automobile ownership requiring each individual to bear his auto's capital and maintenance expenses.) Operating costs for dual mode bus systems could be lower than for comparable manned bus systems because of the absence of drivers during automated operations.

Challengers of dual mode transportation might also contend that dual mode transportation would provide best service to urban low density and suburban residents of metropolitan areas. The purpose of the automated portion of any dual mode system would be to provide fast line-haul transportation between points in heavily trafficked corridors. In most metropolitan areas such transportation corridors link suburban residential areas with the core city. The addition of dual mode transportation service in these corridors would speed commuters' work trips to the central cities, but would provide slight service improvements to the poor and central city dwellers.

On the other hand, dual mode proponents could respond that dual mode guideways need not be used in this limited manner, but could also be used to provide circumferential transportation around city cores. Even if built exclusively to connect suburbs and core cities, such guideways would also serve to establish new linkages between densely populated inner city neighborhoods and suburban jobs and recreation facilities. Dual mode bus systems, and dual mode pallet and auto systems coupled with adequate parking facilities, could also reduce traffic volumes in central city areas.

B. Environmental impacts

Proposed installations of any new transportation systems would be required to satisfy, at a minimum, the environmental protection require-

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ments set forth in the National Environmental Policy Act of 1969.\textsuperscript{85} Because of the potential for environmental disruption incident to the construction of major transportation facilities, such facilities may be made subject to special legislation imposing tighter environmental controls.\textsuperscript{86} In the case of dual mode systems, these restrictions could, for example, prohibit construction of at-grade automated guideways on rights-of-way not already devoted to transportation uses.\textsuperscript{87} Such a limitation could lead to extensive tunneling, causing increased capital costs. Guideways built at or above grade could become a visual blight subject to further environmental challenge. On the other hand, dual mode systems' greater vehicle capacity per lane, when compared with conventional freeways, could make such systems relatively more attractive than conventional highways.

Depending on guideway network layouts, dual mode systems could have significant effect on the distribution of residential population in metropolitan areas having access to the system.\textsuperscript{88} Because dual mode vehicles operating in the automated mode would move much faster than conventional automobiles and buses, it would be possible for users of this system to commute from suburbs to central city places of employment in less time than non-dual mode users. In addition to being able to get to work in a shorter time than they could have by conventional means, suburban users would be able to travel farther from home to work in the same time. System users accustomed to work trip of any given duration could then elect to live farther from their in-town jobs and, thanks to the dual mode system, still travel from home to work in the same amount of time. This relocation phenomenon induced by improved transportation could lead to further extension of low-density suburban residential land uses into what is now rural countryside. Housing in the inner suburbs,

\begin{footnotes}
\textsuperscript{85} 42 U.S.C.A. §§ 4331-4335.
\textsuperscript{86} See, e.g., Airport and Airways Development Act of 1970, 49 U.S.C.A. §§ 1716(c) (4), 1716(e), setting special environmental quality restrictions on certain airport improvements.
\textsuperscript{87} Location of dual mode guideways on existing highway rights-of-way could further adversely impact those who could not afford to purchase dual mode services. While use of highway rights-of-way would reduce the quantity of new land devoted to transportation, closing lanes of highways would also reduce the capacity of the automobile transportation system left to non-users of dual mode systems. Non-automated lanes could become as congested as today’s urban freeways at rush hour if too few persons elected to use dual mode transportation. Even if no highway lanes were actually taken, locating automated guideways anywhere in highway rights-of-way could create distracting conditions for non-dual mode drivers.
\textsuperscript{88} See generally Liepmann, The Journey to Work—Its Significance for Industrial and Community Life 48 (1944).
\end{footnotes}
vacated by dual mode users heading to more distant residential areas, would soon “trickle down” to less affluent inner city dwellers seeking escape from urban ills. These trends could produce a multi-ringed “doughnut city,” its central core filled and abandoned each workday and surrounded by broad rings of increasingly affluent suburban residential areas.

VII. CONCLUSION

Rational well-integrated solutions to the types of issues raised in this essay are essential to public acceptance of any major technological innovation. In the case of dual mode transportation systems, planners should be prepared to supply proposals for administration of a proposed system and a description of the administrator’s authority necessary for efficient and responsible operation. Planners should also have ready a method for allocation of accident costs on the system, or a rationale explaining why none is needed. Planners should further have available recommendations for modification of local communities’ land use regulations to assist them in anticipating and channeling trends in land use patterns spurred by dual mode installation. And, to avoid the accusation that dual mode transportation would be separate and unequal transportation, planners should devise a comprehensive dual mode financing and fare policy.
PLANNING FOR AIRPORTS IN URBAN ENVIRONMENTS—
A Survey of the Problem and its Possible Solutions

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I. THE NATURE AND EXTENT OF THE PROBLEM.

A. Urban Sprawl and the Growth of Air Transportation.

The rapid growth of our national air transportation system has placed


The views expressed in this article are those of the author and do not necessarily represent those of the Federal Aviation Administration or Department of Transportation.

1. The growth of air transportation over the past twenty years is reflected in the following statistics:

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new demands upon urban dwellers. Likewise, the equally rapid growth of our urban and suburban areas, particularly since the end of World War II, has placed new demands on the air transportation system. The result of this dual expansion is that we are now witnessing a head-on collision between two major interests. On one hand, we must promote and maintain a viable national air transportation system as an integral part of our national transportation network, since its continued viability is vital to all of us. Air transportation can no longer be regarded as a "toy of the jetset." Rather, it is an integral part of the national defense, national economy, and our everyday lives. Furthermore, we have seen that the Nation's air transportation system is a prime resource in building for the future. The airport, as a vitally needed transportation center, has spawned and will continue to spawn new cities in the same way that the harbors, highways, and railway junctions have in the past. As former FAA Administrator, John H. Shaffer, has stated,

All societal activity involves transportation of one form or another, and all communities have a basic and fundamental need for an adequate and reliable transportation system to further their economic, educational, cultural, and recreational pursuits. Any com-

<table>
<thead>
<tr>
<th></th>
<th>1951</th>
<th>1971</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scheduled Air Carrier Fleet</td>
<td>1,121</td>
<td>2,679</td>
</tr>
<tr>
<td>General Aviation Aircraft</td>
<td>82,236</td>
<td>131,407</td>
</tr>
<tr>
<td>Jet Aircraft (incl. turboprop)</td>
<td>0</td>
<td>2,501</td>
</tr>
<tr>
<td>Airports in U. S.</td>
<td>6,237</td>
<td>12,070</td>
</tr>
<tr>
<td>Airports in U. S.</td>
<td>6,237</td>
<td>12,070</td>
</tr>
<tr>
<td>Airports Serving Scheduled Air Carriers</td>
<td>552</td>
<td>499</td>
</tr>
<tr>
<td>(Total, including Hawaii &amp; Alaska)</td>
<td></td>
<td>746</td>
</tr>
</tbody>
</table>

(Source: Federal Aviation Administration, Office of Aviation Economics)

2. This term was used by opponents of the authorization of funds for continued Supersonic Transport (SST) development. Statistics concerning aviation employment and economics include this breakdown:

<table>
<thead>
<tr>
<th>Aviation Related Employment (thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1967</td>
</tr>
<tr>
<td>1,037.5</td>
</tr>
</tbody>
</table>

Travel in Air Carriers (1968-1969 figures)

<table>
<thead>
<tr>
<th>Business</th>
<th>Pleasure</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>% passengers</td>
<td>33</td>
<td>40</td>
</tr>
<tr>
<td>% passenger miles</td>
<td>28</td>
<td>45</td>
</tr>
</tbody>
</table>

Total Operating Revenue of U.S. Scheduled Air Carriers in Fiscal Year 1971

$9,743,393,000 .9 percent of GNP

(Source: FAA, Office of Aviation Economics)
munity that lacks such a system, or adequate access to that system, seems doomed to regress into an isolated and remote ghost community.\textsuperscript{3}

Yet, on the other hand, we are faced with other goals which frequently conflict. Urban and suburban areas are expanding, not only due to the "population explosion," but also due to the fact that people are migrating from rural areas into the cities to take advantage of the economic, social, educational, and cultural opportunities that exist there. This migration from rural to urban areas has been so pronounced since the 1960's, that one-third of America's counties have lost population as a result of this shift.\textsuperscript{4} Thus, as our urban and suburban areas have grown, they have "impacted" airports which had existed for many decades on the peripheries of the communities' geographic boundaries; these airports have become surrounded by residential areas, schools, hospitals, business districts, and recreation areas. The impacts on both the community and aviation have been disastrous.

A few years ago it was a popular pastime to visit airports and to watch aircraft operations. Today, as a result of noise, pollution, and ground congestion, airports are considered as bad neighbors and their growth is often opposed.\textsuperscript{5}

Our limited supply of land has created a race between competing interests. Airports require a sufficient amount of land to insure the safety of their operations and to insure that these operations will have no adverse impact upon the inhabitants of the community. Furthermore, our technological progress has given us aircraft capable of flying faster, carrying greater payloads, and producing greater noise levels. Thus, airports, in many instances, feel the pressure to expand or risk falling by the wayside in the national aviation system. Yet, at the same time, other interests within the community are pursuing their causes, desiring land uses more consonant with their own goals, and placing demands on local governments that are equally as legitimate as those proffered by the aviation interests. In the midst of these competing interests, we must consider the arena in which these interests will confront each other—the decision making body of the local governmental unit. These local government


\textsuperscript{5} Joint DOT/NASA Civil Aviation Research and Development Policy Study, Washington, D. C., March 1971. (Hereinafter referred to as \textit{CARD Study}.)
units, as will be discussed later, in attempting to insure the general health, safety, and welfare of their citizens, have frequently failed in their attempts at effectuating viable land use controls. The financial crises confronting these local units of power have too often resulted in land use decisions that are not the best in relation to broader interests.6

The collision has been inevitable, due to lack of adequate advance planning. It's impact has been heard, literally, by those citizens living in those areas in close proximity to airports. They are awakened nightly by the roar of jets. Complaints and suits charging psychological, physiological, and property damage have proliferated. Citizens often drastically alter their daily routines in order to better cope with these adverse affects on their personal environment. Frequently they claim their property values have diminished.

Additionally, airports are frequently forced to curtail their activities, not only to the economic detriment of the aviation industry but to that of the general community; safety considerations may be forced to take a back seat to those of the environment; and the viability of our national transportation system is considerably weakened.

This article will focus on the various attempts that have been used to avoid this serious collision of interests and more amicably relate our progress in aviation technology to social, political, economic and environmental realities. While a number of approaches will be discussed, chief emphasis will be placed on land use planning for airports in the urban environment. The goals of an effective land use policy for and near airports are twofold: first, such a policy must protect the enormous investment of public (Federal, state, and local) funds in the development of our airport system; second, this policy must insure the well-being and protection of persons and property in the airport environment.7

B. Safety Factors

Since the enactment of the first Federal legislation aimed at encouraging and regulating the use of aircraft, the promotion of aviation safety has been either implicitly or explicitly one of the foremost goals. The Air Commerce Act of 1926,8 was an attempt at promoting air commerce as a viable mode of transportation by means of assuring maximum aviation

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7. John Gerba, Jr., Land Allocation and Activity Assignment in Urban Areas, Graduate Program in City Planning, Yale University, 1961.
safety. It conferred upon the Secretary of Commerce the duty of: (1) encouraging the development of airports, civil airways, and other navigation facilities; (2) carrying forward research and development work to create improved air navigation facilities; (3) investigating, recording, and making available to the public the "causes of accidents in civil air navigation in the United States;" (4) exercising regulatory powers over the certification of aircraft and airmen; and (5) promulgating of air traffic rules.10

With the enactment of the Civil Aeronautics Act of 1938,11 the Administrator of the newly created Civil Aeronautics Authority was specifically "empowered and directed to make plans for such orderly development and location of landing areas, airways, and all other aids and facilities for air navigation, as will best meet the needs of, and serve the interest of safety in, civil aeronautics."12

Thus, until the 1958 enactment of the Federal Aviation Act,13 the goals of securing aviation safety were strictly unilateral—safety concerns were solely for the benefit of those who were directly using the air transportation system. However, with the enactment of the Federal Aviation Act of 1958, safety considerations took on a new dimension. In place of the former unilateral emphasis, came a new awareness of the impact of aviation activity on those other than the direct users; more specifically, those on the ground who usually receive only the indirect or incidental benefits from this system. Section 307(c) of the 1958 Act, as amended, provides

The Secretary of Transportation is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects."14 (Emphasis added.)

This recent statutory mandate, as well as practical realities, suggest that aircraft operations must be performed consonant with safety on two fronts—the safety of the aircraft, passengers, and crew, and the safety of

9. Id. section 2.
10. Id. section 3.
12. Id. section 307.
those on the ground below the flight paths and in the vicinity of airports. Thus, the selection of an airport site should incorporate considerations related to safety such as topographical and meteorological factors, prevailing winds to facilitate takeoff, climbout and landing procedures, and character of the development in the vicinity of the airport.

Early efforts at planning for airports in urban areas reflected only a superficial awareness of the needs of aviation safety. The airport was viewed as a mere whistle stop that existed solely for the purpose of picking up and discharging passengers, mail, and cargo. The concern for urban development near the airport, therefore, was limited solely to the notion of preventing obstructions to navigation so as to facilitate safe approach and departure paths for aircraft without unduly interfering with the physical well being of persons carrying on their daily activities under the flight paths.

It was not until relatively recently that safety began to take on a new meaning. Complaints by those living near airports and a new public awareness of environmental dangers have afforded us the opportunity to realize that safety is not only necessary to protect us from aircraft crashing into our living rooms, but to protect us from unwanted air pollution, congestion, and noise.

C. Environment

1. Impact

The impact of aviation on the environment is evident in the rising public concern regarding noise, air pollution, water pollution, esthetics, congestion, ecological disturbances, and meteorological changes. The root cause of the problematic relationship between aviation and the environment lies in the fact that there has, in the past, been insufficient concern for, and inappropriate actions in, designing the air transportation system to meet these environmental considerations. Combatting the unpleasant by-products of the aviation system has, only until recently, been given a relatively low priority as compared to increasing the speed, range, and payload and decreasing the operating costs of the new civil aircraft that serve this system. As a result of these misallocated priorities, our technology base is far from adequate in providing solutions to these unwanted by-products. Yet, despite these technological misapplications and inadequacies, these problems and their impact could have been successfully minimized or abated altogether had there not been a grievous lack of long-range planning of the land surrounding both existing and proposed airports.15

15. CARD Study, pp. 5-3, 5-4.
Now that a new awareness has been placed on the "quality of life," urban and transportation planners will hopefully not overlook the enormous impact of the transportation system, not only in economic terms but in social and environmental terms as well, as it is evident that all transportation activity—the highways, railroads, airplanes, cars, and trucks—affects the quality of our lives. In addition to moving people, mail, and cargo, our transportation system affects the air that we breathe, the sounds that we hear, and the sights that we see; it changes the neighborhoods that we live in; and it dislocates families and businesses.18

While the new orientation of our transportation system planners will be to "make transportation conform to the needs of the people rather than making people conform to the system,"17 we are faced with a very real problem in attempting to effectuate this new approach. Planners, as well as the social scientists that they rely upon, possess very few criteria for determining just how important environmental and social values are when measured against competing values such as economy, safety, and the preservation of homes and businesses.18 Thus, in their attempts at second-guessing urban man's needs and desires, these planners and social scientists may indeed end up being wrong.

Yet, we know that of all the unwanted by-products of our aviation system, noise is the most irritating and is the most responsible element in the rising opposition by airport neighbors to aircraft and airport operation.

The severity of this situation is illustrated by a 1967 article in the Los Angeles Times: '36 Million Claims Filed Against City Over Airport Noise.' Among other complaints were these: 'Children have been deprived of the use of their schools for proper educational activities . . .,' ' . . . subjected to loud noise,' ' . . . complained of anxiety, loss of sleep, hearing . . .', ' . . . suffered permanent hearing damage and emotional disturbance from jets.'19

Noise is nothing more than unwanted sound—unwanted because there is too much of it or because it is the wrong kind.20 Noise, therefore, is

17. Id., at 2.
18. Id., at 4.
20. Statement of Robert W. Fri, Deputy Administrator, Environmental Protection
not only a physical but also a subjective experience. While others may not complain about noise levels, they may unknowingly experience physiological and/or psychological damage. In other cases, noise that individuals complain about may not actually inflict any physiological damage; the emotional stress resulting from this noise, however, may be due mostly to the individual's subjective response to it.

Thus, for the purpose of examining the problem of airports and the urban environment, it is necessary to take these subjective factors into account. Assuredly, many people living near airports and under the flight paths of aircraft do experience physiological and/or emotional discomfort. At the same time, however, many of those are not necessarily complaining about noise levels generated by airplanes or airports, nor, for that matter, about the air pollution and other negative environmental factors that these facilities and aircraft are generating. Rather they are reflecting their personal wishes not to have aircraft over-flying their homes, which are frequently caused by their subjective fear or dislike of flying.

2. Controlling and Abating Unwanted By-Products

Consistent with the philosophy set forth in Section 307 of the Federal Aviation Act of protecting persons on the ground as well as in the air, a viable and effective program to control or abate the unwanted by-products of the aviation system must move ahead on several fronts. In dealing with the noise problem in particular, emphasis must be placed on the interdependence of three factors—the noise at the source, the path of the sound, and the receiver of the sound.

(a) Controlling Noise at the Source.

Pursuant to Section 4(a) of the Department of Transportation Act of 1966, the Secretary of Transportation is authorized and directed to "promote and undertake research and development relating to transportation, including noise abatement, with particular attention to aircraft noise . . . ." During the 90th Congress, Public Law 90-411 was enacted to amend Section 611 of the Federal Aviation Act to require aircraft noise

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21. A good example of "sublimated" noise levels would be a rock and roll band, which with sufficient amplification can produce levels approximating 100 decibels (PNdB) CEQ-Noise at 6.
abatement regulation. Under this Act, the Administrator of the Federal Aviation Administration is authorized and directed to consider relevant research, development, testing, and evaluation activities, consult with the appropriate Federal, state and interstate agencies, consider whether any proposed standard, rule, or regulation is consistent with the highest degree of safety in air commerce, and consider whether any proposed standard, rule or regulation is "economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance or certificate to which it will apply." Pursuant to this legislation, Part 36 of the Federal Aviation Regulations\(^ {24} \) was promulgated to prescribe noise standards for type certification of subsonic transport category airplanes and for type certification of subsonic turbojet powered airplanes, regardless of category. Since the effective date of this regulation (December 1, 1969), three transport category turbojet aircraft have been certificated—the Boeing 747, McDonnell Douglas DC-10, and Lockheed L-1011 Tristar—all of which are perceptibly quieter than their predecessors. Of course, these newer aircraft will not completely replace the older noisier fleet for several years, and possibly even decades. Realizing this, the FAA has issued an Advance Notice of Proposed Rulemaking for the purpose of quieting the existing jet aircraft fleet by means of retrofitting the engine nacelles with acoustical material.\(^ {25} \)

The Federally imposed noise limits specified in Part 36 are important efforts at controlling and abating noise at the source. However, as will be seen later, the Federal Government’s activities in this area have not necessarily precluded local action. Local airport operators and proprietors may establish more restrictive source noise limits in response to local needs for both quiet and air commerce. However, each of these Federal and local efforts are inadequate by themselves to combat the problem of noise, regardless of how substantial these actions may be.

(b) Controlling the Path of the Sound.

Efforts on this front have consisted largely of an FAA Order intended to informally adapt the flow of air traffic to the specific needs of individual airports in order to minimize noise exposure.\(^ {26} \) This order requires FAA personnel to monitor airport activities to anticipate the appearance of noise problems in the community and to achieve some relief through the following means:

\(^ {24} \) 34 Fed. Reg. 18355 (November 18, 1969).
\(^ {26} \) Order 7110.13 (9 January 1968); superseded by Order 7110.22 (19 September 1970).
1. Establishment of arrival and departure flight paths over least congested areas, or the use of fan-out procedures to minimize noise concentration where no areas of least congestion could practically be used.

2. Use of navigational aids, radar vectoring, or off-course climbs to route instrument flight rules aircraft along flight paths compatible with noise abatement routes.

3. Where navigational aids are not compatible with potential noise abatement procedures, relocation or establishment of such facilities to achieve compatibility if possible.

4. Establishment of informal runway use programs that tailor the runway use to the particular noise problem, including education of pilots with respect to the regulation between runway selection and noise exposure.\(^27\)

On this front, as it will be seen later, the Federal Government has preempted the field. Local authorities may not prescribe air traffic control rules unless they do so in conjunction with the Federal Aviation Administration.

(c) The Receiver of the Sound.

The interdependence of all three approaches to control and abate aircraft noise can best be shown in examining the third approach—that in relation to the receivers of the sound through adequate means of land use planning. Whereas the first two approaches depend solely or largely upon Federal action, this last approach is dependent not only upon the results of such Federal action, but also upon the willingness of local communities to adequately plan their land usages in the vicinity of airports. This third front is, to some extent, the "achilles heel" in the fight to control and abate aircraft noise.

The local urban planner has the primary responsibility of adapting land to airport use. By means of employing the Federally determined noise source levels and the more informal operational limitations relating to the path of the noise, the urban planner can insure that land use controls are responsive to the available technology. Without the necessary information concerning where, and in what amounts, the noise begins and ends,\(^28\) we cannot depart from our past errors.

While it was not until the introduction of civilian jet transport aircraft


\(^28\) *Id.*, at 213.
that the airport noise problem became as crucial as it is today, the problems that the airport posed for the community were long ago realized. In 1952, the President's Airport Commission\(^\text{29}\) concluded:

The general objective of all communities is to create a favorable environment in which to live. This environment does not just happen; there is a genuine need to control the forces which determine environment. Planning is a tool for bringing about an effective control of the forces. It does this by creating a physical framework in which communities may eventually achieve a desired environment. The framework is erected by: (1) allocating areas to industrial, commercial, and residential uses; and (2) establishing physical facilities to serve these areas, i.e., transportation, communications, power, water and sanitation, and recreation grounds. Since airports and airways are an important part of a community's transportation facilities, consideration must be given to the problem of properly incorporating them into the framework.\(^\text{30}\)

Utilization of effective land use controls by local governments is a necessary weapon in the total arsenal that is necessary to attack aircraft noise. The local government units who possess the necessary grant of police powers from the state must not abdicate their responsibility of insuring these controls, given the existing Federal-State relationship. Today, this exercise of responsibility is even more crucial than it was in 1952. Most of our air carrier fleet consists of turbojet or turboprop aircraft; the rapidly growing general aviation fleet is also increasingly relying on jet power. Moreover, the new emphasis on Vertical and Short Take-Off and Landing (V/STOL) aircraft serving the city and suburban centers in the near future compels us to require assurances that adequate steps will be taken to protect the enormous public investment in airport facilities and at the same time to secure the well-being of those who inhabit the adjoining areas.

The Airport and Airway Development Act of 1970 requires the sponsor of an airport development project to demonstrate that:

-the project is reasonably consistent with the plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located. . .\(^\text{31}\)


\(^{30}\) Id. at 81.

\(^{31}\) Airport and Airway Development Act of 1970, § 16(c), 84 Stat. 226.
and that:

appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including the landing and takeoff of aircraft . . . 32

as a prerequisite to receiving Airport Development Aid Program (ADAP) Grants.

This legislation places great responsibility upon local governments to abate and control the unwanted effects of aviation activity. The result is that the attack on problems arising from the relationship of the airport and its environs is a somewhat paradoxical mixture of federal preemption and local responsibility.

How well has this mixture worked? Those individuals who live in noise affected areas would argue that it has failed miserably. However, in order to appreciate the significance of its achievements or failures, and in order to effectuate any possible alternative solutions to the problem, it is necessary to more carefully examine each element of this mixture.

II. ALLOCATING RESPONSIBILITY FOR THE UNWANTED BY-PRODUCTS OF AIR COMMERCE

The foundations of aviation noise law lie in the doctrines of nuisance, trespass, inverse condemnation,33 and cujus est solum ejus usque ad coelum.34 These doctrines were given their first major test in the aviation context in United States v. Causby.35 In that case, the claimant owned a dwelling and a chicken farm on a 2.8 acre tract situated near a municipal airport that was leased to the Government. Causby contended that the safe path of glide to one of the runways of the adjacent airport passed directly over his property at 83 feet, his house at 67 feet, his barn at 63 feet, and the highest hill on his property at 18 feet, which destroyed the use of the property as a chicken farm and caused him and his wife loss

32. Id. Section 18(4). 84 Stat. 228.
33. Charles M. Haar, "Airport Noise and the Urban Dweller," Speech presented Practicing Law Institute May 10, 1968, outlines these theories and notes the limitations of each. First, since air commerce is vital to the national well-being, it is very difficult to base a claim on nuisance. Second, trespass is not very well suited for those who are adversely affected by noise but do not live under the flight path. Third, it is difficult to succeed on an inverse condemnation basis, as it is very difficult to define the nature and extent of the taking.
34. Translated as "Ownership of land extends to the periphery of the universe."
35. 328 U.S. 256 (1946).
of sleep, nervousness, and fright. The Court of Claims found that the Government had taken an easement over Causby’s property and that the value taken was $2,000, but made no finding as to the precise nature or duration of the easement. The Supreme Court held that a servitude had been placed upon the land for which Causby was entitled to compensation under the Fifth Amendment; that the flights were not within the public domain, as they were not within the airspace that Congress placed within that domain, even though they were conducted within the path of glide approved by the Civil Aeronautics Authority; and that the common law doctrine, *cujus est solum...* , has no place in the modern world. Mr. Justice Douglas, delivering the opinion of the Court emphasized:

The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of land.38

Since *Causby*, the law has remained largely unchanged in this area.37 However, the result in *Causby* relied heavily upon the fact that the flight path of the Government’s aircraft was outside of the public domain, since the Civil Aeronautics Act and the regulations promulgated pursuant thereto defined navigable airspace as not including approach and departure paths.38 If this airspace were included in the definition on navigable airspace, these flights would have been immune.39

The term “navigable airspace” has not only been applied in situations like *Causby* where an aggrieved party asserts his claim for the taking of his property resulting from aircraft operations, but additionally in defining the relationship between Federal and local roles. In *Allegheny Air-

36. *Id*, at 266.
37. Aviation noise law relating to suits by injured landowners against airports and aircraft operations has remained virtually unchanged since *Causby*. According to *Batten v. U.S.*, 306 F.2d 580 (1962), *cert. denied*, 371 U.S. 955 (1962), in order for an overflight to constitute a taking, the plaintiff’s property must be directly under the flight path. Many state jurisdictions have held likewise while others are more permissive in that they do not require direct overflights. My personal feeling is that his more permissive approach is the wiser one, since an individual property owner may be injured to as great an extent by aircraft noise even when he is not situated directly underneath the flight path.
38. 328 U.S. 256 at 263.
39. *Id*, at 264.
lines, Inc. v. Village of Cedarhurst,\textsuperscript{40} the plaintiff airline company sued the Village of Cedarhurst to enjoin enforcement of a village ordinance prohibiting flights at less than 1,000 feet over the village. The Court of Appeals affirmed the granting of the injunction, emphasizing that since the Federal regulatory system had preempted the airspace below as well as above 1,000 feet from the ground, the ordinance was invalid, and stressed that the residents of the community had not suffered a taking of property, within the meaning of Causby, since the operation of aircraft was not so low and so frequent, but rather took place from 450 upward to 1,500 feet and only under particular weather conditions.

In 1958, with the enactment of the Federal Aviation Act,\textsuperscript{41} "navigable airspace" was redefined so as to include:

> airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off or landing of aircraft.\textsuperscript{42}

In 1967, in American Airlines, Inc. v. Town of Hempstead,\textsuperscript{43} nine major air carriers sought to enjoin enforcement of a local noise ordinance. While the town contended that the ordinance was grounded in its concern for the local order and public health, the District Court enjoined its enforcement, as it had the effect of denying the lower air to aircraft as well as landing approaches and take-off paths to and from an established airport, and, additionally, contravened the Federally granted public right of freedom of transit through navigable airspace.\textsuperscript{44} The court held on the basis of Causby and Allegheny Airlines v. Cedarhurst, that landowners would be entitled to just compensation if overflights are such that they amount to a taking of property for public purposes. However, the court added that this constitutional right to compensation should not constrict the federally granted public right of freedom of transit through airspace, and that the right to compensation confers no legislative power on municipalities to control aircraft noise or flight paths, as Federal legislation preempts these areas.

In view of the facts that: (1) individuals reside, work, or engage in recreational activities in or near areas that are adversely affected by

\textsuperscript{40} 238 F.2d 812 (2nd Cir. 1956)
\textsuperscript{41} 49 U.S.C. § 1301.
\textsuperscript{42} Id. § 1301(24).
\textsuperscript{44} Id. at 231, referring to Section 104 of FAA (49 U.S.C. 1304):

> "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."
airports and their operations; (2) local governmental units are vested with
the necessary police power to secure the health, safety, welfare, and mor-
als of its inhabitants; and (3) the courts have held that the Federal Gov-
ernment preempts the areas of aircraft flight and aircraft noise regula-
tion, who should assume responsibility for the losses suffered by those
who are confronted with the unwanted by-products of the aviation sys-
tem? In Griggs v. Allegheny County, the Supreme Court answered this
question in holding that Allegheny County, as proprietor and operator
of the airport, had taken an air easement over petitioner’s property for
which it must pay just compensation, as required by the Fourteenth
Amendment, for the damages to his property resulting from noise, vibra-
tions and other dangers. As Mr. Justice Douglas stated:

It is argued that though there was a ‘taking,’ someone other than
respondent was the taker—the airlines or the C.A.A. acting as an
authorized representative of the United States. We think, however,
that respondent, which was the proprietor, owner, and lessor of the
airport, was in these circumstances the one who took the air eas-
ement in the constitutional sense. Respondent decided, subject to the
approval of the C.A.A., where the airport would be built, what
runways it would need, their direction and length, and what land
and navigation easements would be needed. The Federal Govern-
ment takes nothing; it is the local authority which decides to build
an airport, vel non, and where it is to be located.46

The responsibility of the local airport proprietor was recognized in the
enactment of P.L. 90-411 and in the promulgation of Part 36 of the
Federal Aviation Regulations.47 As the introduction to Part 36 states:

1. Relation to responsibility of airport proprietors. Compliance
with Part 36 is not to be construed as a federal determination that
the aircraft is ‘acceptable,’ from a noise standpoint, in particular
airport environments. Responsibility for determining the permissi-
ble noise levels for aircraft using an airport remains with the proprie-
tor of that airport. The noise limits specified in Part 36 are the
technologically practicable and economically reasonable limits of
aircraft noise reduction technology at the time of type certification
and are not intended to substitute federally determined noise levels
for those more restrictive limits determined to be necessary by indi-

45. 369 U.S. 84 (1962).
46. Id. at 89.
47. See note 24, supra.
vidual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce. This limitation on the scope of Part 36 is required for consistency with the responsibilities placed upon the airport proprietor by the United States Supreme Court in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). Consistent with this limited scope, this amendment specifies that the Federal Aviation Administration makes no determination, under Part 36, on the acceptability of the prescribed noise level in any specific airport environment.48

Thus, under the holding in *Griggs* and pursuant to Part 36, local airport operators and sponsors may use their own discretion in establishing maximum noise levels at their airports by restricting the type of aircraft and the frequency of service that they will receive.49

As was explained earlier, the attack on the aircraft noise problem must move forward on three fronts. In efforts at controlling noise at the source we have seen that while Public Law 90-411 and Part 36 of the Federal Aviation Regulations give the Federal Government the exclusive authority to set aircraft noise standards at the source, the local operator may set more rigid standards for his facility. In controlling the path of the sound, we have seen that the air traffic rules promulgated by the Federal Government preempt the field so as to prohibit localities from adopting their own air traffic ordinances.

Progress on the third front, in relation to the receiver of the sound, is chiefly the responsibility of the local governmental unit. It is to this area that we will now turn.

III. ATTEMPTS AT INSURING COMPATIBLE LAND USE

A. Zoning

The remedies furnished by individual court actions such as *Causby* are

48. *Id.*

49. Receiving service as opposed to permitting aircraft to overfly the area, as the latter, on the basis of *Allegheny Airlines v. Cedarchurst*, is beyond the scope of municipal power. However, in *Lockheed Air Terminal, Inc. and Pacific Southwest Air Lines v. The City of Burbank*, 318 F. Supp. 914 (C.D. Calif. 1970), a local curfew ordinance which restricted jet flights at a privately-owned public-use airport was held void, as it invaded a field of regulation that the Federal Government had preempted; conflicted with the obligation of interstate carriers to furnish adequate service as required by their Federal certificates of convenience and necessity; conflicted with the Federally granted right of freedom of transit through the navigable airspace; and violated the commerce clause which limits the imposition of this type of regulation solely to the Federal Government.
for the most part, inadequate in eliminating the problems arising from the relationship of the airport and its environs. First, these court actions are costly, time-consuming, and frequently unsuccessful. As a result, many aggrieved individuals in the airport environs would rather subject themselves to the physiological and emotional strains resulting from noise, air pollution, and congestion rather than go through the ordeal of extensive litigation.

Second, and perhaps of greater importance, is the fact that the case-by-case after-the-fact approach is unduly cumbersome. In order to effectively control or abate the factors that lead to this problematic relationship, a comprehensive prophylactic scheme is needed. This prophylactic scheme must be aimed at the third front in the battle to make airports better neighbors, i.e., the receiver.

Zoning can be an effective and inexpensive device in minimizing the effects of air commerce's annoying by-products upon airport neighbors. While the Federal Government's activities may have precluded local communities from combatt[ing] the airport problem by regulating either noise source or path of flight, these local communities are chiefly responsible for insuring compatible land use control in airport areas.

The importance of zoning has been recognized by the aviation community and, as a result, has become an important element in the Airport and Airway Development Act of 1970. This legislation makes compatible land use zoning a prerequisite for Federal grants to local airport sponsors.51

The validity of an airport zoning ordinance is measured by the same test as other zoning ordinances are, i.e., whether the ordinance regulates the use of property or whether it constitutes a taking of property for which compensation must be paid.52 Waring v. Peterson,53 decided by the Florida courts in 1962 for the purpose of determining the validity of an airport zoning ordinance, illustrates the considerations that must be given to determine the validity of such ordinances. This case held that a zoning ordinance enacted to provide for the safer use of an airport by means of limiting vertical development of surrounding properties and prohibiting manufacturing establishments that produce smoke so as to interfere with air navigation was a valid exercise of police power; that there was a patent need for such zoning; that limitations of use or diminution of property

50. According to Erwin Seago, *The Airport Noise Problem and Airport Zoning*, 29 Md. L. Rev. 120 (1968), most of these courts actions have not succeeded.
51. See notes 31 and 32, supra.
52. *The Validity of Airport Zoning Ordinances*, 1965 Duke L.J.
53. 137 So. 2d 268 (1962).
values alone will not render such ordinance void, even though the effect of such ordinance is harsh and results in a serious depreciation of the value of the property affected by it; and that the zoning ordinance:

should be reasonable and should take into account, among other things, the type of flight operations expected to be conducted at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable.⁵⁴

However, despite the overall importance of effective airport zoning ordinances, they have not met much success in jurisdictions other than Florida, as most states have declared them repugnant to state or Federal constitutional “taking” provisions.⁵⁵ This can be exemplified in Indiana Toll Road Commission v. Jankovich,⁵⁶ in which the Supreme Court of Indiana held that an ordinance prohibiting the construction of buildings exceeding a certain height within a specified distance of the airport without paying compensation unconstitutionally appropriated property rights in the airspace above plaintiff’s land, as the landowner owns the airspace above his property at least to the extent that such airspace may reasonably be used by him.

Generally, the jurisdictions that have declared airport zoning ordinances invalid have relied upon four theories. First, they emphasize that these ordinances benefit only a particular group, the users of the airport, rather than the general public.⁵⁷ Second, they emphasize that these ordinances constitute a destruction of private property for a public use, for which compensation must be paid. Third, they rely upon the governmental enterprise theory—the landowner is deprived of property rights by a regulation enhancing the value of some governmental enterprise and a taking of property results for which compensation must be paid. Fourth, these jurisdictions are sensitive to the fact that, in many cases, these ordinances are attempts by the local authorities to circumvent the payment of damages as required by Causby and Griggs.⁵⁸ Yet, despite the fact that these ordinances have lacked success in the past, it is reasonable to assume that their success will improve in the future as a result of the

⁵⁴ Id. at 271.
⁵⁵ See note 53 supra. Examples of other jurisdictions that have stricken airport zoning ordinances are: Maryland—Mutual Chemical Co. v. Baltimore, 1 Avi. 804 (1939); Idaho—Roark v. City of Caldwell, 394 P.2d 641 (1964).
⁵⁷ Query: Doesn’t the general community benefit from the increased safety operations and control of the unwanted by-products of such operation?
zoning requirements of the Airport and Airway Development Act, the severity of the airport noise problem, and the uncomfortable conflict that has arisen between aviation and other interests. However, before we become overwhelmed with optimism, it is necessary to examine the practical limitations of land use zoning.

In the first place, the financial crises that affect local governments, frequently militate against responsible land use decisions.

There is no doubt that the financial crises of local governments has sometimes resulted in land use decisions which are not the best when broader interests are considered. Local officials themselves have recognized these problems but can do nothing to avoid them and still raise the money to maintain adequate levels of municipal services.\textsuperscript{59}

For land use planning to succeed, local dependence on the property taxes needs to be reduced. New financing approaches . . . can aid this process by limiting pressures to gain the maximum tax dollar return from every scrap of land available in the city.\textsuperscript{60}

While economic dictates may substantially hinder the local unit in devising a suitable zoning scheme to assure the integrity of the airport, its operations, and the surrounding community, these fiscal matters may additionally induce the local governmental unit to depart from or vary the zoning scheme that they have devised. Even though as a condition to receiving a Federal ADAP Grant, the local sponsor must give assurances that "appropriate action, including the adoption of zoning laws, will be taken . . . to restrict the use of land and adjacent to or in the immediate vicinity of the airport . . .,"\textsuperscript{61} there is no requirement that the local sponsor must adhere to this plan after the development project is completed.

Secondly, zoning for compatible land uses near or surrounding the airport can only be truly effective where the land is presently undeveloped, as zoning is not retroactive in effect. Once the land has been developed with incompatible uses, such uses must be eliminated, either by means of amortization or condemnation. However, in such instances, the action of the local sponsor may amount to a taking of property for which compensation must be paid. Additionally, the costs of removing incompatible uses for the purpose of assuring more compatible development or establishing a clear zone or buffer zone can be astronomically high. Airports tend to attract development in the areas near and surrounding them

\textsuperscript{59. See note 7, supra.}
\textsuperscript{60. Id. p. 165.}
\textsuperscript{61. See note 32, supra.}
and thereby increase land costs in their vicinities. For instance, at Chicago’s O’Hare International Airport, the original purchase price of the land in 1947 was $400-500 per acre. In 1960, during O’Hare’s expansion efforts, the surrounding farmland was sold for $20,000 per acre. Today, the same land is being sold for $50,000 per acre.62

According to Business Week, the new Dallas-Fort Worth Airport is considered to be ‘‘the most significant project in the U.S. in the last 20 years in terms of its impact on real estate values.”63 Land in the tiny town of Cappell, Texas, located between Dallas and Fort Worth, which was selling for $1,000 per acre five years ago is now selling for ten times that amount as a result of the growth in homes, offices, hotels and motels, warehouses, stores, and industrial plants that the new airport has generated.64

Thirdly, and perhaps the largest problem, is that airports are multi-jurisdictional in nature and effect. In many instances, the local airport sponsor is neither the local unit in which the airport is situated nor the local unit which must tolerate the adverse ills associated with airport operations.65 It is indeed difficult to insure coordinated zoning schemes among the several jurisdictions that are effected by the airport and aircraft operations as evidenced by the fact that when the Federal Government was in the process of building Dulles Airport on its 10,000 acre tract, it is unable to induce neighboring Fairfax and Loudon Counties to compatibly zone the areas surrounding the airport.66

The nature of governmental units is such that each tends to think in terms of optimizing its own immediate objectives and usually is not much concerned about whether or not such optimization is contrary to the optimization of the objectives of other governmental units.67

Lastly, it should be stressed that before an effective zoning scheme can be effectuated, a working technical knowledge of aircraft noise is vitally necessary for the purpose of making noise exposure forecasts and design-

64. Id., at 116.
65. An example of this type of situation is Bridgeport Municipal Airport which is owned and operated by the City of Bridgeport, Connecticut and located in the adjacent Town of Stratford. The existence and operations of this facility have led to substantial disagreements between these to local units.
ing noise contour areas. The application of this technical knowledge to plan airports and their environs for today is not particularly difficult. However, the goal of the planner is that of planning for the future as well. In this respect, he must anticipate the introduction of newer types of aircraft, additional types of service, and the future air transportation needs of the community in order to make relevant noise exposure forecasts and, in turn, devise effective zoning schemes.

B. Other Existing Methods

Methods other than zoning that may be used to prevent hazards to air navigation and to those below the flight paths and to prohibit land uses that are incompatible with the operation of an airport are: (1) the enactment of building codes requiring sound proofing; (2) advance site acquisition; (3) acquisition of avigation easements; and (4) eminent domain.

The enactment of building codes to require sound proofing for residences as a prerequisite to the granting of building and/or occupancy permits could significantly reduce the interior noise levels of those residences that are located in the airport environs. However, this approach possesses serious drawbacks. First, as with the experiences encountered in zoning, reliable noise contours are a necessary prerequisite. It is mandatory that we first determine where the noise begins and ends, and in what amounts. Second, the enactment of such codes requires criteria for permissible interior noise levels; performance standards would then have to be adopted. Third, sound proofing is costly. For areas that are as yet undeveloped, the requirement for sound proofing could substantially increase the price of housing in these noise-affected areas. In areas in which housing is already present, the costs associated with and the time involved in sound proofing these instructions would be unduly burdensome. This, in turn, leads to the problem of determining who should pay for the sound proofing of existing houses—the individual landowner who wishes to protect his investment or the airport sponsor who obtains a direct and immediate benefit from airport operations? In either case, the crucial question must be resolved as to whether the airport location values exceed the insulation costs. Fourth, sound proofing would only diminish interior noise levels. Those who engage in outdoor activities at home would still be confronted with the ear and nerve shattering experience of having aircraft either flying overhead or operating nearby.68

Advance site acquisition can be one of the most economical means to insure compatible land use in areas that are as yet undeveloped. However, since urban areas are faced with conflicting development pressures, local authorities might not be desirous of setting aside great portions of land to lie dormant until they are needed for airport development or expansion at some indefinite time in the future. For those areas in which there has been either partial or total development, the acquisition of the necessary sites could be very costly, as evidenced by the Chicago and Dallas-Fort Worth situations previously cited.

Avigation easements would limit the use of land surrounding the airport to uses that would not interfere with air navigation (e.g., agriculture). However, this method has produced a multiplicity of suits for the purpose of measuring the diminution of value of the land-owner’s property through such use restrictions and condemnation of the landowner’s future development rights.

Eminent domain, like the avigation easement, is also available for the purpose of securing compatible land use in areas that have already been incompatibly developed. Yet, while most airport sponsors and authorities, as creatures of the state, possess eminent domain powers, they are reluctant to employ them as the costs involved in employing such means are frequently beyond their fiscal resources.

As can be seen, each of the existing methods of achieving compatible land use has its own disadvantages which severely limit its effectiveness in reducing the conflict between the airport and its environment. The airport and its operations cover a large geographic area and, as a result, points that are several miles away can be adversely affected by air commerce activities. Because of this, the attempts at insuring compatible land use should be broadly based. Considering the multitudes of airport neighbors and those affected by airport operations, it is easily realized that a piecemeal approach to this problem will not work. It, therefore, appears that within the existing governmental framework and the scope of existing methods, the most economical and effective remedies for the problem are compatible land use zoning for undeveloped and future airport areas and condemnation and repurchase for presently impacted areas.

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69. *Id.*


71. *HUD-Study.*

ordinances have had questionable success in the courts and condemnation has proven to be very costly.

In view of the problems inherent even in these two preferred methods, it can be seen that the future struggle to ease the conflict between the airport and its surrounding community will have to rely upon more innovative concepts. These new concepts may become manifest in new Federal, state and local relationships, and in the emergence of new governmental institutions to more effectively deal with these problems.

IV. INNOVATIVE CONCEPTS FOR MINIMIZING THE ADVERSE IMPACT OF THE AIRPORT ON ITS ENVIRONS.

A. Introduction

The same technology that created the noise problem should be able to solve it. Many of the problems created by noise today, however, cannot wait for the technological solutions of tomorrow. It is doubtful that there will ever be such a thing as a quiet airplane, but, by technological and regulatory means, it will be possible to reduce the impact of aircraft noise exposure for the majority of Americans who are now, or potentially will be, exposed to excessive noise.

In surveying the current approaches that are used to make airports better neighbors, it can be seen that “new ideas, new approaches, perhaps even new institutions will be required to deal with the problems” arising in this area. The severity of these problems—the imminent danger to the physical and mental well-being of myriads of urban dwellers living near airports and to the continued viability of our national air transportation system—require that more effective approaches be used. No longer can we callously let the damage rest where it falls (i.e., on the nearby landowner) and superficially rationalize our actions by arguing, “the airport was there first” or that once the airport exists it simply cannot be bulldozed. On the same token, however, the importance of our air transportation system demands assurances of continued viability and growth and requires airport and aircraft operations, which are so necessary to the public interest, to exist unimpeded by small groups of vocal citizens who

75. See note 16, supra at 16.
may be desirous of either closing or restricting the airport operations. As stated earlier, the existing approaches that have been used to avert this head-on collision between competing interests have met with something less than success. Perhaps the following innovative concepts may achieve a higher ratio of success.

B. Avigation Lease

Charles M. Haar has called attention to the weaknesses and inadequacies inherent in the traditional common law theories that have been used to deal with the anxiety-producing relationship between the airport and the community, and has emphasized the failures of legislative efforts to insure compatible land usage—"to make compatible the existing conflicting demands for land in urban areas is a task beyond the dreams of the urban alchemist." Haar believes that decisions that are made regarding the location of airports should reflect all economic, social, and environmental costs. In this resource allocation, the price of "quiet" should also be included.

Quiet, like the land on which runways are constructed, is a commodity; and if the airlines and air travelers consume it, they should pay for it. Implicit in this resource allocation is a reliance upon our technological ability to identify, measure, and control the by-products of air commerce. Thus, the resource allocation made in accordance with the technology of the 1950's is not necessarily relevant to the 1970's. As a result, permanent resource allocation, or more specifically, a settlement between the airport operator and the aggrieved landowner may not be the most equitable and fair for either party. Noise contours may change, congestion may be displaced, and airport activity may be altered over the course of several years.

In view of the transient nature of these unwanted by-products, Haar suggests a system of leasing quiet and airspace for short periods of time (e.g., 2-3 years). During this time, the local resident and the airport operator would assess the value of the easement on the landowner's property and on the airspace above it. Upon the expiration of this lease, the airport operator would then have to re-settle the costs, based upon the available technology, the nature of the airport's operations, and the char-

76. See Note 33, supra.
77. Id. at 15.
78. Id. at 20.
acter of the surrounding area at this new date, and then enter into a new lease.

This proposal would have three major impacts. First, it would shift the threshold question as to the payment of damages from a consideration of whether any damages will be paid to that of who will pay for the damages that are suffered. Secondly, reliance upon the economy of resources would insure a more proper location for the airport. Third, this proposal would encourage the aviation industry to develop quieter engines, employ quieter aircraft, adhere to noise abatement procedures, and study the effects of the location and expansion of runways.

Yet, this proposal also contains serious drawbacks. First, it is not the airlines and air travelers alone who benefit from the existence and operation of the airport. The entire community, directly or indirectly, benefits by the fact that an important link in the national transportation scheme serves it. To place the financial burden solely upon the airlines and air travelers would be an unduly harsh measure and would probably be counter-productive to the general welfare of the entire community. Second it is difficult to determine a fair damage award. What value can we place on quiet? Can a dollar value be determined for the difference between 120 EPnDb and 100 EPnDb? Third, considering the numbers of urban dwellers situated near airports and in excessive noise areas, this individual-oriented approach would be extremely cumbersome.

Surely, the only truly effective solution to the problem at hand is through a broadly-based comprehensive planning scheme. The purpose of this scheme is not to attempt to make the plaintiff whole after he has been injured by the annoyances of aircraft and airport operations, but rather to prevent these annoyances from ever taking their toll on the health, safety, and welfare of those who live in urban areas.

C. Comprehensive Planning

In too many places, airports are 'planned,' expanded and operated with no attention paid to the effects which their operations have on their neighbors.79

The multi-jurisdictional and metropolitan-wide nature of airport influence requires that planning for both the airport and its impact be metropolitan in scale.80 Area-wide transportation system planning requires metropolitan planning agencies to foster and serve as a medium of exchange

80. HUD-Study
between the interests of the airport sponsor and those of the community. While these comprehensive planning schemes are costly, the financial cost involved in planning of this nature is probably much lower than the costs (economic, social, and environmental) that arise from poorly planned airport-community relationships. Additionally, the Federal Government, pursuant to the Airport and Airway Development Act of 1970, is authorized to make planning grants to state, regional, and metropolitan planning agencies for airport system planning and master planning. Section 13 of this Act, authorizes up to $75 million per fiscal year and directs the Secretary of Transportation to coordinate the administration of this program with the Secretary of Housing and Urban Development to preclude duplication and insure balanced planning.81

Comprehensive planning must include a study of the existing and expected noise exposure problems, particularly:

(1) the number and use of properties and the noise sensitivity of the land uses surrounding the airport;
(2) the number and major structural characteristics of the buildings in the area;
(3) the number and character of people exposed in the area;
(4) the market value of the property;
(5) the existence of special noise sensitive activities (such as schools and hospitals).

It should additionally provide an adequate means of review actions to analyze complaints, formulate complaint profiles, and continually assess the relative usefulness and costs of alternative land use strategies.82 Without this comprehensive study of the variables and problems incident to the relationship between the airport and its environs, the traditional means of insuring compatible land use, regardless of how vigorously they may be carried out, will continue to be ineffective.

The Minneapolis-St. Paul Metropolitan Airports Commission (MAC) is an example of the type of governmental unit that is required to administer comprehensive planning.83 Although this Commission was conceived as a means of quelling the traditional competition for scheduled air service between St. Paul and Minneapolis, it now serves the entire seven-county metropolitan area and possesses general jurisdiction over all

81. 84 Stat. 224.
82. HUD-Study
aeronautical activity in that area, including the operation of the major air carrier airports and control over privately-owned fields.

Implicit in MAC's functioning is the necessity of insuring maximum coordination between it and Federal, state, and local agencies. In coordinating its activities, MAC represents the aviation interests of the entire metropolitan county area—the cities in which the airports are located as well as those who are only indirectly affected by them, as it is comprised of members from each community in the metropolitan area.

To a considerable extent, comprehensive planning, as it is embodied in such regional or metropolitan-wide bodies as MAC, is a marked improvement over the types of "planning" that we have had in the past. However, these comprehensive planning schemes are not flawless. As in the case of zoning, these planning schemes are not retroactive in effect. While they may plan ideally for the future, they may be virtually ineffective in alleviating the present ills associated with "impacted" airports. Furthermore, while planning agencies may develop a plan that reflects the best in technological, political, social, and environmental wisdom, there is nothing to prevent these agencies from later changing this plan to some less acceptable norm. This problem is especially significant in those instances where imminent financial crises have caused planning agencies to succumb to development pressures that may be contrary to the best interests of the entire region.

Yet, the most significant problem arising in this area is that these metropolitan-wide comprehensive planning bodies may become too parochial in their outlook, placing regional or metropolitan matters far ahead of those of national importance. Thus, if there is to be any future in comprehensive planning, at least as such planning pertains to airports and air commerce, a close working relationship with the Federal Government will be required.

D. A National Land Use Policy

The necessity for and desirability of a national land use policy arise from the fact that the use of land significantly influences the quality of the environment and that past and present state and local arrangements for planning land use of more than local impact have generally been inadequate.

S. 992, a bill

To establish a national land use policy; to authorize the Secretary

of the Interior to make grants to encourage and assist the States to prepare and implement land use programs for to protection of areas of critical environmental concern and the control and direction of growth and development of more than local significance; and for other purposes.

was introduced in the 92nd Congress. Specifically, this legislation would have authorized the Secretary of the Interior to make program development grants to each state to assist in developing a national land use plan and, upon the Secretary's review of the state plan, to make a program management grant to each state to assist each in managing the plan that they have devised. Section 104 of this bill provided that the state plan must include methods of inventorying and designating areas impacted by key facilities (such as a major airport); exercising state control over the use of land within such areas; assuring that local regulations do not restrict or exclude development and land use of regional benefit; controlling proposed large-scale development of more than local impact upon the environment; and periodically revising and updating the state land use program to meet changing conditions. The bill also provided that the Secretary, prior to making a program management grant pursuant to Section 104, must consult with those Federal agencies that conduct or participate in the construction, development, or assistance programs that significantly affect the land use in the state and that these Federal programs and activities must be consistent with these state land use programs.

The amendment to S. 992 would have additionally amended Section 15 of the Airport and Airway Development Act of 1970 to impose economic sanctions on those states that have not been found eligible for a plan management grant pursuant to Section 104 of the National Land Use Policy Act. Under this provision, airport development grants to states that do not qualify under Section 104 would be reduced by specified percentages. The rationale for this provision can be seen in the following excerpt from a letter from the Secretary of Interior to the Chairman of

86. Id, section 102.
87. Id, section 104.
88. Id, section 102(b) provides "key facilities" are public facilities which tend to induce development and urbanization of more than local impact and include . . . (1) any major airport that it is used or designed to be used for instrument landings . . .
89. Id, section 105.
90. Id, section 106.
the Senate Committee on Interior and Insular Affairs, on February 8, 1972:

The legislation submitted last year provided in part that to qualify for Federal funding a State land use program must include a method for exercising control over areas impacted by key facilities. Key facilities were defined as public facilities which tend to induce development and organization of more than local impact including major airports, highways and recreation facilities. Decisions as to the actual siting of such key facilities can, of course, dictate the uses to which the surrounding lands subsequently are put. Thus, we believe it desirable clearly to require that the States’ land use programs include methods for exercising control over key facility site location, as well as major improvements and access features of such facilities.

Under our proposal of last year, the principal incentive for States to develop land use programs was the Federal matching grants for program development and program management. We now are persuaded that economic sanctions as well as grants should be provided to assure State action. Recognizing the significant effect which key facilities can have on broad land use patterns, the sanctions which we propose would reduce the amount of financial assistance under these Federal programs with the most far-reaching effect upon land use—airport and highway construction and recreation facilities. The proposed reductions would apply to any State which has not developed an adequate land use program by 30 June, 1975. Any funds withheld from States which have not implemented adequate land use programs would be diverted to States complying with the National Land Use Policy Act, since complying States would be better able to make sound decisions with respect to activities with major land use impacts.92

Naturally, it would be difficult to speculate as to the success or failure of this legislation, since it was neither enacted nor implemented. However, it is possible to make some general observations concerning this bill’s possible impact.

As has been emphasized throughout this article, state and local governments and agencies have encountered considerable difficulty in comprehensively and compatibly controlling land use in urban areas. The Federal grants that were provided for in this legislation may have assisted the states in hiring the needed manpower and in permitting them to engage

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92. 118 Cong. Rec. S. 3313 (March 6, 1972)
in land use studies and resource allocations. The Federal grants would have also, to some extent, relieved the state and local governments of many of the economic pressures that have in the past been counter-productive to wise land use policies.

However, several problems would have remained even if S.992 were enacted. First, what if the state chooses neither to avail itself of these grants nor to formulate a land use policy? The obvious result would have been that those who are living in such states would have continued to be the victims of the past ineffectual attempts at improving the relationship between the airport and the urban environment. The use of the sanction provided for in the amendment to S. 992, the reduction in ADAP Grants, might additionally have been counter-productive. Surely, the reduction in Federal funds for airport development in the unresponsive state could have hindered that state's airport development projects. However, at the same time, this reduction in Federal grants could have effectively impeded the achievement of the goals set forth in the Airport and Airway Development Act of 1970,93 to the detriment of the national aviation system and, in turn, the national transportation system.

Second, this proposal maintained the duality of responsibility between the states and the Federal Government. Thus, while the Federal Government regulates and promotes civil aviation to foster its development and safety and to provide for the safe and efficient use of the airspace, the states would have retained direct responsibility over the formulation of a land use policy. Even upon the enactment and implementation of S. 992, the states might have continued to be the weak link in the promotion and growth of the air transportation system, as they may fail to adopt a land use policy or coordinate their policies with those of the Federal Government. Furthermore, this split in authority and responsibility might have prevented either level of government from taking any decisive action. A case in point is that of the Everglades Jetport.

The airport was a local improvement project;94 yet its effects were far reaching. Because of its location in the Everglades, the jetport threatened to alter the south Florida eco system. . . . Both the

93. Section 2 (84 Stat. 219) Declaration of Policy provides in part:
The Congress hereby finds and declares—
That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.
That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense . . . .

94. The project was funded by a local bond issue rather than by the Federal purse.
state and the Federal governments, therefore, opposed the plan. Nevertheless, the nature of the project made it almost impossible for either government to take decisive action.  

E. Conclusion: The Need for Federal Ownership and Control

The clash between airports and their surrounding communities has emphasized the need to develop better ways of managing the problems that confront us. This presentation would not be complete without referring to the possibility of Federal ownership and control of airports. Action of this nature could have the distinct advantage of placing the responsibility for aviation promotion, development, and safety completely within one governmental entity. Centralized authority of this nature would be consistent with the current goals of the Federal Government of promoting air commerce and safety and might provide for better land use controls surrounding airport areas since the Federal Government would have a greater interest in protecting its investment in and power to build airports.

This idea was considered to some extent by the President's Airport Commission in 1952.

There is reason to believe . . . that the Federal Government, as a corollary to its authority to regulate interstate commerce, and under its postal and national defense powers, has the power to regulate and to zone any airport engaged in such activities.

Surely, in light of our past failures, Federal ownership and control of our airport system might be the best means of insuring

the development of national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation at the lowest cost consistent (with the general welfare, economic growth and stability of the Nation) and with other national objectives, including the efficient utilization and conservation of the Nation's resources.

Mr. Justice Black, dissenting in Griggs, emphasized that the United States should be held liable rather than the defendant, Allegheny County, for the "taking" of airspace over the plaintiff's property.

Congress has over the years adopted a comprehensive plan for na-

95. See note 85, supra.
96. Doolittle Report, at 72-73.
tional and international air commerce, regulating to a minute detail virtually every aspect of air transit—from construction and planning of ground facilities to safety and methods of flight operations.

While it could be feasibly argued that Federal ownership and control of airports and airport operations would be incidental to the Federal Government's comprehensive plan for national and international air commerce, it is likely that local agencies, authorities, and citizens will vehemently oppose this particular means of controlling and abating the unwanted by-products of our national aviation system. These local bodies and local citizens would naturally be wary of any Federal encroachment into matters that they feel are legitimately of local concern as they are of national importance.

It, therefore, appears that the existing and the more innovative attempts at minimizing the conflict between aviation and other urban interests possess both inherent advantages and drawbacks. Considering the fact that we have just wakened to realize the severity of the problem, it is difficult to sit back and choose any one of the available methods and rely upon it to instantly soothe the problematic relationship. Considering this sudden awareness, our "technological" base for implementing a feasible and acceptable solution on the third front has not substantially advanced since the Wright Brothers epic twelve-second flight of December 17, 1903.

98. 369 U.S. 84 (1962) at 91.
ROUTE ASSIGNMENTS AND THE C.A.B.

TERRY A. FERRAR*

**Background and Introduction**

In 1938 Congress passed and President Roosevelt signed into law the Civil Aeronautics Act which established the Civil Aeronautics Board (the C.A.B.). The Board consists of a five-man body appointed by the President with the consent of the Senate. Each member serves a six-year term and may only be dismissed for serious causes. The C.A.B. has six main controls on civil aviation, this note focuses on but one of these—the C.A.B.'s responsibility to decide how many and which operators are scheduled on designated air routes within the United States.

This facet of the C.A.B.'s operation has been a recurring problem, particularly since 1951. As commercial aircraft have increased in speed and capacity, it has become increasingly apparent that only the major routes in the air-transport network spanning our country will be profitable. However, the trunk or feeder lines are socially valuable to our mobile way of life, and the C.A.B. has sought to maintain them.

In its endeavor to avoid extinction of these unprofitable low-passenger-density routes, the C.A.B. has proposed and implemented numerous subsidy techniques. These subsidies have covered the spectrum from direct government subsidy, to the construction of integrated route patterns that, in effect, produce internal subsidies within the involved airlines. In this note we will suggest a route allocation mechanism that satisfies this responsibility in a socially desirable (efficient) fashion.

**Defining the Routing Problem**

Between any two nodes in the air-transport network, the C.A.B. specifies the desirable flight frequency. These frequencies are specifically based on the characteristics and interdependence of the cities in question. In this sense we will speak of a given number of flight assignments that are

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1. For further background on the C.A.B.'s responsibilities, etc., see Corbett [1].
2. See Corbett [1] for further comment concerning the C.A.B.'s indecision on this routing issue.
3. This flight frequency route decision must be approached as a system or network optimizing problem; increasingly, considerations of airport congestion are influencing this specification (e.g. see Ferrar [2], and Levine [3]).
required by the C.A.B. in any time period for each network route. Alternatively, we will model the C.A.B.'s routing responsibility as the distribution of these "route permits" among the airlines.

**Route-Permit Allocations**

The C.A.B. by specifying the flight frequencies over the various routes defines an inelastic supply of route permits which *must be* distributed among the nation's airlines. Fundamentally, we propose the C.A.B. sell or lease these permits at a price which reflects the profitability of operating over these routes.

The airlines form the demand side of this permit market. It is expected that due to the economic rent associated with certain route assignments the bidding will be intense, whereas it will prove to be slack or virtually nonexistant for others. For example, route licenses that are associated with high-density travel will doubtlessly attract the interest of many airlines due to the profitability of such operations. Similarly, the trunk-line licenses will experience slack or no demand for their ownership.

But this characteristic of airline preference being related to profit potential is in no way different from what we presently experience in the industry. Moreover, due to the vagueness of the current operation these preferences tend to prevail at the expense of the C.A.B.'s welfare criteria. In the following section we will modify our system in a manner which will eliminate these troublesome characteristics.

**Redistribution of High Density Route Revenue Throughout the Air-Transport Network**

The route permit marketing structure for the C.A.B.'s operation will have the pleasant feature of recouping the economic rent available in the airline industry. By marketing these licenses and collecting the equilibrium price the C.A.B. will obtain revenue support for its operation. However, we have the following persistent problem: How is the C.A.B. going to induce the scheduling of the nonprofitable trunk-line routes?

As we implied earlier by suggesting that the "price" of these permits should reflect the "profitability" of operating over the involved routes, we are about to define a subsidy (or negative market price) for these excess-supplied licenses. By providing a market-determined subsidy to the airlines which accept the responsibility of supplying these socially desirable though unprofitable routing assignments, the C.A.B. may induce their supply.⁴

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⁴ The most recent C.A.B. subsidy scheme, low-bid-trunk-line subsidies (as reported in...
In effect we have described a rent transfer throughout the air-transport network. That is, we have developed a mechanism which defines a socially efficient redistribution of the economic rent available in the nations airways.\footnote{5}

**Summarizing Remarks**

In this note we have advocated a route assignment allocation framework to fulfill the C.A.B.'s most controversial responsibility. By utilizing a route-permit market the C.A.B. may both recoup the available transport rent factor on high-passenger-density routes and reduce the potential for self-interest pressure influence on its operation. Moreover, we observed that in this market structure there would tend to be a lack of bids for the permits earmarked for low-passenger-density routes. In this respect our structure defined the appropriate subsidy as a market transfer of the realized rent; this subsidy for inducing these socially desirable services appeared as a negative equilibrium price for such permits.

Fundamentally, the transport industry exists to modify the time-space characteristics of our society. This proposed route allocation system adapts this industry structure in the interest of social welfare. It seems appropriate that the rent derived from certain characteristics of our spatial distribution should be used to implement the modifications necessitated by other peculiarities of our demographic lumpiness.\footnote{6}

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the *Wall Street Journal* [4]), is not too different from that here suggested; however, we have argued that the revenue support for such a program may be derived from the available economic rent inherent in the nation's transportation network.

5. Of course, the magnitude of the required subsidy and the obtainable rent would have to be compared to determine if this system would be totally self financing.

6. This view of the derivable rent being associated with demographic lumpiness could be used to argue for the transfer of the obtained funds to other forms of national transit (e.g. the railroads).

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**Bibliography**


The Administrative Conference of the United States has commented upon the recommendations of the American Bar Association to amend the Administrative Procedure Act. Those recommendations, while general in nature, have considerable relevance as applied to the area of transportation law. This is illustrated by the A.B.A. recommendation calling for improved definition of "rule" and "order" so as to distinguish more sharply between rulemaking and adjudication. . . . The Editors.

STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON THE ABA PROPOSALS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT (Adopted June 7-8, 1973)

In August, 1970 the House of Delegates of the American Bar Association adopted twelve resolutions calling in general terms for amendments to the Administrative Procedure Act. They are a valuable means of focusing the attention of the Administrative Conference, the organized bar, and other interested persons upon revisions and improvements in the APA suggested by a quarter-century of experience.

The Conference has studied the resolutions and the implementing recommendations prepared by the Administrative Law Section of the ABA. The Conference has expressed its views in recommendations previously adopted respecting the subject matter of several of the resolutions. We believe it desirable, however, to state in a single document our views on the resolutions and on those parts of the implementing recommendations which appear to raise issues separate from those posed by the resolutions.

Resolution No. 1:

The Conference approves in principle Resolution No. 1, calling for improved definitions of "rule" and "order" so as to distinguish clearly between the nature of rulemaking and the nature of adjudication. The Conference has commenced, and will continue, the further study that is needed to determine how this can most effectively be achieved.

Resolution No. 2:

The Conference agrees with Resolution No. 2. We have previously called for eliminating from 5 U.S.C. §553 the exemption for rules relating to "public property, loans, grants, benefits, or contracts" (Recommendation No. 69-8). We also favor limiting or eliminating the present exemption that applies whenever a military or foreign affairs function is involved, provided that appropriate safeguards can be retained to protect the aspects of those functions that concededly need special treatment. This subject deserves further study, which the Conference has already begun.
Resolution No. 3:

Resolution No. 3 would extend the existing provisions regarding separation of functions in 5 U.S.C. §§554(d) to all formal proceedings, both adjudicatory and rulemaking; the existing exceptions for ratemaking, initial licensing, and formal rulemaking generally would be eliminated. With respect to such formal proceedings, the Conference approves this proposal insofar as it applies to agency staff who have actually engaged in investigative or prosecutorial functions in the particular proceeding, including persons who have actually exercised supervisory authority over such functions once the formal phase of the proceeding has commenced. We do not believe, however, that agency officials having generally organizational or supervisory responsibility for such functions should, solely by virtue of that responsibility, be barred from performing their customary function of advising agency members in proceedings not presently covered by 5 U.S.C. §§554(d).

Resolution No. 4:

The Conference approves the purpose of Resolution No. 4, which seeks the prohibition of ex parte communications between agency members and parties or other interested persons outside the agency on any fact in issue in an adjudicatory or rulemaking proceeding subject to 5 U.S.C. §§556 and 557. We leave open for further consideration by the Council and cognizant committees whether this objective can most advantageously be sought by legislation or by agency rules.

Resolution No. 5:

As the numerous Conference recommendations of general applicability indicate, the Conference endorses the principle of uniformity of administrative procedures—including procedures governing the conduct of formal adjudication—where considerations of fairness or expedition do not justify differences. It is extremely difficult to determine, however, where such considerations are widely applicable without an intensive agency-by-agency examination of the particular procedure in question. As a matter of priority, the advantages to be gained by seeking standardization through agency-by-agency examination of a procedure whose only apparent flaw may be its nonuniformity are not always as important as improvement of some procedures whose actual operation has been shown to be defective. The work involved, and hence the opportunity cost, becomes even greater if the uniform procedure is to be not merely recommended but imposed, making it necessary to pass upon exceptions for
particular agencies. For these reasons, the Conference would not desire a statutory mandate to enforce the single goal of uniformity with respect to particular provisions of administrative law, but would prefer to further, as it has in the past, all the values of sound administrative procedure—including the value of uniformity—by making recommendations in those areas where the need and the utility of Conference action are most apparent.

Resolution No. 6:

The Conference has already called for agencies to consider delegating final decisional authority to presiding officers or to intermediate appellate boards, subject to discretionary review by the agency (Recommendation 68-6). ABA Resolution No. 6 and that part of its Recommendation No. 8 which authorizes such delegation are consistent with and would implement the Conference recommendation, and we endorse them.

Resolution No. 7:

Resolution No. 7 would require agencies “to the extent practicable and useful” to provide by rule for prehearing conferences. The Conference has already endorsed the principal objective of this resolution, which is increased use of prehearing conferences in adjudicatory proceedings (Recommendation 70-4). We agree with the conclusion expressed in ABA Recommendation No. 7 that pursuit of this objective is best conducted through the Conference.

Resolution No. 8:

The Conference agrees that the presiding officer should have substantial authority in the conduct of adjudicatory proceedings. The Conference has already recommended legislation to authorize agencies, at their discretion, to accord administrative finality to the decisions of administrative law judges (Recommendation 68-6). We endorse the ABA proposal insofar as it would achieve that result.

The Conference shares the Association’s view that an Administrative Law Judge who has presided over the reception of evidence should exercise responsibility for rendering the initial decision, with limited exceptions. The specification of those exceptions and other matters set forth in the ABA’s implementing recommendation raise issues which the Chairman’s Office of the Conference and the Committee on Agency Organization and Personnel have studied in some depth and discussed with the relevant committee of the Administrative Law Section of the
ABA. Since further study and discussion would be fruitful, the Conference takes no position on these matters at the present time.

Resolution No. 9:

Resolution No. 9, as elaborated upon by its implementing recommendation, calls for legislation authorizing agencies to provide by rule for abridged on-the-record procedures for use by unanimous consent of the parties. We do not believe that such legislation would accord the agencies any authority they do not already possess, and it might be construed to invalidate certain procedures at present employed in the absence of unanimous consent. Accordingly, we recommend against implementation of this proposal.

Resolution No. 10:

Resolution No. 10 would grant all agencies authority to make subpoenas generally available in adjudicatory proceedings. Those agencies which conduct adjudications subject to 5 U.S.C. §§554, 556 and 557 or otherwise determined on the record after hearing should, as a general rule, possess subpoena power, and subpoenas should be available to the parties in such proceedings. We favor an amendment to the Administrative Procedure Act which would achieve this result with respect to adjudications subject to §§554, 556 and 557. It is not feasible or desirable, however, to make subpoenas available to either the agencies or the parties in every case of informal adjudication. Thus, amending the Administrative Procedure Act to provide a grant of subpoena power in appropriate cases of informal adjudication will require a definition of the category of proceedings to be covered; since framing a workable definition is exceedingly difficult, it may be found preferable for Congress to make such grants of subpoena power on a less general basis. In any event, we favor retention of that provision of the Administrative Procedure Act (5 U.S.C. §555(d)) which permits the agencies to require by rule a statement or showing of general relevance and reasonable scope of the evidence sought before issuance of a subpoena.

Resolution No. 11:

The Conference agrees in principle with the proposal that agencies be required to provide by rule the procedure applicable to cases of informal adjudication. We are convinced that in view of the vast range of informal agency adjudication, more empirical study is necessary before sound procedures of general applicability can be formulated.
Resolution No. 12:

The Conference does not favor at this time amending the Administrative Procedure Act to treat agency issuance of prejudicial publicity. We believe that there exists at present an adequate legal remedy for agency publicity which affects the integrity of an on-the-record agency proceeding. We agree with the American Bar Association that agency practices in the issuance of publicity adversely affecting persons in their businesses, property, or reputations also present a problem, and we have proposed in our Recommendation 73-1 means of dealing with it.


The above-named members of the Committee on Agency Organization and Personnel are of the opinion, for the reasons set forth in the Staff report accompanying the proposed Recommendation, that the Conference's position on Resolution No. 3 of the ABA Proposals (Separation of Functions) should be in the form and language originally submitted by the Council and various committees, to wit:

Resolution No. 3

Resolution No. 3 would extend the existing provisions regarding separation of functions in 5 U.S.C. §554(d) to all formal proceedings, both adjudicatory and rulemaking; the existing exceptions for ratemaking, initial licensing, and formal rulemaking generally would be eliminated. With respect to rulemaking of particular applicability, all ratemaking, and initial licensing, the Conference approves this proposal insofar as it applies to agency staff actually engaged in investigative or prosecutorial functions, including the actual exercise of supervisory authority over such functions in a particular case. We do not believe, however, that agency officials having general organizational or supervisory responsibility for such functions should, solely by virtue of that responsibility, be barred from performing their customary function of advising agency members in proceedings not presently covered by 5 U.S.C. §554(d). With respect to rulemaking of general applicability, the Conference believes there should be no statutory requirement of separation of functions.
Separate Statement of Malcolm S. Mason

I join in the above statement of Max D. Paglin and other named members of the Committee on Agency Organization and Personnel, except that I favor that portion of the Assembly's amendment to the original submission which would permit consultation with staff members whose exercise of supervisory authority occurs prior to commencement of the formal phase of the proceeding. More generally, I am of the view that various portions of the Conference's Statement concerning the ABA proposals overemphasize notions of formal neatness at the expense of realistic examination of the actual problems encountered in actual agencies in various kinds of proceedings.

ADMINISTRATIVE CONFERENCE REPORT EXPLAINING PROPOSED STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON THE ABA PROPOSALS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT

This Report has been prepared by the Chairman's Office of the Conference. It is intended accurately to reflect the factors considered by the Council and the Committees responsible for the Statement. It does not, however, have their express endorsement.

Resolution No. 1*

Resolution No. 1, elaborated upon in the implementing Recommends:

* The proposed Statement on Resolution No. 1, as presented to the Assembly by the Council and by the Committees on Rulemaking and Agency Organization and Personnel, was as follows:

The Conference approves in principle Resolution No. 1, calling for improved definitions of "rule" and "order" so as to distinguish clearly between the nature of rulemaking and the nature of adjudication. Specifically, we agree that agency action of tightly focused applicability should be classified as adjudication whether or not it has future effect. This, we believe, is in keeping with the traditional understanding of rulemaking as a process akin to legislation which applies to open classes of persons rather than identified individuals.

In endorsing the proposed redefinition, the Conference does not imply that fixing the permissible rates of a specific enterprise—the agency activity principally affected—should be treated in all respects like other formal adjudication. To the contrary, although we believe that ratemaking, like initial licensing, should be made subject to the separation-of-functions requirements of 5 U.S.C. §554(d) (with the reservations discussed below in connection with Resolution No. 3), we are of the view that it should not be subject to the mandatory initial decision requirement of 5 U.S.C. §557(b) and should continue to be governed by the provision of 5 U.S.C. §556(d) authorizing agencies to require that all evidence be submitted in writing. Any amendments of the Act necessary to achieve these results should accompany the proposed redefinition of rulemaking.
dation, proposes a fundamental change in the statutory boundary line between rulemaking and adjudication. The term “rule” is presently defined by the Administrative Procedure Act as “the whole or a part of an agency statement of general or particular applicability and future effect . . .” 5 U.S.C. §551(4). Recommendation No. 1 would delete the words “or particular,” thus redefining “rule” to mean agency action “of general applicability and future effect.” Agency action of particular applicability and future effect—e.g., ratemaking—would be reclassified as “adjudication.”

The words “or particular” in the present definition of rule have long been a source of puzzle to practitioners and students of administrative law. As Professor Kenneth Davis has observed, under a literal application of the words almost every agency process would qualify as rulemaking; “adjudication” would cover nothing but licensing, and that only because the statute specifically says so. Davis, Administrative Law Treatise §502, at 295 (1,158). Early drafts of the Act defined “rule,” in accordance with the accepted meaning, as “any agency statement of general applicability . . .” The words “or particular” were added at the eleventh hour—after enactment by the Senate. (H. Rep. No. 1980, 79th Cong., 2d Sess. App A, p. 283 note 1 (1946). The House Judiciary Committee explained that the “change of language to embrace specifically rules of ‘particular’ as well as ‘general’ applicability is necessary in order to avoid controversy and assure coverage of rulemaking addressed to named persons.” The phrase was added, in Professor Davis’s view, “to make sure that what has traditionally been regarded as a rule will still be a rule even though it has particular instead of general applicability.” Davis, Administrative Law Treatise §502, at 296 (1,158).

The proposed redefinition would have a number of specific procedural consequences. Part of formal rulemaking would become formal adjudication, hence subject to the separation-of-functions and mandatory-intermediate-decision requirements of §§554 and 557. Part of informal

We note that, under the proposed definition, part of what is now informal rulemaking would become informal adjudication, and thus no longer be subject to the notice-and-comment requirements of 5 U.S.C. §§553. The question of appropriate procedures for informal adjudication is a subject deserving much further study. Meanwhile, we believe agencies should continue to accord informal action of particular applicability and future effect (though reclassified as adjudication) the procedural protections prescribed for informal rulemaking by 5 U.S.C. §§553.

The discussion in text is addressed to the above proposal, which was substantially amended on the floor of the Assembly.
rulemaking would become informal adjudication, hence no longer subject even to the notice-and-comment requirements of §553. Conceivably, some agency action of particular applicability might be classified as informal rulemaking under the present definition but as formal adjudication under the new one, either because Congress might be more inclined to formalize a proceeding defined as adjudication or because the courts might be more inclined to construe an ambiguous statutory hearing requirement as requiring formality (i.e., determination on-the-record).

The principal argument for the Recommendation—and the basis on which the proposed Conference Statement supports it—does not depend upon the merits of these specific consequences. It is simply that omission of the phrase "of particular" would yield a sounder, more logical definition of "rule," a definition in keeping with our common understanding of rulemaking as a process, essentially legislative in character, resulting in decisions applicable to open classes of persons, not merely to named individuals or closed classes. According to this view, the present definition of "rule" does not reflect a basic Congressional judgment that the generality or particularity of agency action is procedurally immaterial; it represents an essentially ad hoc decision to confer the status of rulemaking on certain governmental functions—chiefly ratemaking—that had historically been performed by legislatures but differ fundamentally from other legislative processes. This faulty definition, it is argued, has been conducive to muddy procedural thinking and may well have contributed to the unfortunate Congressional tendency to overformalize rulemaking and underformalize adjudication. Setting the categories straight might help to arrest this tendency.

Against all this, one can argue that the value of the new definition would be outweighed by the difficulty of applying it. For the first time, courts would have to determine whether agency action is of general or particular applicability, an often difficult question which need not be answered under the present statute since nothing hinges upon it. The borderline cases would be those involving agency action general in form but particular in impact or intent—as when a "rule" not addressed to named parties in fact applies to one or a very few individuals. This objection would be more telling were it not for the fact that cases troublesome under the proposed revision are potentially troublesome even now. A proceeding "that in form is couched as rulemaking, general in scope and prospective in operation, but in substance and effect is individual in impact and condemned in purpose," (American Airlines v. CAB, 359 F.2d 624, 631, cert. denied 385 U.S. 843 (1966)) may even now be unmasked as an imposter and subjected to the more rigorous procedures
required of formal adjudication. And even agency action concededly
rulemaking under the statute may, because of its particularity of impact,
be held to require trial-type procedures as a matter of constitutional due
process. (see Anaconda Co. v. Ruckelshaus, 31 Ad. L. 2d 1004 (D. Colo.
1972)). Arguably, it is preferable that the issue of “particularity” be
resolved at the statutory rather than at the constitutional level, and the
proposed redefinition of “rule” would make this possible.

It remains to examine the specific consequences of the proposed redefi-
nition (a) in the area of informal agency action and (b) in the area of
formal agency action.

**Informal Agency Action**

Agency action of particular applicability and future effect is presently
classified as rulemaking. Unless required by statute to be based on the
record of an administrative hearing, it is informal rulemaking. Under
Recommendation No. 1, it would become informal adjudication. The
APA prescribes trial-type procedures for formal rulemaking and adju-
dication, notice-and-comment procedures for informal rulemaking and no
procedures at all for informal adjudication. Thus, adoption of Recom-
modation 1 would relax, rather than tighten, the procedural require-
ments for this important class of agency action. This might well be con-
sidered an undesirable result. To be sure, ABA Resolution No. 11
proposes certain procedural reforms in the area of informal adjudication,
requiring each agency to establish procedural rules calling for at least one
level of internal review and providing that notice of adverse action be
accompanied by a written statement of reasons. This Resolution, how-
ever, presents formidable difficulties of its own. See p. 29, infra. Even if
adopted, moreover, Recommendation No. 11 would seem to afford less
in the way of procedural protection than the notice-and-comment require-
ments of§553, which likewise demand a statement of reasons and in addi-
tion provide opportunities for written, and where appropriate, oral com-
ment and argumentation. The proposed Conference Statement, in ac-
cordance with the views of the Committee on Rulemaking, suggests that
agencies continue to use these notice-and-comment procedures for infor-
mal action of particular applicability and future effect, even though such
action be reclassified as adjudication.

**Formal Agency Action**

Much more important are the consequences of Recommendation No.
1 in the area of formal agency action. These consequences are worth spelling out.

1) Section 554(d) of the Act, which applies to formal adjudication but not to formal rulemaking, provides that a hearing examiner may not “consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate” or “be responsible to or subject to the supervision or direction of an employee or agency engaged in the performance of investigative or prosecuting functions for an agency.” It further provides that an “employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings.” These “separation of functions” requirements do not apply, however, “in determining applications for initial licenses” or “to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.” Recommendation No. 1 would make these requirements applicable to certain type of proceedings presently classed as rulemaking—e.g., approval of corporate reorganizations by the SEC—but not to ratemaking, which would still be expressly excepted. Only the elimination of that exception—as proposed by ABA Recommendation No. 3—would bring separation-of-functions to ratemaking.

2) Section 556(d) provides that a party to any formal proceeding “is entitled to present his case or defense by oral or documentary evidence . . .,” except that in “rulemaking or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.” The negative implication is that in matters of adjudication other than initial licensing or claims determination, no party may be denied the opportunity for oral presentation of testimony, at least where material facts are in issue. Under Recommendation No. 1, a party to a ratemaking proceeding could be avoided only by carving out a specific exception for ratemaking, and the proposed Conference Statement so recommends.

3) Section 557(b) of the Act requires an intermediate decision—either initial or recommended—by an administrative law judge, in all cases other than rulemaking or initial licensing. There the intermediate decisions may take the form of a tentative decision of the agency heads or a recommended decision of a responsible staff member, or may be omitted altogether if the agency finds on the record “that due and timely execution of its functions imperatively and unavoidably so requires.” Under
Recommendation No. 1, that exception would no longer apply to ratemaking or other rulemaking of particular applicability but would continue to apply to initial licensing and to rulemaking of general applicability. If the intermediate decision procedure is to remain flexible in ratemaking—as the proposed Conference Statement recommends in connection with Resolution No. 8—adoption of Recommendation No. 1 must be accompanied by a specific exception for "ratemaking," along with rulemaking and initial licensing.

Recommendation No. 1, however, cannot be considered in isolation from other components of the ABA package which deal specifically with separation of functions and intermediate decision. Recommendation Nos. 3, 4 and 8, if adopted without modification, would eliminate all functional differences between on-the-record adjudication and on-the-record rulemaking (except that created by the written evidence provision of §556(d)) and thus deprive Recommendation No. 1 of nearly all practical consequence in respect to formal proceedings.

Thus, if one's goal is to establish a uniform procedural rule for all agency action required by statute to be based on a hearing record—the goal which underlies Recommendation Nos. 3 and 8—Recommendation No. 1 is neither necessary nor even helpful; it is redundant. If, on the other hand, one's goal instead is to establish a uniform rule for a narrower class of agency action—namely, that which is both on-the-record and of particular applicability—Recommendation No. 1, along with certain other changes, is a convenient means. Under this principle, the separation-of-functions and mandatory-intermediate-decision requirements would apply to initial licensing, ratemaking, and other proceedings involving named parties but not (as under Recommendation Nos. 3 and 8) to rulemaking of general applicability. This result would be accomplished by adopting Recommendation No. 1, deleting the initial-licensing and ratemaking exceptions in §554(d) (without transferring the separation-of-functions requirements, as under Recommendation No. 3), and deleting the initial-licensing (but not the rulemaking) exceptions in section 557(b).

The proposed Conference Statement does not, however, adopt the approach just outlined. It takes the position that ratemaking of particular applicability (though reclassified as adjudication) ought not be made subject to the mandatory initial-decision requirement of section 557(b)—a position, it might be added, not inconsistent with ABA Recommendation No. 8 (which would authorize omission of the presiding officer's decision, upon appropriate findings, not only in ratemaking and initial licensing, but in all formal agency proceedings.) The proposed Statement expresses
the further view that ratemaking, along with initial licensing, should be subject to the separation-of-functions requirements of section 554(d), with the limited exceptions discussed in connection with Resolution No. 3. See p. 9, infra.

Resolution No. 10

ABA Resolution No. 10 would grant authority to all agencies to make subpoenas generally available in adjudicatory proceedings. The implementing language contained in the ABA Recommendation provides that "each agency is authorized to issue subpoenas in every case of adjudication." The Recommendation also directs the agencies to "issue such subpoenas upon request made by any party" and to provide a procedure for quashing or modifying subpoenas on motion.

The Resolution and Recommendation were considered by the Conference's Committee on Compliance and Enforcement Proceedings. It was assisted by a report prepared by Richard Berg, Executive Secretary of the Conference.

Grant of Subpoena Power

The Committee concluded that the Resolution and Recommendation raised two significant problems. The first was in what category of proceedings should subpoena power be granted. The Administrative Procedure Act does not presently grant subpoena power to any agency, but merely provides that where agency subpoenas are authorized by law, i.e., by the statute governing the agency or program in question, subpoenas shall be made available to parties, 5 U.S.C. §555(d). The ABA Resolution is not entirely clear as to what it means by "adjudicatory proceedings" but the Recommendation provides for authority to issue subpoenas "in every case of adjudication," and this language would appear in section 555, which is not limited in its applicability to proceedings governed by sections 556 and 557.

While the precise meaning of "adjudication" is in some doubt, the term includes a great many essentially informal proceedings which do not at present involve either a trial-type hearing or any structure for defining and resolving factual issues in an adversary context. Naturally, in such informal proceedings subpoena power is presently lacking, and it is difficult to imagine how it would be used were the ABA's Recommendation to be adopted. To permit parties to an adjudication to obtain subpoenas appears to assume either a trial-type hearing at which the subpoenaed witness is to testify or, at the least, a procedure sufficiently complex to
include a formal commencement of the proceeding, a definition of the issues on which evidence is to be considered, and a procedure for collecting, assembling, and submitting the evidence to the agency. A major question mark in the ABA proposal is whether it should be interpreted to require for every case of adjudication a procedural format which will permit effective use of subpoenas where facts are in dispute, or merely to provide that where agency proceedings are carried on in such a format the subpoena power will be available. In any event a serious problem inherent in the ABA proposal is how it can be applied to informal and unstructured adjudications.

A narrower approach would be to grant subpoena power in all proceedings subject to section 554 of the Administrative Procedure Act, that is, on-the-record adjudications. This would be consistent with paragraph 9 of the Conference's Recommendation No. 70-4, addressed exclusively to such proceedings, which stated that the presiding officer should have power to issue subpoenas at any time during the course of the proceeding. The practical effect of such an amendment to the APA would be rather limited, however. The staff study disclosed that in only a handful of proceedings clearly subject to section 554—among them, proceedings in the Postal Service and the Food and Drug Administration, and public land contests in the Department of the Interior—does there appear to be a need for a grant of subpoena power or a broadening of existing subpoena power. A possible disadvantage of amending the APA to grant subpoena power in proceedings governed by section 554 is that this might precipitate litigation over the question whether a particular proceeding is or is not subject to section 554. At present an agency may resolve doubts in favor of coverage, and if its procedures comply with section 554 no one is in a position to object. In other situations, such as contract appeals and debarments, it has been generally assumed that section 554 is inapplicable. Although a plausible case for coverage can be made, parties have, apparently, not felt sufficiently aggrieved by the existing administrative procedures to litigate the question. If, however, existence of agency subpoena power turns on the answer, parties and even witnesses might compel the resolution of what has been hitherto a largely academic question.

A middle approach would be to grant subpoena power in proceedings, whether or not governed by section 554, which are structured as adversary proceedings with trial-type hearings. A number of proceedings of this nature are presently conducted without subpoena power, notably, contract appeals, debarment cases, and adverse action proceedings for employees in the civil service (see Conference Recommendation No. 72-8). Implementing this approach by amending the APA presents considerable drafting problems, however. One possibility would be to grant subpoena
power in connection with adjudications required by statute or by agency
regulation to be made on the record after hearing. A variation would be
to grant subpoena power to administrative law judges in connection with
all adjudications over which they preside. This approach is subject to the
criticism that it would permit agencies, essentially, to grant themselves
subpoena power by structuring their proceedings to comply with the stat-
tutory test. But agencies are hardly likely to do so unless their proceed-
ings are already trial-type, and if the authority to grant subpoenas is
confined to an administrative law judge, there would be a check on abuse.
Indeed, the greater potential disadvantage in this approach seems to lie
in the opposite direction, in that agencies might have an incentive to
downgrade the formality of their proceedings in order to avoid party
requests for subpoenas. For frequently it is the private party and not the
agency staff which feels the lack of subpoena power most keenly.

The remaining possible approach is, of course, not to grant subpoena
power in the APA at all, but to amend the statute governing each agency
program for which subpoena power is desired. To recommend such an
approach would not be inconsistent with paragraph 9 of Recommendation
70-4. That paragraph favored subpoena power for presiding officers
in all section 554 adjudications, but did not address itself to whether this
should be accomplished by amendment to the APA.

Procedures for Issuance of Subpoenas

The second major problem considered in connection with Resolution
No. 10 arises not from the Resolution itself, but from the Recommendation.
The Recommendation would require agencies to issue subpoenas to
parties on demand. The subpoena could be challenged after issuance by
a motion to quash or modify on the usual grounds. APA §555(d) now
permits the agencies to require by rule that the party applying for a
subpoena make an ex parte showing before the subpoena is issued, al-
though a motion to quash is also available.

The ABA's Recommendation is consistent with Recommendation No.
13 of the 1962 Administrative Conference. However, of the approxi-
mately 20 agencies surveyed, only the National Labor Relations Board
follows the procedure prescribed in the Recommendation. (The NLRB
practice is required by statute.) All other agencies require or permit the
issuing officer to require some initial ex parte showing in connection with
the issuance of subpoenas duces tecum, although in a few agencies the
issuance of subpoenas ad testificandum is well-nigh automatic.

Although the NLRB does not appear to have experienced difficulties
in its procedures, comment from the agencies and administrative law
judges on this aspect of the ABA Recommendation was generally nega-
tive.
Conference Statement*

The Conference Statement on Resolution No. 10 is presented by the Committee on Compliance and Enforcement Proceedings. It endorses the principle that subpoenas should be available in agency adjudications determined on the record after hearing. It opposes as unfeasible a grant of subpoena power for every case of informal adjudication. It notes that amending the APA to grant subpoena power in the appropriate kinds of proceedings presents a drafting problem, but it is not intended to rule out the possibility that satisfactory language may be worked out. However, it suggests that it may prove preferable for Congress to make grants of subpoena power on a less general basis than by amending the APA, i.e., by amending the statutes governing the proceedings in which subpoena power is desired.

The Committee concluded that it was not convinced that the proposed procedure for automatic issuance of subpoenas was so superior to the procedures presently followed in the great majority of agencies to justify its being written into the Administrative Procedure Act. Therefore, the last sentence of the Statement on Resolution No. 10 is intended to express the Conference's view that agencies should continue to be permitted to require an initial showing of general relevance and reasonably scope before issuing a subpoena.

* If the top officials continued in their supervisory role, a separate staff of advisors would have to be assembled at the Commission level. To provide the Commission the kind of advice to which it is accustomed, such a staff would have to include Indians as well as chiefs, enough of them to keep close running tab on the agency's heavy caseload. Testifying in 1967 before a Senate Subcommittee, Chairman Lee White estimated that such a staff would add 100 new employees to the Commission's present complement of 1200. Nor is it clear that a group of experts comparable in ability and experience to the present senior staff of the Commission could in fact be recruited for faceless, nameless, glamorous jobs as behind-the-scenes advisors. And, even if a suitably qualified staff of advisors could be assembled at acceptable cost, isolation of the trial staff from the Commission and its current thinking might well diminish the usefulness and relevance of its presentation. The problem of recruitment might be eased somewhat if the present titled officials remained as advisors while donning their supervisory hats. They might be less difficult to replace in the latter than in the former capacity. It is possible that counseling staff attorneys on points of difficulty at the trial level may demand less maturity and experience than counseling the Commission on matters of policy at the decision level. Yet even on this score one cannot be sanguine. The FCC has experienced high turnover of late and finds it difficult to replace even the foot soldiers, let alone the lieutenants. Moreover, the "FCC model"—a separate trial staff isolated from the senior officials of the relevant bureaus—might be expected to work rather better in an agency which has very few cases than in one which has a steady stream and all the attendant problems of coordination and consistency.
Resolution No. 11

ABA Resolution No. 11 calls for requiring the agencies to establish by rule in all cases of informal adjudication procedures for giving written reasons for denial of requests and, unless the agency finds it impracticable, for at least one level of agency review.

The Resolution and its implementing Recommendation were considered by the Conference's Committee on Informal Action. The Committee found a number of definitional problems in the Recommendation, particularly the uncertain breadth of the term "adjudication." The Committee also noted that it is in the very early stages of developing a major study project to test the feasibility of drafting an "informal Procedure Act." The heart of the project would be an empirical exploration and test with a very good number of representative federal agencies. If this project can be funded and can go forward it should produce either proposals in which we have confidence or a conclusion that the task in our present state of knowledge cannot be done. Resolution No. 11 should be a part of this study, and the Conference should be in regular contact with the appropriate ABA committee as the work proceeds. Until it is done, the Committee believes that the Conference should not recommend any legislation in this intractable field.

Resolution No. 12

ABA Resolution No. 12 calls for providing that prejudicial agency publicity may be restrained by a reviewing court or held to constitute a ground for setting aside an agency determination.

The ABA Resolution and its implementing Recommendations address two distinct problems: 1) agency statements which indicate bias or pre-judgment or otherwise affect the integrity of a pending proceeding; and 2) agency statements which affect a person adversely in his business or reputation.

Consideration of the Resolution and Recommendation was merged into a larger study of adverse agency publicity, undertaken by the Committees on Compliance and Enforcement Proceedings and Judicial Review on the basis of a report prepared by their consultant, Professor Ernest Gellhorn.

The report criticizes the Resolution as

"inapt and misdirected. First, injunctive relief is usually restricted in its availability; it is a limited remedy designed only to prevent additional serious harm. Consequently equity provides no relief for past injuries and is available only when the complainant can demonstrate by clear and convincing evidence that he is likely to be injured
(and not otherwise compensated) by unlawful acts of the defendant. Second, the ABA's concept of "prejudicial agency publicity" seems unnecessarily vague and misconstrues the basic concern arising from adverse agency publicity. The basic concern is that erroneous, misleading or excessive publicity may unfairly injure the identified persons' reputation and business. The concept of prejudice, on the other hand, suggests that agency publicity will impair the fairness of a subsequent adjudicatory hearing . . . . The latter possibility is remote (especially since there is no jury to sway) and is, in any case, fully protected by currently available remedies. Third, the suggestion that adverse publicity should also be a basis for voiding agency determinations not only allows procedure to control substance, but also is oddly designed to protect the guilty and not the innocent. That is, there is no agency order to set aside where the respondent was innocent of any violation. The ABA Resolution would provide only injunctive relief for the innocent while allowing parties guilty of violations the additional protection of voiding the agency order where agency publicity is "prejudicial.""

The Conference Statement opposes legislation to deal with the problem of agency publicity which prejudices the conduct of the agency proceeding on the ground that present remedies are adequate. See, e.g., Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965). The Statement agrees that agency publicity practices which adversely affect persons in their businesses, property, and reputations present a problem. This problem is addressed in a separate proposed Recommendation which the Committees are presenting to the Conference.

Resolution No. 2

ABA Resolution No. 2 calls for "broadening the coverage of provisions for notice and opportunity for public participation in rulemaking . . . by limiting . . . exemptions now included in the Administrative Procedure Act . . . ." To implement this resolution the ABA Recommendation calls for deleting from 5 U.S.C. §553(a)(2) the exemption for matters relating to "public property, loans, grants, benefits or contracts" and substituting for the present exemption to section 553(a)(1) for military and foreign affairs functions an exemption for "rule making which is specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy."

The Administrative Conference has in its Recommendation No. 69-8
already called for elimination of the exemption for matters relating to "public property, loans, grants, benefits or contracts." The Conference's Committee on Rulemaking and Public Information has been studying proposals to narrow or eliminate the military and foreign affairs exemption. The Committee has had the benefit of a comprehensive report from its consultant, Professor Arthur Bonfield, which concluded that the exemption for military and foreign affairs functions should be deleted, perhaps with substitute language for matters requiring secrecy, along the lines of the ABA's Recommendation:

The reasons advanced to justify the current exemption from section 553 for all rule-making involving a "military or foreign affairs function" are insufficient. At most, those justifications dictate the need for a more narrowly tailored exemption from usual rule-making proceedings than is currently found in section 553(a)(1). The existing "impracticable, unnecessary, or contrary to the public interest" provision found in section 553(b)(B) and the "good cause" exemption found in section 553(d)(3) provide such an exclusion from the requirements of section 553(b)-(d). They would work an adequate accommodation of the competing interests involved, carefully balancing the need for public participation against the need for effective, efficient, expeditious, and inexpensive government administration. And an exemption from the right to petition conferred by section 553(e) seems no more necessary or justifiable for subsection (a)(1) rule-making than for rule-making already covered by section 553. When a special need for secrecy appears in cases of rule-making involving a "military or foreign affairs function," it can adequately be handled by section 552(b)(1). If this is not sufficient, the language of section 552(b)(1) can be expressly carried over and incorporated into section 553. That is the ABA proposal. It seems wise because it will reassure the agencies involved that their legitimate needs for secrecy will in no way be interfered with by the repeal of section 553(a)(1).

The Committee is generally favorable to Professor Bonfield's conclusion and has been attempting to formulate a Conference Recommendation on the subject. It has consulted with the interested agencies. The Departments of State, Defense and the Treasury have expressed opposition to elimination of the exemption on three grounds:

1) There are situations where the procedures of notice-and-comment rulemaking are inappropriate because of a need for secrecy in the interest of national defense or foreign policy.

2) Some of the affected agencies, particularly the Department of Defense, make a vast number of rules and other directives arguably consid-
ered rules as to which public procedures would be inappropriate. It would be burdensome for the agencies to have to apply on a case-by-case basis the statutory exception that requires a finding that public procedures are "impracticable, unnecessary or contrary to the public interest," 5 U.S.C. §553(b)(B).

3) The agencies are unwilling to abandon the security of the broad present exemption in favor of the "impracticable, unnecessary, contrary to the public interest" test, the applicability of which may be doubtful in given cases and possibly subject to judicial review.

The Committee recognizes there is some force in these points and is attempting to draft a recommendation to meet them. It does not, however, presently have a definitive solution to propose.

The text of the proposed response to ABA Resolution No. 2 is intended to endorse the general terms of the resolution, to point to our previous action respecting the so-called proprietary exemption, and to express support for elimination or narrowing of the military-foreign affairs exemption conditional upon the feasibility (not yet conclusively established) of achieving it without impairing military or foreign affairs operations.

Resolution No. 3

Resolution No. 3, and the Recommendation designed to implement it, would bar agency employees engaged in investigative or prosecuting functions in an adjudicatory or formal rulemaking proceeding from participating ex parte in the decision of that proceeding by agency heads, review boards, or hearing examiners. Such a bar is already imposed by section 554(d) in all formal proceedings other than rulemaking, ratemaking, and initial licensing. The ABA proposal would remove these limitations.

In approaching the separation-of-functions problem, it is well to make clear what the issue is not. It is not whether agency members, in rulemaking and initial licensing, should be free to consult staff advisors on an informal basis concerning pending proceedings. Such consultation would be permitted even under the ABA proposal and, nearly all would agree, is essential to wise and informed decisionmaking. Nor is such consultation logically incompatible with the use of trial-type procedures in the hearing phase; indeed the two are complementary. Trial-type procedures are designed for questions of specific fact; they assure maximum participation and input from those in possession of the relevant evidence. Informal consultation with staff, on the other hand, is designed for questions of policy; it assures maximum participation and input from experts best able to illuminate those questions. The requirement that agency action be based on the record pertains to factual not policy questions. So long as staff consultants do not abuse their position by seeking to introduce
additional evidence, their *ex parte* advice on matters of policy does no violence to the “on-the-record” requirement.

The narrow question, rather, is whether agency members should be free to consult, off the record, the very staff members who, directly or indirectly, have played an adversary part in the investigatory or hearing stage of the particular case to be decided, or whether, instead, a wall of separation should be established between the staff which litigates and the staff which advises. The problem arises from the hybrid, quasi-legislative-quasi-judicial, nature of formal rulemaking, ratemaking, and initial licensing. In legislation, nothing is thought amiss if those who advocate policy likewise decide policy and do so on the basis of all available information, whatever its source. In adjudication, however, contrary norms prevail: no man may judge his own cause and decision must be based solely on evidence developed on the record by means of trial-type procedures. This neat dichotomy begins to break down when statutes require rules of general impact to be made “on the record” by means of trial-type procedures. Given the adversary format and the exclusion of non-record evidence, it seems, at first blush, anomalous to permit backstage consultation between agency heads and staff members who have played a partisan role at the hearing. Yet most thoughtful proceduralists strongly disapprove of formality in rulemaking of general applicability. The Administrative Conference, for its part, has recommended against the requirement of trial-type procedures in rulemaking of general applicability (recommendation 72-5). It is in keeping with that position that the proposed Statement opposes the extension of the separation of functions principle to rulemaking of general applicability.

The problem is more difficult, however, in the case of ratemaking and other named-party proceedings. Here, everyone agrees that adversary procedure and on-the-record decision are appropriate. The impact of a rate decision, and the factual determinations on which it rests, are particular, not general. Not broad facts about the industry or the economy, but specific facts about the costs, service, and revenues of a particular carrier or utility are in issue. True, questions of policy loom larger in ratemaking (and initial licensing) than in the mine-run of adjudication, but not so large as to warrant the use of legislative-type in place of trial-type procedures. It is plausible, therefore, that separation of functions should be required along with the other incidents of adjudicative procedure. In this view, it is basically unfair that one party to a controversy—the agency’s staff—should have privileged access to the decisionmaker with no opportunity for reply by its adversary. One can further argue that commingling of functions impairs the effectiveness, no less than the fairness, of the decisional process. A man who doubles as adversary and advisor cannot do either task well. The advocate, having committed himself to a position,
cannot be relied upon thereafter for truly objective advice; the advisor, viewing the scene from an Olympian perspective, cannot be an effective voice for interests—notably the consumer interest—that would otherwise go unrepresented. The advisory role is thus compromised, the adversary role devitalized.

The opposing considerations, however, are equally potent. From the standpoint of effectiveness it is possible that duality of function brings synergistic benefits. Close and continuing familiarity with the thinking of agency heads may enable the trial staff to channel its presentation along more relevant lines; close and continuing familiarity with the particular case, and with the agency's caseload in general, may enable the advisory staff to give more accurate and informative guidance. And even from the standpoint of fairness, the desirability of separation is open to question. Given that agency heads will inevitably seek the ex parte advice of trusted staff officials, the parties would surely be better off if the views and arguments of these influential advisors were aired on the record and exposed to rebuttal rather than merely whispered, unchallenged, in the royal ear. Separation of functions, by isolating the advisor from the hearing, magnifies the likelihood that parties may be defeated by arguments they have had no chance to meet. This factor must, of course, be weighed against the possibility that separation would produce more objective advice; that prospect, however, may well be illusory either (a) because even advisor-advocates are capable of objectivity, or (b) because institutional loyalties may exert some influence even upon formally separate components of a single agency.

As a practical matter, every major federal agency engaged in licensing or ratemaking, save only one, already adheres voluntarily to the principle of separation of functions in that agency heads refrain from consulting staff members who participate, or supervise those who participate, in investigation or hearing. The lone exception is the FPC, which, at its weekly meetings, regularly receives advice from high-ranking staff officials (the general counsel and his principal assistants and the chiefs and deputy chiefs of the major technical bureaus) who, in turn, supervise lawyers and technicians at the hearing level. In practice, the separation of functions issue may thus come down to the narrow question whether it is worthwhile forcing the FPC to abandon this practice. The Commission would be required to sever either the advisory link between the agency heads and the senior staff or the supervisory link between senior and trial staffs. Either separation would be costly. *

* The proposed Statement on Resolution No. 4, as presented to the Assembly by the Council and by the Committee on Agency Organization and Personnel, was as follows:
The position taken in the proposed Conference Statement—reflecting the views of the Committee on Agency Organization and Personnel—represents, with respect to ratemaking and initial licensing, a middle view. The General Counsel of the FPC would not be disqualified from advising the agency solely because the attorneys who handled the case below were subject to his authority. Nor would he be barred (as under the ABA Recommendation) because of his personal participation in factually related cases or in cases presenting similar or related questions or law or policy. The only barrier would be his own active participation in the particular case sub judice—for example, by helping to design the tactics and strategy of the litigation, or by instructing or counselling the staff attorneys of record. Admittedly, difficult borderline cases can be anticipated in which the role of the supervisor is arguably de minimis or only indirectly related to the particular case. Nevertheless, a separation-of-functions requirement that distinguishes between actual participation and unexercised supervisory authority seems preferable to either of the extreme alternatives.

Resolution No. 4*

The ABA's Resolution No. 4 proposes amendment of the Administrative Procedure Act for the purpose of "[p]rohibiting ex parte communications between agency members and parties or other interested persons outside the agency on any 'fact in issue' in the decision of an adjudicatory or formal rulemaking proceeding." In implementation of this Resolution, the Administrative Law Section of the ABA has prepared and revised draft legislation setting forth in some detail the terms of such a prohibition and the consequences of violation.

The subject of ex parte contacts first gained widespread attention in the 1950's when several well publicized cases involving licenses led to demands for reform. The 1961-62 temporary Administrative Conference considered the problem in detail, and in its Recommendation No. 16 proposed that each agency promulgate ex parte rules in accord with general principles endorsed by the Conference:

The Conference approves in principle Resolution No. 4, which calls for prohibiting ex parte communications between agency members and interested persons outside the agency on any fact in issue in an adjudicatory or rulemaking proceeding subject to 5 U.S.C. §§556 and 557.

The discussion in text is addressed to the above proposal, which was significantly amended on the floor of the Assembly.

* AEC; Agriculture; CAB; CSC; FCC; FMC; FTC; FPC; HEW(SSA); ICC; Justice (BNDD, INS, LEAA); NLRB; SEC; Treasury.
"Whereas the Administrative Conference deems it essential that the administrative process should be protected from improper influences and that the agencies should take certain action to help achieve these objectives,

It Is Recommended That—

Each agency promulgate a code of behavior governing ex parte contacts between persons outside and persons inside the agency which should be based upon the principles set forth below.

The Conference recognizes that it may not be practical for all agencies to adopt a uniform code embodying its recommendations. Some agencies may find it advisable to add to the recommended prohibitions and requirements, while others may find it inadvisable to accept all the recommendations in connection with particular kinds of proceedings conducted by them. The Conference expects that each agency will seek to effectuate the general recommendations in light of the specific considerations of fairness and administrative necessity applicable to each of the proceedings conducted by it."

The Recommendation went on to state in nine numbered paragraphs the recommended contents of such an agency code.

Conceptually, there are several distinguishable policy factors affecting ex parte rules, which may lead to the imposition of different sanctions for violation and, to a lesser degree, to differing scope of the rules. The first approach is concerned with the integrity of the decision-making process: all facts and arguments relating to the decision should be available on the public record so that the bases on which the agency is acting are discernible to affected parties and to the courts, the Congress, and the Executive in their oversight functions. Under this rationale, a proper remedy is insertion of ex parte communications into the public record. Similar policies are securing the rights of affected parties to participate in the decision-making process, and enhancing the accuracy of decision by insuring that all relevant data and argument will be subject to adversary testing; to satisfy these objectives, the proper remedy is not merely disclosure, but also an opportunity to rebut the ex parte information.

Somewhat different considerations become operative when the ex parte communication involves information that is not, in the legal sense, relevant to the issues to be decided—in short, when a powerful “outsider” brings political or personal pressure to bear on the agency decision-maker. In this situation, while disclosure and an opportunity to rebut may deter future misconduct, they would be of little utility in curing the violation, since permitting other parties to respond in the same fashion would
convert the proceeding from a process of deciding specific issues on the merits into a political contest. About all that can be done, once the violation has occurred, is to try to remove from the decisional process those who have been the recipients of impermissible contacts. In aggravated circumstances where the ex parte contact verges on bribery, professional misconduct or abuse of a public trust, there may also be sufficient ethical and moral grounds to conclude that punishment, discipline or denial of a benefit for the violator is necessary.

A final situation with distinguishable policy overtones is communication from agency decision-making personnel to persons outside the agency. The principal concern in this area is avoidance of actual or apparent prejudgment, and the traditional remedy is disqualification of the decisional personnel in question. It is appropriate to note, however, that here, unlike in the preceding situations discussed, it is not the communication itself so much as state of mind it evidences which represents the real threat to the decision-making process. Consequently, rigid enforcement of rules as to what may or may not be communicated can mistake the shadow for the substance of the problem.

Beyond the logic of the various remedies for each policy factor, deterrence of future violations is a useful general approach. Thus it may be thought necessary to provide punishment for merely negligent or attempted violations, or for situations where it seems logically inappropriate, in order to prevent others from stepping over the line in the future. In light of this range of policy factors affecting ex parte communications, it is not surprising that existing agency ex parte rules encompass a variety of approaches, and that the draft legislation contemplates a number of different sanctions.

The basic question presented by the ABA Resolution is whether there is a need for any additional legislative treatment of the problem in the Administrative Procedure Act. The Act is not now entirely silent on the subject. Section 554(d) provides that the presiding officer at a hearing shall not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate." But section 554(d) is applicable only to formal adjudications, and is subject to the additional significant exceptions set forth in clauses (A), (B) and (C) of the subsection, which exclude initial licensing, all ratemaking, and communications with agency members themselves. Basically, therefore, the present prohibitions of ex parte communications in initial licensing ratemaking and formal rulemaking depend on constitutional considerations of due process, see Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959); Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966), on inference from the principle set forth in section 556(e) that the
transcript, exhibits and other papers filed in the proceeding constitute "the exclusive record for decision," and on agency rules.

In supporting individual agency rulemaking as against legislation, the 1962 Administrative Conference report advanced two main arguments: legislation would tend to rigidify the prohibitions, thereby making change and improvement difficult; moreover, allowing the agencies to take the initiative would create the impression that the agencies were "setting their own houses in order," thereby improving public confidence in the administrative process. In addition, it could be argued that the tremendous variety in agency procedures, traditions, and affected interests would make uniform proscriptions inappropriate, particularly in light of the broad scope of the proposed legislation discussed below; no matter how carefully the legislation was drafted, there would likely be many instances in which the statute would either permit improper ex parte contacts, or impair the quality of decision by deterring useful communications. It has also been suggested that imposing upon the executive departments a rule requiring disclosure of improper ex parte contacts may raise questions of executive privilege. Finally, it might be asked whether legislation is warranted, since there have been few recent cases in which courts have found that ex parte contacts have tainted an on-the-record proceeding.

On the other hand, there are certain obvious advantages to uniformity in ex parte rules, particularly for those who do not confine their participation in administrative proceedings to one or two agencies. Moreover, in the absence of a statute the failure of an agency to promulgate rules dealing with a particular situation may lead a reviewing court to reverse on constitutional grounds, and this could undoubtedly impose more of a "strait jacket" on administrative procedure than a statute.

The Conference's Committee on Agency Organization and Personnel considered the ABA Resolution with the assistance of a report prepared by Barry Boyer, of the Conference staff. The Committee concluded that specific legislative treatment in the APA of the problem of ex parte communications would be desirable, and it recommended that the Conference endorse Resolution No. 4 in principle.

The proposed endorsement is not intended to commit the Conference at this time on the questions raised by the text of the ABA Recommendation, including whether the APA should contain a detailed prohibition or a general prohibition to be amplified by agency rules, how the statute should deal with communications of data of general significance to an industry which may be relevant to the merits of a pending on-the-record proceeding (see 1962 Conference's Recommendation No. 16, para. I(d)(4)), or how the agencies should remedy or penalize violations of the prohibition.
Resolution No. 5

ABA Resolution No. 5 calls for legislation providing that in formal adjudication agencies shall, to the extent practicable, issue uniform rules governing pleadings, discovery, the admission of evidence, requirements of proof, decisions, and appeals, and that such basic rules shall be sufficiently comprehensive to insure fairness and expedition in all phases of the agency process.

Unlike the other ABA Resolutions, which are directed at the Administrative Procedure Act, the proposed amendment to implement this Resolution would revise the Administrative Conference Act. It would establish within the Conference a special Committee on Uniform Rules with authority to draft rules of procedure for formal adjudication which, if not disapproved by the Assembly, would be binding on all affected agencies. The special Committee would also be empowered to grant waivers or modifications of particular rules on petition, as appropriate. Agencies would be permitted to adopt other procedural rules not inconsistent with any effective uniform rule.

In view of the direct applicability of this Resolution, as implemented by the ABA Recommendation, to the functions of the Conference itself, it was reserved for initial consideration by the Council rather than any single Committee. As indicated in the proposed Conference Statement, the Council has no doubt of the general desirability of uniformity where fairness and efficiency are not impaired—though there was some disagreement among the Council members as to the degree of desirability and the frequency with which such impairment would be an anticipated result. In essence, however, the Council was in agreement with the ABA Resolution, given its qualifying language “to the extent practicable.”

The Council’s principal concern, in view of the manner of implementation suggested by the ABA Recommendation, was the extent to which determination of “practicability” and framing of necessary exceptions would require the continuing devotion of substantial Conference resources. In order to assess this, the Council requested the informal views of eighteen members of the Conference from fourteen agencies most affected by the proposal,* concerning the application to their agencies of proposed texts of nine uniform rules developed after an extensive study by the 1953 Conference on Administrative Procedure. These texts applied

* A “recommended decision” cannot, like an “initial decision,” become the final decision of the agency if unappealed. Other than that, however, the two are functionally equivalent. Both are subject to exception by the parties; both are part of the record and must state findings and conclusions on all issues of fact, law, and discretion; neither is entitled to any particular deference on appeal.
to what the Council regarded as probably the simpler of the areas embraced by the ABA proposal—computation of time, service of process, subpoenas, depositions and interrogatories, official notice, presumptions, stipulations and admissions, format/content of decision, and appeals from initial decision. It was thought that if the application of these carefully framed texts on these particular subjects posed substantial difficulties, the implementation of the ABA Resolution in the fashion suggested would indeed be a task of considerable magnitude.

Responses from seventeen members ranged from approval in principle to outright rejection. No member expressing his view of effect on his agency gave outright endorsement to any specific uniform rule. Many expressed little difficulty in accommodating their rules in the areas of computation of time, service of process, official notice, presumptions, and stipulations and admissions. In almost every instance, however, some special language would be required to meet a special agency problem. Members from a number of agencies voiced strong objection to uniform rules in the areas of subpoenas, discovery, form and content of decision, and appeals from initial decisions. In some instances a uniform rule would be inconsistent with statutory authority (subpoena); in others it would be contrary to established agency rules as approved by court decisions (discovery). In sum, the sampling suggested that substantial difficulties of accommodation are involved even with respect to the most mechanical of the rules; and that the difficulties tend to increase in proportion to the substantive impact (and hence, presumably, the significance) of the rule in question.

The Council therefore concluded that, in view of the other matters which may usefully occupy the Conference’s attention, it would not be a desirable expenditure of its financial resources and the limited time of its members to be compelled to establish (and grant exceptions from) uniform rules of procedure. This decision of course implies a judgment, not as to the desirability, but as to the degree of desirability, of uniformity as an end in itself. It was felt that the mere lack of standard procedures—especially in those areas where standardization seems more “practicable”—is not the principal barrier to practice before the Federal agencies by the unspecialized bar.

Resolution No. 6

ABA Resolution No. 6 calls for authorizing agencies to establish appeals boards to review decisions of administrative law judges in order to “provide expedited and more thorough consideration of routine cases, and to enable agency members to focus on major policy issues by relieving them from the burden of deciding routine cases.”
This resolution is consistent with Conference Recommendation No. 68-6, which urged agencies with substantial case-loads of formal adjudications to consider establishing intermediate appellate boards and delegating them final decisional authority subject to discretionary review by the agency or alternatively delegating final decisional authority to the presiding officer subject to discretionary review by the agency. The Conference Recommendation also called for amending section 557 of the APA to clarify the agencies' authority to do so.

The problem that the Conference Recommendation attempted to deal with was that, in the absence of specific authority either in organic statute or reorganization plan, agencies are not empowered to delegate final decision-making authority to the presiding officer or appellate board (unless, of course, there is no appeal, 5 U.S.C. §557(b)) and must, therefore, consider on the merits any appeal from the initial decision. In agencies with a large volume of cases this detracts considerably from the time agency members have to consider longer-range problems of regulatory policy. One agency where this has been considered a serious problem is the National Labor Relations Board.

ABA Resolution No. 6 is not, of course, on all fours with Conference Recommendation No. 68-6 because the former does not deal with discretionary review of decisions of administrative law judges. However, this Resolution must be considered together with ABA Resolution No. 8, which calls for "conferring greater authority upon the presiding officer," and, in particular, with that part of ABA Recommendation No. 8 which would add to section 557(b) the sentence: "An agency may provide by rule that decisions, or categories of decisions including agency appeal board decisions, become final, unless reviewed by the agency at its discretion." It is this language, or something like it, which is necessary to implement both Resolution No. 6 and Conference Recommendation No. 68-6. (It is doubtful that agencies need new statutory authority in order to create appellate boards; but they need it in order to decline appeals from decisions of such boards.)

The proposed Conference Statement calls attention to our Recommendation No. 68-6 and states that Resolution No. 6, taken together with the quoted language from ABA Recommendation No. 8 would implement the Conference Recommendation.

Resolution No. 7

Resolution No. 7 would require agencies "to the extent practicable and useful to provide by rule for prehearing conferences to facilitate and expedite the determination of the facts and issues involved in the proceeding."
Section 554(c) provides that in cases of formal adjudication the agency shall give all interested parties opportunity to submit and consider offers of settlement and proposals of adjustment when circumstances permit. Section 556(c)(6) authorizes presiding officers to "hold conferences for the settlement or simplification of the issues by consent of the parties." The ABA’s Administrative Law Section concluded that these provisions supplied adequate statutory authority for prehearing conferences. Accordingly, it proposed no legislation to implement Resolution No. 7, but instead proposed that it be implemented by the Administrative Conference.

The Conference has already endorsed increased use of prehearing conferences in its Recommendation No. 70-4, Discovery in Agency Adjudication:

1. Prehearing Conferences

The presiding officer should have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding. The presiding officer should normally hold at least one prehearing conference in proceedings where the issues are complex or where it appears likely that the hearing will last a considerable period of time.

This Recommendation, by its terms, is applicable only to adjudications governed by section 554 of the APA. However, there seems to be no reason why the portion quoted above would not be equally applicable to on-the-record rulemaking.

The proposed Conference Statement calls attention to Recommendation No. 70-4 and agrees that the goal of ABA Resolution No. 7 can better be achieved by Conference action than by legislation.

Resolution No. 8

This proposal, endorsed by the Council and the Committee on Agency Organization and Personnel, represents a response to the major points of the ABA Resolution but is essentially a deferral of the problems involved in implementing that Resolution, which (together with some other difficult issues) appear in the ABA Recommendation. The Office of the Chairman and the Committee on Agency Organization and Personnel have given extensive consideration to these problems, and discussed them at length with the Special Committee on Revision of the Administrative Procedure Act of the Administrative Law Section of the ABA. That effort in fact resulted in a draft Statement speaking directly to the ABA
Recommendations, a copy of which is attached to this discussion as Exhibit A. A variant approach to the ABA Recommendation, reflecting views considered within the Council, is attached as Exhibit B. (The Exhibits appear on pp. 22-23).

Both the Council and the Committee on Agency Organization and Personnel have recommended against Assembly consideration of these fundamental issues at this time because the ABA Recommendation in its present form has certain important effects which do not represent the traditional ABA position and which may not accurately reflect the current thinking of its Section on Administrative Law; hence, to address that Recommendation may be to address the form but not the substance of the Association’s position. Achieving legislative enactment of needed amendments to the APA will be a difficult task under any circumstances, without the added handicap of unintended disagreement (or mistaken agreement) between two of the most knowledgeable organizations in the field. For this reason, the Council and the Committee on Agency Organization and Personnel think it desirable to defer consideration of those matters not raised in the ABA Resolution, with the hope that continuing discussions with the ABA Section on Administrative Law can achieve a clarification of its position and perhaps even a revision of the present Recommendation to a form with which the Conference will agree. In the latter connection, it should be noted that in its last meeting the Council of the Section on Administrative Law adopted a resolution emphasizing that at this point it is only the Resolutions (and not the implementing Recommendations) which represent the official position of the ABA.

[In order that the Assembly may appreciate the complicated nature of the issues leading to the present proposal of deferral, there follows a discussion clarifying the more substantive draft Statements on Recommendation 8 attached as Exhibits A and B.]

ABA Resolution No. 8 espouses, in general terms, the conferring of greater authority upon the administrative law judge and the specification, by agency rule, of his powers and duties, including that of rendering initial decision in cases over which he has presided. The implementing Recommendation, however, is addressed solely to the matter of initial decision. Its declared purpose is to restrict the power of agencies to make the first decision in matters in which “evidentiary issues are important, including the demeanor of witnesses, without having presided at the hearing.” 24 Ad. L. Rev. 404 (1972). In order to explain the operative effect of the proposal, it is necessary to outline the present statutory provisions governing the intermediate decision process.

Under 5 U.S.C. §557(b) a decision—either “initial” or “recom-
mended"—by the presiding officer is required in all cases other than rulemaking (including most ratemaking) and initial licensing. In rulemaking and initial licensing, the presiding officer's decision may be replaced by a "tentative" decision of the agency or a "recommended" decision of its staff; and may be omitted altogether upon an agency finding that "due and timely execution of its functions imperatively and unavoidably so requires."

The ABA proposal would require a decision by the presiding officer in all cases except those in which the agency finds either that "an expedited decision in the particular proceeding is imperatively and unavoidably required to prevent public injury or defeat of legislative policies," or that "there are no substantial, relevant and material issues of fact, the resolution of which is required for the decision." Thus the Recommendation would modify the present statutory arrangement in four significant respects:

1) Whereas a decision by the presiding officer is presently mandatory save in rulemaking and initial licensing, the ABA proposal would authorize its omission, upon appropriate findings, in all types of proceedings including those having a strong accusatory flavor, e.g., FTC unfair trade practice cases or NLRB unfair labor practice cases. This result—seemingly at odds both with the traditional ABA position and with the declared basic thrust of the current Recommendation—apparently flowed from two premises: (i) that omission of the presiding officer's decision might sometimes be justified in ratemaking and initial licensing; and (ii) that all on-the-record proceedings should be governed by uniform procedures. Exhibit A endorses the first premise but rejects the second. It concludes that a decision by the presiding officer should, as under present law, be mandatory in all cases of adjudication other than initial licensing. The basis for this conclusion is that, apart from these specifically excepted categories, the need for speedy determination rarely outweighs the utility of the presiding officer's decision in assessing credibility, focusing the issues, and preserving the appearance (no less than the reality) of fairness; hence the value of a discretionary power to omit is not worth the risk of its abuse. Exhibit B, on the other hand, endorses

* The Recommendation, as it stands, unduly limits the use of "abridged procedures" even in cases where the parties do consent. The further precondition that "all evidence and argument have been submitted in writing and without oral cross-examination" impliesly bars the use of simplified procedures where the parties are prepared to waive oral testimony and cross-examination but not oral argument, or where the parties waive all three but the agency requests oral argument \textit{sua sponte}. In short, it would appear that nothing in the way of simplified procedure may be used if any oral residue remains.
the ABA’s position that, where the need for expedition is imperative or material facts are not in issue, agencies should be authorized to dispense with intermediate decision in any adjudicatory proceeding. This conclusion need not rest—as apparently it did for the ABA—on a philosophical opposition to special treatment for ratemaking and initial licensing. An alternative basis is the conviction that, in agency adjudication generally, questions of credibility and demeanor are not so frequent, or the need for speedy determination so infrequent, as to warrant a categorical requirement of intermediate decision.

2) The ABA proposal, unlike existing law, would authorize the omission of an intermediate decision upon a finding that no material fact is in issue. Here again, the effect is to broaden, rather than restrict, agency discretion in this area. The premise of the amendment seems to be that an intermediate decision is valuable primarily for the purpose of resolving factual questions hinging on demeanor evidence and ought not be mandatory where such questions are absent. A strong argument can be made, however, that an intermediate decision (not necessarily by the presiding officer) is equally important as a device for sifting and focusing the issues, whether of fact, law, or policy and thus should be mandatory (absent compelling need for expedition) even where questions of demeanor and credibility are not presented. This view is buttressed by two further considerations—

(i) The difficulty of distinguishing, at the margin, between questions of fact and questions of law or policy. Agency decisions frequently involve issues not clearly denominated either factual or non-factual—such as questions of inference, interpretation, evaluation, characterization, prediction, and “mixed questions” involving the application of law or policy to undisputed data.

(ii) The difficulty of determining at the agency level that no facts are in issue without an initial decision by the presiding officer or its functional equivalent.

Exhibit A takes no position as to whether absence of “material issues of fact” should be made a sufficient basis for omitting the intermediate decision. Exhibit B endorses the ABA view that it should.

3) Both the ABA proposal and the present section 557(b) allow omission of the intermediate decision upon a finding of necessity. But whereas under the present statute the agency must find that “due and timely execution of its functions imperatively and unavoidably” requires such omission, the ABA proposal would require a finding that “an expedited decision in the particular proceeding is imperatively and unavoidably required to prevent public injury or defeat of legislative policies.” (Emphasis added). The key difference lies in the underscored language.
This amendment is aimed primarily at the Interstate Commerce Commission, the only major ratemaking agency which routinely and systematically omits the intermediate decision procedure altogether (as distinct from omitting the presiding officer's decision in favor of a tentative agency or recommended staff decision). The ICC, pursuant to an internal agency rule, makes the "due and timely execution" finding in virtually all its "investigation and suspension" cases on the theory that Congress intended final decision to be rendered within the seven-month statutory suspension period (or as soon thereafter as feasible) and that the intermediate decision procedure would almost invariably postpone final decision beyond that limit. The ABA Recommendation would require this finding to be made case-by-case instead of by rule. Since it is clear that even under this proposal, the ICC would be able, and certainly willing, to make the required finding in nearly every suspension case, it is questionable whether the amendment would have any significant practical effect other than to impose some additional paperwork upon an already overburdened agency.

Exhibit A takes no position as to whether the relevant findings must be made case-by-case. Exhibit B would permit them to be made on a categorical basis.

4) The ABA proposal would require that the intermediate decision, unless excused by one of the two findings discussed above, be made by the presiding officer; his initial decision could not be replaced (as it presently can be in rulemaking or initial licensing) by a tentative decision of the agency or a recommended decision of staff. The Recommendation would thus bar the practice which the Federal Communications Commission followed until recently, of assigning the recommended decision to the Chief of the Common Carrier Bureau rather than to the officer who presided at the hearing. We believe that in many cases—particularly those in which novel questions of policy are presented—an intermediate decision which discloses the current thinking of the agency or its influential staff may be more valuable to the parties, and more helpful in eliciting from them relevant comment, than the decision of an administrative law judge. Nevertheless, this is not a conclusive objection to the ABA Recommendation, if only because the requirement of a decision by the presiding officer would not preclude the agency or its staff from issuing, either concurrently or in response, a statement of views for comment by the parties.

Exhibit A takes no position as to whether or when an agency should be free to substitute a preliminary decision of its own or its staff for that of the presiding administrative law judge. Exhibit B would permit such substitution in all cases of ratemaking, initial licensing, or rulemaking of
general applicability—whether or not findings can be made which would justify omitting the intermediate decision altogether.

The ABA Recommendation would further amend section 557(b) by authorizing agencies to “provide by rule that decisions, or categories of decisions including agency appeal board decisions, become final, unless reviewed by the agency at its discretion.” The Conference has already proposed to grant agencies such authority (Recommendation No. 68-6).

EXHIBIT A

RESOLUTION NO. 8

The rather vague language of Resolution No. 8 is given specific content by the implementing Recommendation, the main thrust of which is to require that administrative law judges render initial decisions in all proceedings over which they have presided, with certain exceptions at once broader and narrower than those presently contained in 5 U.S.C. §557(b), and that agencies be empowered to accord such decisions administrative finality. The Conference expresses the following views on this subject:

a. The Conference has already recommended that agencies be authorized, at their discretion, to accord administrative finality to the decisions of administrative law judges (Recommendation 68-6). We endorse the ABA proposal insofar as it would achieve that result.

b. Where final decision is to be made by the agency itself, an intermediate decision to which the parties may file exceptions serves to narrow and focus the issues, whether of fact, law or policy. Moreover, where the case significantly involves questions of fact that hinge upon credibility and demeanor, an intermediate decision by the presiding officer is the only means of obtaining a judgment on these factors. For one or both of these reasons, it is ordinarily highly desirable for an agency to provide for intermediate decision.

c. In all cases of adjudication other than initial licensing, both of the foregoing reasons usually apply with full vigor, and an intermediate decision by the administrative law judge should, as under present law, be required absent unanimous waiver by the parties.

d. In ratemaking, initial licensing and rulemaking of general applicability, fact issues turning upon credibility and demeanor are not often central. Moreover, in ratemaking, where statutes frequently provide that proposed rates shall become effective within a specified period of time even without agency approval, the need for expedition may often outweigh the value of an intermediate decision. For these reasons, in ratemaking, initial licensing and rulemaking of general applicability, agencies
should be authorized to omit the intermediate decision in some circumstances.

e. With respect to ratemaking, initial licensing and rulemaking of general applicability, we reserve judgment on the following questions: (i) the precise nature of the agency findings that should be prerequisite to omission of an intermediate decision; (ii) whether the statute should require those findings to be made case-by-case or permit them, as now, to be made by rule; and (iii) when, if ever, an agency should be permitted to substitute for the decision of an administrative law judge a tentative decision of its own or a recommended decision of its staff.

EXHIBIT B

RESOLUTION NO. 8

a. The Conference shares the Association’s view that, “with limited exceptions,” an administrative law judge who has presided over the reception of evidence should exercise the responsibility for rendering initial decisions.

b. A decision by the presiding official should be required except when

(i) The agency has required that the matter should be referred to it for initial decision because it has found in that particular instance or in a narrowly defined category which the particular instance exemplifies an overriding need for speedy determination; or

(ii) The matter does not involve the resolution of substantial issues of fact; or

(iii) The matter to be decided is in the nature of ratemaking, initial licensing, or rulemaking of general applicability and an intermediate decision to which the parties may file exceptions has been issued by the agency itself or its staff.

c. Further in accord with the objectives of the ABA proposal, the Conference has already recommended that agencies be authorized, at their discretion, to accord finality to the initial decisions of administrative law judges as if those decisions had been made by the agency itself.

d. Where the final decision is to be made by the agency itself, an intermediate decision to which the parties may file exceptions is, in general, an effective means of narrowing and focusing the issues, whether they relate to fact, law, or policy. The initial decision of the presiding official is designed to serve this purpose. If an initial decision by the presiding official is to be omitted in one of the circumstances indicated in (i) or (ii) above, the agency should remain free to issue in its stead a tentative decision of its own or a recommended decision of its staff.
Resolution No. 9

This Resolution would require agencies to provide by rule for abridged procedures to be used by consent of the parties. The implementing Recommendation would merely authorize such procedures. The following discussion is addressed to the Recommendation, that being the fuller and more recent statement of the ABA proposal.

The position taken in the proposed Conference Statement—that the Recommendation is unnecessary and potentially harmful—represents the view of the Committee on Agency Organization and Personnel, and is supported by the following considerations:

1. By conditioning the use of "abridged hearing procedures" upon the unanimous consent of the parties, the Recommendation impliedly rules out existing and highly valuable non-consensual procedures such as the summary decision procedure recently adopted by the FCC (upon the recommendation of the Administrative Conference) (47 C.F.R. 1.251) and the "modified procedure" by which the ICC dispatches the great majority of its cases (49 C.F.R. 1100.45-1100.54). This extremely undesirable result is not averted by the last sentence of the Recommendation, which confirms existing agency power to dispense with oral presentation of evidence, but not existing agency power (a) to restrict cross-examination not "required for a full and true disclosure of the facts" (upon which the ICC "modified procedure" is predicated) or (b) to decide a case without hearing where no material facts are in dispute (upon which summary decision procedures are predicated).*

2. The need for specific statutory authority for "abridged hearing procedures" upon consent of the parties has not been demonstrated. Few agencies can be unaware that an oral evidentiary hearing is generally unnecessary in uncontested proceedings or proceedings in which the parties agree to waive such a hearing. The ABA drafting committee apparently had in mind the FPC's former practice of assigning even uncontested cases to an examiner who went through the motions of dictating an oral hearing to a transcribing reporter in an otherwise empty room. But that grotesque practice has long since been abandoned.

3. Elevating to the level of statutory authority the presently implicit power to omit an oral hearing may have the unintended effect of undoing

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* The proposed Statement on Resolution No. 10, as presented by the Council and the Committee on Compliance and Enforcement Proceedings, and to which the explanation above in text is addressed, did not contain the sentence: "We favor an amendment to the Administrative Procedure Act which would achieve this result [grant of subpoena power] with respect to adjudications subject to §§554, 556, and 557."
earlier Congressional determinations or expectations (however rare they may be) that oral hearings would in fact be required. Only one such situation comes to mind: The Atomic Energy Act, at least when interpreted in the light of legislative history, does require the AEC to conduct an oral and public hearing before issuance of a nuclear reactor construction permit, whether or not any party requests such a hearing or even contests the application. 42 U.S.C. §2239(a). The purpose of this unusual requirement is to insure that important AEC decisions are made in public and that the community is fully informed of the safety factors involved. The procedure, to be sure, is intended to be flexible; but to omit all oral testimony, cross-examination and argument, as the ABA proposal would permit, would be clearly contrary to the intent of the Atomic Energy Act.