

U. S. Department of Transportation



news:

Office of Public Affairs

Washington, D.C. 20590

REMARKS PREPARED FOR DELIVERY BY SECRETARY OF TRANSPORTATION BROCK ADAMS, TO THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, NEW YORK CITY, MARCH 16, 1978.

I. PUBLIC TRANSPORTATION PROGRAM

Last October I had the pleasure of announcing a \$280 million grant to New York City for the modernization and improvement of the city's bus, rail and subway system. That system will soon be marking its diamond jubilee and some "plastic surgery" is overdue. Half of that grant goes toward the replacement or renovation of power, track, signal and communications components -- the heart of the system -- and the rest for new buses and other equipment, and operating expenses.

Our new bill will provide more money for New York City under a revised grant formula that takes factors other than population into account. In fact, for large urban areas we are calling for two formula programs for transit and highways and one discretionary program. To give cities a better fix on funds that will be available for transit, we are recommending that more money be shifted from the discretionary to the formula program. Apportionments will be based not only on population, but also on population weighted by density, commuter rail train miles, fixed guideway route miles, bus seat miles and a factor for the replacement of buses. In other words the formula program will be expanded to better serve the capital and operating assistance needs of individual cities. At the same time the discretionary program for large cities will continue to assist the major capital projects where substantial long-term investments are required.

So we are keenly aware of the substantial needs of the nation's major metropolitan areas, and our proposal addresses those needs. Under our bill, metropolitan planning organizations in areas of one million or more could be designated by the Secretary as grant recipients.

This change will allow local officials to make the necessary trade-offs between highway and transit projects. And it gives the operators of mass transportation systems a greater voice in the ways urban transportation policies and plans are implemented.

II. TRANSPORTATION POLICY

But I want to talk with you tonight not so much about our surface transportation program as about the process by which such programs are developed and decisions made.

You begin with a statement of policy. Now, policy -- I have discovered -- is not something you manufacture and put on display, nor is a doctrine of good intentions enough. Transportation policy is a combination of the practical and the ideal -- it says where you are and where you want to be and, hopefully, sets some workable guidelines for bridging the gap between the two.

I have done that. We have a policy statement. And while I do not have time to go into all of its details this evening, it emphasizes that energy use is a major factor in preparing our transportation systems for the 1980's and '90's and so the development and support of public transportation is very important.

It is our duty to set in motion the policies and programs that will affect American lifestyles for the next twenty years.

III. THE DECISION-MAKING PROCESS

But I didn't come to talk to you tonight about transportation policy alone, but to use it as an example of the problems we face in the decision-making process of modern constitutional government. I believe we are not doing it as well as we could and should. As a private attorney, a United States district attorney, a United States congressman, and now a Cabinet officer, I have had an opportunity to participate in the decision-making process from a variety of positions over a long period -- longer than I like to admit -- and I am concerned.

I am concerned as a Cabinet officer in a department with over a hundred thousand people that we as a nation are losing our ability to make up our minds, or to implement a majority decision over a militant minority once we have made a decision. As a result we are developing a system directed toward avoiding or stopping any activity. This means that decisions which under our tri-partite system should first be made politically by a legislative body -- then implemented by administrative action -- and reviewed by the courts are instead going into the courts for the basic decision. In my judgement there can be no real review when there has not been a crisp decision with the legislative history or an adequate administrative record on which the court can base its review. Too often the court makes the initial decision and then sits in judgment on its own handiwork.

I believe this is occurring because the Federal courts are basically insulated from the pressure of the political process by lifetime appointments and the public respect for the judiciary and therefore don't avoid the tough decisions. Too often now those who must run for legislative office (a painful process) and those who are appointed to office (a most precarious existence) who are then constantly exposed to the electronic media which is not known for in-depth analysis which means that the easy way out is to send the tough decisions to the insulated security of the court, rather than fight it out on the legislative and administrative battlegrounds. This avoids clear legislative or administrative decisions which are often final in terms of both the decision and the individual's ability to survive in public office.

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IV. WHY NOT LEAVE IT TO THE COURTS?

The legitimate question then is -- why not leave it to the courts to decide the controversial questions on education, abortion, voting rights, Concorde, Westway and many others. You as lawyers know the answer. Litigants are not equal in resources in the adversary system. Judges do not have the resources for sufficient analysis of difficult problems. Their staff is usually a clerk, a bailiff, a secretary, and sometimes a special master. Finally the legal system is highly structured which often distorts the analysis of the problem and looks to precedent rather than the innovation which can produce a new solution. The penalty for a policy mistake is neither as swift nor final as it is in the legislative or administrative areas -- defeat at the polls or loss of employment. The penalty for the public is that error is slow in being recognized.

V. WHY NOT LEAVE IT TO PUBLIC INTEREST GROUP LITIGANTS?

As the policy decision action process has moved to the courts, our society has attempted to compensate as any truly representative system will always do. If the ultimate policy decision is not going to be made in the legislative branch or executive branch, then we try to create representative government in the judicial branch. We try to duplicate the political process in the courtroom. Of course, we do not do that very well.

We have turned to building judicial records through more and more public hearings with more and more participants outside of the elected local or Federal officials. The hope is that there will then be a public debate which can be reviewed and sent through the system to be certain that the majority rule -- with minority input appropriate to a democracy -- has prevailed and that all viewpoints represented. Thus the developing of a political policy position for controversial matters is replaced by the survey consultant report or public hearing. Decisions by the public regulatory body, which was created to represent the public interest are now turned into an adversary proceeding (which can then be reviewed by the judiciary). The administrative decision is replaced by an administrative proceeding often using administrative public hearings, which are then reviewed for process as well as substance by the judiciary.

VI. IS THIS SO BAD?

If the original system of political elections to establish policy officials (legislative and executive) who in turn appoint regulatory officials and executive branch administrators had been abolished by a Constitutional convention and replaced with the new system, the people would have made a choice as to which they preferred. Instead, we now have both systems with the result that the people complain of "red tape." And no wonder. Because we usually have a static situation produced by a diffusion of responsibility with no end point because all parties to the process deny they can make a final decision. This allows all to be absolved from blame for any bad result, since by the time the result occurs everyone has forgotten what the problem was.

Perhaps to govern in a volatile world it is necessary that decision-making authority be either diffused or insulated so that decisions do not create overwhelming flash points. But when it becomes overburdened as now it creates stability at the expense of the innovation and changes that mark a dynamic society. I happen to believe that neither those who sanctify the creators of our Constitution as being omniscient nor those who advocate that nothing traditional is worthwhile believe that our future lies in the senility of absolute stability.

VII. THE CONSTITUTIONAL ALTERNATIVE

A constant theme I have repeated within the Department of Transportation since shifting from the legislative branch to the executive branch has been:

- Look at the law
- Make a decision
- Litigate if challenged

With the thousands of people working in the Department of Transportation it is possible on any difficult policy decision to assign literally hundreds of people to contemplate, criticize and create an administrative decision. Such resources should be used to create a record of support for a decision which the court can then review for conformity with the law and the Constitution. The limited resources of the court are adequate to review such a record and decision, and to send it back with instructions if it is inadequate or incorrect under the law. It does not require the court to make the original decision, to create a record or to carry out the enforcement either through court appointed marshals or indirectly by judicial orders to local, state or Federal executive agencies.

It may be necessary at times in our Nation's history for the courts to rescue the political system from its faults, or to hold firm when the other branches of government falter. It is not the way our system should be operated on a day-to-day basis. The legislative branch and the administrative branch should not depend on the friendliness or unfriendliness of the judicial branch to establish a direction for the Nation. Each must make its own decisions in its own way so the people can examine the policies being made and then control their government, using the rules for change established by the Constitution.

Our people will then face crucial decisions and become an enthusiastic part of government because they will know their votes will set policy in the legislative branch -- that administrative officials will carry it through -- and the courts will see to it that this process is being properly used. In this fashion the inalienable rights of each citizen under the Constitution will be observed.

VIII. DECISION-MAKING AT DOT

I am trying, in one Department, and to the extent possible, to assist that process. I am convinced that the only way to move forward - to get something done in a reasonable period of time - is to reach agreement with those involved as quickly as possible, make a decision and get on with it.

We are working more and more with other Federal departments - and that's as it should be - but it becomes very difficult to get an agreement, much less a consensus. That's why it is sometimes better to move unilaterally, make the best decision possible and send the decision in clear form to whatever agency is objecting with the mandate to accept it - or reject it or it will proceed.

When I began this job I took issues that had been in the Department or elsewhere for as long as 15 years awaiting decisions. I started with the oldest and worked my way up. For example we started with the St. Louis Airport controversy, the Concorde problem, airbags and the Westway project here in New York.

I stand by those decisions. I still think Westway, as we approved it, is a sensible solution and will provide the balanced system needed. The decision had strong state and local support, and it affords a means of moving the most people in the fewest vehicles, along New York's West side. Any change is now up to the state and local officials or the courts.

I made that decision, and others, and they're on the record and moving. As Justice Brandeis said, it's often better to take an issue and decide it promptly than to wait forever and do it perfectly. I am willing to be judged on my decisions, and maybe time will prove that some decisions should have been made differently, but that will be done in an active and dynamic fashion and not decided by endless argument among agencies or between litigants. I can assure you if and when I am sued on any of these decisions, we will press for immediate court action and final results, pro or con, and will not accept decisions by inaction as a substitute.

IX. ORGANIZATION

Finally, I want to say just a word about organization. I don't speak of "reorganization" because what I really want to do is complete the organization that was intended when the Department was established. I don't think the people on the 10th floor of DOT Headquarters should be second-guessing what the people on the other nine floors and the other buildings are doing. In other words, there used to be a checkoff system on all decisions between the 10th floor people in the Secretary's office and the people on the other nine floors where the operating administrations are housed. I guess you call that "creative tension."

I don't believe in governing that way. I don't subscribe to the theory of 'circular decision-making' where you write a memorandum with five options, then circulate it forever until the solution finally is to give the problem to a consulting firm to study for six months. I think we have to stay away from that kind of fictional staff work. We have established, and will follow, straight lines of authority. I don't believe anyone who is an Administrator or a Director or a regional official should ever have any doubts about the extent of his or her authority or degree of responsibility.

So we haven't made any fancy organizational changes. We took the operating elements out of the Secretary's office and put them in the modes. For those without a mode we created a special entity -- the Research and Special Program Directorate. And what we try to do now is tie together the operating decisions and those that involve national policy, or cut across the whole area -- but we're not diluting the policy-making responsibility or running decisions through a series of bureaucratic filters.

X. CONCLUSION

I hope this approach to organization and decision-making will be proven by performance and confirmed by success. I hope, too, that it becomes contagious. For I believe that the system has not been functioning as our forefathers intended. Perhaps we have become too afraid of error, or too timid to govern in bold strokes.

Down deep, I think those of us schooled and skilled in the law know that the decision process can function more responsively and efficiently. We have a responsibility to seek reform where it is needed.

For, as William Hazlitt said:

"Man is the only animal that laughs or weeps ... for he is the only animal that is struck with the difference between what things are and what they ought to be."

Making things what they ought to be is the business of the government -- and making decisions is what it is all about.

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