U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20590

STATEMENT OF JOHN W. BARNUM, GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION, BEFORE THE SUBCOMMITTEE ON AVIATION OF THE SENATE COMMERCE COMMITTEE RESPECTING S. 2280, MONDAY, MARCH 6, 1972.

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to appear before you today to discuss S. 2280. This is the bill submitted by the Department designed to implement for the United States the Convention for the Suppression of Unlawful Seizure of Aircraft (sometimes referred to as the Hijacking or Hague Convention).

The Hijacking Convention was signed by the United States and 49 other countries at The Hague on December 16, 1970. The Convention was designed to strengthen substantially the Tokyo Convention which applies to the commission of crimes aboard aircraft. The Tokyo Convention provides that in the case of aircraft in flight in international air transportation the law of the state of the flag of the aircraft applies to events occurring aboard that aircraft. That Convention gives certain powers and responsibilities to the commander of an aircraft with respect to crimes committed aboard his aircraft. In the case of a hijacked aircraft, contracting states are obliged to restore control of the aircraft to its lawful commander, permit the passengers and crew to continue their journey as soon as practical, and return the aircraft and its cargo to the lawful possessors. However, the Tokyo Convention does not oblige any state to establish jurisdiction over hijacking or to extradite or submit to prosecution hijackers in its custody. It is this gap in the international legal system which the Convention for the Suppression of Unlawful Seizure of Aircraft closes. This Convention obligates

its parties to establish jurisdiction over hijackers and agree to extradite or submit to prosecution offenders in its custody.

Current law already enables the United States to implement in many respects the Hijacking Convention. In 1961, Congress added to title IX of the Federal Aviation Act a number of provisions dealing with the commission of crimes aboard aircraft. These included provisions proscribing aircraft piracy, interference with the performance of the duties of a flight crew member, and a number of crimes of violence such as murder and manslaughter. In 1970, following the ratification of the Tokyo Convention, a number of amendments were made to those provisions to fulfill our responsibility to implement that Convention. Previous to the enactment of these amendments, most of the criminal provisions in title IX applied to acts committed aboard aircraft in flight "in air commerce." The 1970 amendments extended and clarified Federal jurisdiction over these crimes by establishing the "special aircraft jurisdiction of the United States" to include while in flight (1) all civil aircraft of the United States; (2) all aircraft of the U.S. national defense forces; and (3) all other aircraft (a) within the United States; or (b) outside the United States if the aircraft has its next scheduled destination or last point of departure in the United States, and next actually lands in the United States.

In order to implement effectively the Hijacking Convention, additional amendments to these provisions are required, and this is the purpose of S. 2280. First, the definition of the special aircraft jurisdiction of the United States is amended to include (1) any aircraft outside the United States aboard which the offense of air piracy is committed, if the aircraft lands

in the United States with the offender still aboard; and (2) any aircraft, no matter what its registration, leased without crew to an operator who has his principal place of business in the United States or who is a permanent resident of the United States.

Secondly, in order to satisfy Article 4, paragraph 2 of the Convention, the bill includes a special provision establishing jurisdiction over the offense of hijacking when it occurs anywhere outside the special aircraft jurisdiction of the United States but the alleged offender is later found in the United States. This is the so-called universal jurisdiction provision which makes hijackers outlaws wherever they are found. We are proposing that there be established a separate substantive offense to cover this situation, carrying its own penalty provision. The proposed penalty for this offense would be death or imprisonment for any term of years, or for life, whereas, under our existing law (and under our proposed law as it relates to the extension of our special aircraft jurisdiciton), the offense of aircraft piracy is punishable by death or by imprisonment for not less than 20 years, or for life. Thus, the maximum penalty is the same for both provisions; only the minimum penalty is different. It should be noted, however, that the existing domestic law on air piracy provides for lesser included offenses such as interference with flight crew members, which is punishable by imprisonment "for any term of years," the same minimum penalty we recommend for the "international" offense. Consequently, the penalty structure for a "domestic" offender is in practice no different from that which would be applied by the proposed legislation to implement the universal jurisdiction provision of the Convention, since in some

domestic cases the offender may be prosecuted for a lesser included offense rather than air piracy because of lack of evidence, extenuating circumstances, or other reasons.

Before closing, I should mention that we have prepared an amendment which would preclude the interpretation that the provisions in the bill establishing the offense of hijacking outside the special aircraft jurisdiction of the United States applies to a hijacker of a purely domestic flight within a foreign country. The amendment conforms the provisions to article 3, section 3 of the Convention which states that the Convention applies only if the place of take-off or the place of actual landing of the aircraft is situated outside the territory of the State of registration of the aircraft. The amendment also incorporates into the new universal jurisdiction provision the definition of the term "in flight" as it is used in the Convention. The amendatory language we propose is attached to my statement. In addition, there is a change of a clerical nature which should be made to the bill. Section 4 contains effective date provisions which would have been appropriate had the bill been enacted before the Convention was ratified. Now, however, those provisions no longer are necessary and we recommend that they be deleted.

Mr. Chairman, the United States was an active participant in the development of the Hijacking Convention and was one of its original signatories. Last September the Senate gave its consent to ratification of the Convention. The United States was the tenth state to so act, thereby enabling the Convention to enter into force. The next official step needed to fulfill our

obligations with respect to the Convention is the enactment of legislation properly adjusting our domestic law to its provisions. In order to insure such action, we urge that the Committee act favorably on S. 2280.

Mr. Chairman, this concludes my prepared testimony. Now General Davis and I will be happy to answer any questions the Committee may have.

Attachment

Amendments to S. 2280

1. Insert between lines 6 and 7 on page 4 the following:

"(3) This subsection shall only be applicable if the place of take-off or the place of actual landing of the aircraft on board which the offense as defined in paragraph 2 of this subsection is committed is situated outside the territory of the state of registration of that aircraft.

"(4) For purposes of this subsection an aircraft is considered to be in flight from the moment when all the external doors are closed following embarkation until the moment when one such door is opened for disembarkation, or in the case of a forced landing, until the competent authorities take over responsibility for the aircraft and for the persons and property aboard."

2. Delete section 4 (line 15 of page 4 through line 5 of page 5).

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U.S. DEPARTMENT OF TRANSPORTATION
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STATEMENT OF JOHN W. BARNUM, GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION BEFORE THE FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE OF THE HOUSE COMMITTEE ON GOVERNMENT OPERATIONS ON THE FREEDOM OF INFORMATION ACT, TUESDAY, MARCH 28, 1972.

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to appear before you today to discuss the administration of the Freedom of Information Act.

At the outset, I would like to outline for you the regulations we have established in the Department respecting the public availability of information. These regulations were first promulgated in June 1967 shortly before the Freedom of Information Act became effective. However, we have just revised them in several important respects. Therefore, in describing them to you, I will try to point out the most significant changes included in this revision.

The sequence of the subject matter of our implementing regulations follows closely that of section 552 of title 5, United States Code. The regulations include provisions respecting the publication of the Department's organization and operating procedure, and the inspection and indexing of Departmental orders and policies that affect members of the public. They also provide guidelines to the public respecting the availability of identifiable records other than those that are published or indexed. Next and perhaps most important, the regulations set forth

guidelines respecting the exemption of certain records from public inspection. The only group of records which are not to be made available for public inspection at any time are those protected from disclosure by Executive order in the interests of national defense or foreign policy, and those specifically exempted from disclosure by statute. The Department's policy is to release a record authorized to be withheld under other exemptions of the Freedom of Information Act unless it is determined that the release of the record would be inconsistent with the purpose of the exemption.

A number of the amendments we have just made to our regulations have the effect of narrowing the scope of some of these exemption provisions. For example, the provision dealing with trade secrets and confidential information was revised to state less broadly various examples of records to be considered within the exemption. Also, the provision dealing with intra-governmental exchanges was revised to indicate that any memoranda made part of an agency action are not within the exemption, and to specify that factual information contained in intra-agency memoranda may be made available unless the facts are so inextricably intertwined with deliberative or policy-making processes that the factual information cannot be separated without disclosing those processes. Finally, the provision dealing with records related solely to internal personnel rules and practices was revised to reflect the position that the words "internal personnel" modify both the words "rules" and "practices", and that the exemption in this more limited interpretation

applies to rules and practices concerning the relations between the Department and its personnel, rather than to rules and practices concerning relations between the Department and outsiders.

We have one set of regulations on the Freedom of Information Act applicable to all elements of the Department. However, the authority to administer the regulations is decentralized. In the Office of the Secretary, the Director of the Office of Public Affairs is responsible for arranging for the public inspection, copying, and release of information. However, if there is a denial of a request for records in the Office of the Secretary and the requesting party appeals to the Department for reconsideration of the case, our revised regulations call upon the General Counsel to issue the final decision of the Department as to the releasability of the information. With respect to records in each operating administration, the authority to administer the regulations is delegated to the head of the administration and, in turn, may be redelegated to subordinate officers in connection with defined groups of records. However, the head of an operating administration may delegate his authority to issue a final denial of a request for a record only to his deputy and to not more than one other officer in the headquarters of the administration who reports directly to the head of the administration.

Our regulations require each person desiring to see or copy Department records to make a written request to the appropriate Departmental officer specified in the regulations. (The regulations list in

appendices document inspection facilities for the Office of the Secretary and the various administrations of the Department, including those in regional and district offices throughout the country.) There are two basic requirements associated with the making of such a request. First, the request must describe the particular record in enough detail to allow the record to be identified and located with a reasonable amount of effort. Secondly, each request must be accompanied by the prescribed fee if that fee can be readily ascertained from our published fee schedules.

The procedure for handling an individual request for information varies somewhat in different elements of the Department, as many details respecting the implementation of our regulations are left to the discretion of our operating administrations. Typically, however, a request received by one of our administrations is routed to the office which has actual custody of the records in question and the decision to provide or deny access to the information is made by an officer of the administration associated with the activities of that office. Under our revised internal directive on Public Availability of Information, the initial denial of a request normally is to be coordinated with the Chief Counsel of the administration, his designee, or the appropriate field legal officer. Our regulations then provide that the officer who makes the determination that the record is not to be disclosed must provide the requesting party a written statement of his reasons for the determination.

Upon receipt of an initial denial of access to information, the requesting party may apply in writing to the head of the operating administration (or his designee) for reconsideration of his request. Under our revised procedures, the head of the administration must coordinate a denial of a request for reconsideration with the General Counsel of the Department. If a denial is then issued by the head of the administration, or his designee, that action is considered to be a withholding by the Secretary for the purposes of section 552(a)(3) of title 5, United States Code.

I would like to add a note about our new requirement for legal review of both initial and final denials. Our intent in establishing this requirement is to assure that documents are not withheld unless it is clear that one of the exemptions of the Act is applicable, and even if applicable, that release would be inconsistent with the purpose of the particular exemption involved. Thus, we believe the use of this procedure should promote the release of information rather than make its release more difficult.

It has been suggested that it might be appropriate to impose on agencies a time limit for responding to requests for information. We agree that agency responses should be made as promptly as possible and we recognize that, in some cases, a long delay in receiving information might substantially reduce its value to the requesting party. We would recommend against the establishment of any flat requirement in this

regard, however, because special problems frequently arise which make it difficult to act upon a request in a short period of time. In some cases, it may be discovered that records sought at the headquarters level are stored in field offices of one of our administrations. In other cases, the request may require a lengthy search because it is couched in imprecise terms or seeks a voluminous quantity of records. On other occasions, there may be a need for a thorough legal review of a request to determine how much of the desired information can be provided. I should point out, however, that our regulations require an officer handling a request which will require an extended search to notify the requesting party of the estimated time that will be needed to fill his request. The regulations also provide that where a record is not made available within a reasonable time, the requesting party may treat his request as denied and move directly to the appeal stage.

Now I would like to discuss the fees we charge for supplying information to the public. Prior to the revision of our regulations, our fee schedule included a $3.00 charge for a record search, a copying fee of 50 cents per page, and a minimum copying fee of $1.00. The revised regulations provide that a search fee is to be charged only if a search is necessary, and that no fee is to be charged for time spent in preparing correspondence relating to a request, or in making legal determinations as to releasability. Under the revised regulations, the copying fee has been reduced to 25 cents per page and the minimum copying fee has been

abolished. Also, a new section has been added listing specific requests for which no fee will be charged. These include requests by employees or former employees for personnel records, and requests by members of Congress, the courts, and other governments. In addition the regulations now provide that documents may be furnished without charge or at a reduced charge if the head of the operating administration concerned determines that the furnishing of the information primarily benefits the general public. Examples of such situations are requests from groups engaged in nonprofit activities designed for the public safety, health, or welfare, and requests from schools and students.

We have also changed our regulations as they apply to the availability of transcripts of hearings and oral arguments. In the past copies of these transcripts have been available only from the nongovernment reporting service which retained the exclusive sales privilege for duplicate copies, usually at a price much higher than that listed in our fee schedule. Last year, the General Services Administration modified its contract solicitations to provide Government agencies the option of contracting for transcription service with or without the sales privilege. A new section of our regulations assures that where the Department has the right to handle the reproduction of copies of these transcripts, the usual fee schedule applies.

Finally, our revision calls attention to alternate sources of information in the interest of making documents of general interest publicly available as cheaply as possible. Appropriate material will be published

and offered for sale by the U.S. Government Printing Office, the Commerce Department's National Technical Information Service, the National Audio Visual Center and the Consumer Product Information Coordinating Center.

The revisions we have just made to our regulations are based on experience we have gained in the administration of the Act over the past few years. While the revisions are not broad sweeping changes, we believe they will help make it easier for members of the public to obtain certain Department records. There is no doubt that the changes in the fee structure will make it less expensive to acquire records in many cases. We recognize the need to continue seeking ways to improve the administration of the Act and, at present, are now looking into the possibility of restructuring filing systems in various elements of the Department so that requests for information can be dealt with more promptly, and releasable portions of records can be separated more easily from materials falling under exemptions of the Act. We also will be following with interest the course of your hearings. We believe they should provide a considerable amount of constructive thought as to how the administration of the Act can be improved.

Mr. Chairman, that completes my prepared statement. Now I will be happy to answer any questions the Committee may have.

DEPARTMENT OF TRANSPORTATION | NEWS

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REMARKS OF U.S. DEPARTMENT OF TRANSPORTATION GENERAL COUNSEL JOHN W. BARNUM AT THE SECOND ANNUAL TRANSPORTATION LAW SEMINAR, ASSOCIATION OF INTERSTATE COMMERCE COMMISSION PRACTITIONERS, WASHINGTON, D.C., MONDAY, OCTOBER 16, 1972

Thank you Mr. Foster.

When Carl Lyon invited me to speak to you today, he suggested that you might be interested in hearing some of the impressions a private practitioner has had after a year of government service. Although many of you have yourselves worked with the government -- and I am happy to see some DOT alumni in the audience -- I would like to accept his suggestion for at least a part of my remarks.

I would like to start in August 1914.

August 1914 is the title of the first volume of what Sozhenitsyn has always intended to be his life work, the story of Russia in World War I. In a very thoughtful chapter in this first volume, Sozhenitsyn describes two young men who have just resigned from the university to join the army, and who on their last free day in Moscow encounter an older man whom they had often seen in the library at the university, and whom they had come to refer to affectionately as "the stargazer". They seize the opportunity finally to strike up a conversation with him, and the chapter records the exchange between the two young idealists and the older man who has seen a little bit more of the world. After one observation by the stargazer, one of the students says, "That is

not clear." The stargazer replies -- and this line is the reason I am recounting this story to you -- the stargazer replies, "When things are too clear, they are no longer interesting."

Although in our briefs to the ICC we too often pronounce glibly: "It is clear that . . ." -- a sure invitation to the law clerks to look over the cited authority carefully -- if in fact we have any citation at all -- the truth of the matter is that, in Washington generally and in transportation law and policy specifically, there are many things that are not too clear.

If when I left the quiet halls of the Cravath firm I had consulted a stargazer, I would have been a little better prepared for the outside world. Now, after a year in Washington, I am a little more appreciative of what is clear and what is not clear. And I would like to talk with you briefly about both.

It is clear that, for an attorney, an opportunity to work in the Federal government is a magnificent experience. Those of you who have already been there know I am sure just what I mean. For the rest of you, from the lawyer just graduating from law school to the established lawyer in the private bar, in my opinion the only question you should be asking yourself about government practice is not whether but when, and where.

Another thing is clear to me -- but nevertheless interesting. In private practice, most of the laws with which I dealt had long been on the books -- the antitrust laws, the securities laws. To be sure, I did not have a transportation oriented practice. But transportation has been the subject of legislation for a long time, longer for example than the securities industry. Yet the laws with which I now deal day in and day out have largely been passed in the last five or six years -- in 1966 the Highway Safety Act, and the National Traffic and Motor Vehicle Safety Act, and the Department of Transportation Act itself; in 1968 the Natural Gas Pipeline Safety Act; in 1969 the National Environmental Policy Act. 1970 was a banner year: the Airport and Airway Development Act, the Emergency Rail Services Act, the Federal Railroad Safety Act, the Hazardous Materials Transportation Control Act, the Rail Passenger Service Act, the Uniform Relocation Assistance and Land Acquisition Policies Act, the Urban Mass Transportation Assistance Act, and, of course, a Federal-Aid Highway Act. And you can think of many others, in those and other recent years -- all passed long after most of us were paying bar association dues in the highest category. Clearly this is a time of foment in the law of transportation, and that is one reason why symposia such as this are so valuable to the practitioners who participate and to the industries and other interests they serve.

Another thing I have learned since I came to Washington is the relatively greater complexity of virtually any issue in dispute. In private practice it is usually your client and the other guy -- two

sides to a story. To be sure, in ICC practice there are often intervenors, who may be speaking for competitors, from the same or different modes, for environmentalists, for local government and for labor, among others. For this reason any one of you, having worked in such an arena, would be better equipped to be the General Counsel of the Transportation Department than I. But watching and working with these countervailing considerations -- not just in cases before the regulatory agencies, but in legislation and in funding priorities and resource allocation and in policy generally -- weighing valid but conflicting law and policy goals is, in my brief experience, the most significant lesson the private practitioner can learn in government.

And it is not just a question of the Executive Branch vis-a-vis the rest of the world. Some of the merriest melees I have enjoyed in Washington have been within the Executive Branch. I despair, for example, of persuading the Antitrust Division that its theories of potential competition have little application to regulated industries. At 2 p.m. this afternoon the Supreme Court will hear the Division's argument as applied to the banking industry, and in all likelihood we will soon have an opinion that will advance the ball beyond Penn-Olin and El Paso, but in this respect I still feel there is a significant difference between the banking industry and railroads or air carriers.

And one other thing has become clear -- or at least been driven home in the brief time I have been in Washington -- and that is the enormous power of the Congress. The smorgasbord of laws that I sampled for you earlier is indicative of the affirmative role that Congress can play. In those laws Congress has affected virtually every mode.

But in the center ring, for the main event -- the continued effectiveness of surface transportation generally -- that power of Congress has been exercised negatively. The industry has been affected by Congress not by action, but by inaction. The Congress, as much if not more than the Executive Branch, is subject to -- and subjected to -- the same countervailing considerations that I have already mentioned. But it is uniquely designed to resolve them. Yet Congress has simply not been effective in resolving those conflicting considerations concerning the major issues in surface transportation. The result is likely to be disastrous.

A month or so ago a group of financial and investment experts, at our invitation, gave us some insights on how the financial community regards the transportation industry. It was a discouraging session, characterized for me by the observation made by one investment advisor. He said, "Transportation stocks are like Christmas whisky -- not good enough to drink, but too good to throw away." That opinion -- and I should add that most of the investments they could justify were not in surface transportation industries, but in air carriers -- that opinion is far from unique. But if we are to avoid nationalization of the railroads, or even further governmental intervention connected with

grants or loans -- that opinion must be changed. Over the next ten years the capital needs of the transportation system are probably in the order of $300 billion -- $50 billion more for the transportation system alone than the President has requested to run the whole Federal establishment for just one of those ten years. That capital must come largely from the private sector -- but it will come only if the improvement in the economic outlook changes.

This past year everybody and his mother-in-law sent to the Hill proposals aimed to reverse the quickening decline of the railroads, and to avoid the same fate for other modes by permitting competitive forces to stimulate efficiencies. Extensive hearings were held in both houses, and I should note that this was in itself a good sign and something of a triumph.

I think it is fair to say that there was substantial support from a wide spectrum of interests, including the Administration, for five ingredients of a bill. Count them with me on the fingers of one hand and see if you do not agree that these are desirable.

First, outlaw discriminatory taxation by State and local governments.

Second, make capital available to the railroads to improve their right-of-way. There is general agreement that railroads need to augment their freight car fleets, but the modernization of roadbed and right-of-way is equally compelling. To an amateur like me the fact that a freight car is loaded and moving only 8% of the time -- one hour out of every twelve, or two hours a day -- came as a shock I will not soon forget. It is an absurd use of a major capital investment. Bill Moore of the Penn Central has said that if he could spend $30 million to modernize the Cleveland yard, he could pay it back in five years out of the savings from increased efficiency of the Cleveland yard alone, largely in increased car utilization.

Third, rates below variable costs should be banned. No one shipper should be charged part of the cost of moving another shipper's freight. Essentially we believe that all shippers should cover their own costs. I would like to divert for a moment to give you an example of the insidious consequences that result when rates are not based on costs.

The CAB is conducting a wide-ranging investigation of air fares in a proceeding entitled the Domestic Passenger Fare Investigation. In that proceeding we have pointed out that the airlines charge the New York to San Francisco passenger $8 more for his ticket than they need to, whereas the New York to Washington passenger pays $4 less than he ought to. The airlines do this because most persons travelling from New York to San Francisco commercially do not have any real alternative to flying, whereas the person going from New York to Washington can

travel either by train or bus. When the airlines charge the Washington passenger $4 less than they should, the other modes lose passengers, with obvious detrimental consequences for the revenues of the railroads and the motor carriers.

This is an example of how the total transportation system is injured when carriers are permitted to charge rates below variable costs. The practice also injures unnecessarily the carrier charging the below cost rate. We believe that railroads lose $480 million a year in carrying freight at rates below the compensatory level.

Fourth, railroads should be able more expeditiously to discontinue operations that are neither economical to the railroad nor essential to the shipper. The branch line concept has been obsolete for 40 years, succeeded by our ever growing network of paved roads and motor truck fleets. The Commission's 34 car rule is a step in the right direction, and we applaud it as a first step, but I respectfully submit that it is not enough.

Fifth, the practices of rate bureaus should be modified to prohibit protesting a rate proposed by one member carrier, and rate bureaus should be required to decide on a proposed rate change within 120 days after it is filed.

Now these questions and others Congress considered are all interesting, and I do not insist that the answers are too clear to warrant discussion. But it is too clear for words that they need to be answered.

You have often heard the axiom that a lawyer should not ask a witness a question if the lawyer does not know what the answer is going to be. Unfortunately, the Executive Branch lawyer does not have that option when he addresses to the Congress the question "How are you going to help the railroads?" The answer from the Senate Commerce Committee was billions for rolling stock, but not one dime for roadbed -- and a 28-month moratorium on abandonment proceedings, to be extended by complex regulatory review procedures, plus a government subsidy of 70% of any operating deficit on low density lines. The answer from the House was no bill, although the latest version of the subcommittee's bill had all five ingredients I mentioned.

It is probably just as well that the Senate bill stopped where it did, but the sad fact of the matter is that this week the 92nd Congress will probably go home, leaving behind six railroads in bankruptcy, two more than it found when it came to town two years ago -- just as the previous Congress left with two more than it found. At the rate of two bankrupt railroads per Congress, pretty soon the investment community is going to throw out the Christmas whisky.

This leads me to a final thought. Section 77 of the Bankruptcy Act, the railroad reorganization statute, had its last -- and only -- major revision in 1935. Our experience with railroad reorganizations since then has shown Section 77 to have some very serious defects.

1. It has not permitted the debtor railroad effectively to reduce the lines it operates to a point where its traffic density will be maximized and its expense per unit of freight thereby minimized, thus laying a solid basis for profitable operations.

2. It is very difficult for a debtor railroad, as part of its plan of reorganization, to merge or consolidate with another railroad.

3. It has not required the debtor railroad to raise its rates which do not even cover its variable costs.

4. And it has bogged down attempts to reorganize, or to discontinue service, or to merge or consolidate, in a procedural morass.

Section 77 was a slow enough cure in the '30s for railroads which had to restructure their debt. But it does not appear to be any cure at all for the railroads in the '60s and '70s that can't generate an operating profit, without regard to debt service. Something must be done to Section 77 to make the entire mechanism of railroad reorganization responsive to the current problems facing bankrupt railroads. We must develop a mechanism capable of resolving those problems where there is a real need for the services provided by those railroads, and capable of resolving them before the enormity of their losses and the constitutional rights of their creditors compel their liquidation.

Many of the things that we have proposed for railroads generally have particular application to railroads in reorganization, but some of the generic reorganization problems need also be addressed in a rewritten Section 77 -- the facilitation of mergers or consolidations, for example. And most importantly, we must find the proper balance between the role of the ICC and the role of the reorganization courts, avoiding duplication wherever possible, while giving appropriate recognition to the interests of stockholders and creditors, to labor, and to shippers and communities that need to be served.

The stargazer said, "When things are too clear, they are no longer interesting." Exactly how Section 77 should be rewritten may not be too clear -- although I have some ideas -- and it is certainly interesting, I think vital. At the end of that same chapter in August 1914 the stargazer said to the students, "Important questions always have long, tortuous answers." Section 77 has created some important questions that need to be answered. You will be dealing with

other important questions these next four days, and for some of those questions you will not find answers. It may be some solace, then, to remember that, when things are too clear, they are no longer interesting.

DEPARTMENT OF TRANSPORTATION | NEWS

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WASHINGTON, D.C. 2059

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REMARKS BY UNDER SECRETARY OF TRANSPORTATION JOHN W. BARNUM BEFORE THE SYMPOSIUM ON EFFECTIVE HIGHWAY SAFETY ADJUDICATION, ROOSEVELT HOTEL, NEW YORK, NEW YORK, NOVEMBER 13, 1973

It is a pleasure for me to welcome you to the Symposium on Effective Highway Safety Adjudication. I was privileged to serve as Chairman of the National Highway Safety Advisory Committee when the Committee's Task Force on Adjudication submitted its final report in May of this year. The Task Force has blazed a path to meaningful changes in traffic adjudication, and their report is an invaluable document to the States, the Department of Transportation and its National Highway Traffic Safety Administration. Judge Sherman Finesilver, Chairman of the Task Force while the report was in preparation, will present the report to this symposium. The findings, conclusions and recommendations of the Task Force should be a useful guide for your deliberations.

Those of you who are delegates from the District of Columbia and the States of Florida, Maryland, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, and Rhode Island are government leaders and interested citizens. You have both the power and commitment to bring about meaningful change in traffic law adjudication. You are the catalysts in State and local government who can first decide what changes are necessary and then make them happen.

The symposium is designed to assist you in that mission. It will emphasize development and implementation of State goals. Your States have already demonstrated an interest in addressing those problems. A free exchange of ideas here should further help you to find ways to improve traffic offense adjudication.

The Secretary of Transportation pointed out in a recent speech that highway safety is properly a State and local responsibility. The Federal role, he emphasized, is a mixture of "advisory, regulatory, legislative, and fiscal actions." This symposium provides such advice--thanks largely to the Task Force. The highway safety program standards, especially those on Codes and Laws, Police Traffic Services, and Traffic Courts provide regulation. The Highway Safety Act of 1973 legislates demonstration projects for the

administrative processing of traffic infractions. The Department's grant and demonstration programs provide fiscal help. The new Special Adjudication for Enforcement (SAFE) program is an example.

But in the area of highway safety the Feds are merely wholesalers of some of the basic ingredients. What we deliver, you in the States must mix and finish and distribute. And sell. Only through these joint efforts will we make driving safer.

Every year more drivers occupy more motor vehicles and travel more miles. The rural death rate is twice as high as the urban death rate, and rural speeds are increasing. More drivers are among the youngest and oldest age brackets. Most serious of all are the statistics which show that per capita consumption of alcohol rose 23 1/2 percent between 1967 and 1972. Alcohol clearly remains the number one highway killer.

And the energy crisis isn't going to solve the problem for us. Speed limits and gas rationing may make the statistics look better for a while, but better statistics create their own problem; they will tend to lull people into thinking that the danger is going away and that nothing more needs to be done. You and I know that's not true, but we will probably have to work harder to sell highway safety.

While the unsafe highway environment and defective vehicles still cause automobile crashes, driver error is by far the largest culprit we have to collar. Improper driving is involved in four-fifths of all crashes. Poorly understood and non-uniform traffic laws, lack of enforcement by police or courts, and failure to retrain problem drivers contribute to the problem.

Human behavior is hard to change. Witness seat belts. Use of three point safety belts would save more lives than any other single measure, including driver control programs. We are attempting to persuade states to legislate the mandatory use of belts. The 1973 Highway Safety Act provides a monetary incentive for adoption of mandatory laws.

And this is a fertile field to plow. I am sure you are all aware of the Australian experience, but perhaps you have not yet heard of the results in France last summer of the introduction of speed limits and seat belt laws. Christian Gerondeau--"Mister Highway Safety" in France--told me last month that highway deaths fell 16 percent in July, August, and September.

But in America the results are not very encouraging. Puerto Rico has a mandatory seat belt law, and the New Jersey legislature is halfway there. And that's just about all the good news.

The major question for this symposium is: Where should the States and communities commit their resources to improve highway safety through driver control programs? Certainly strict enforcement of traffic laws have great accident reduction potential. Selective Traffic Enforcement Programs (STEP) and Fatal Accident Reduction Enforcement (FARE) projects are testing police enforcement countermeasures. The 35 Alcohol Safety Action Projects around the country are aimed at getting the drunk driver off the road. The use of effective blood-alcohol content testing methods, including pre-arrest breath testing in a number of States, has increased drunk driving arrests. For the first time many of the Nation's lower criminal courts have been given the vital presentence investigation tool to assist in identification and sentencing of problem drinker drivers. And this is where our symposium comes in.

Crucial to all of the Department of Transportation's special driver control demonstration efforts is the adjudication and sentencing of traffic violators. Adjudication serves as the balance wheel in the traffic law system. It also provides the constitutional due process necessary for a nation ruled by law. The serious plight of the Nation's lower criminal courts is largely due to their processing extensive

petty offense caseloads, dominated by a high percentage of traffic cases. This situation has been eloquently described in a number of commission reports including the President's Commission on Law Enforcement and the Administration of Justice in 1967 and the Advisory Commission on Intergovernmental Relations on "State-Local Relations in the Criminal Justice System" in 1971.

Only recently, however, have these needs started to be translated into meaningful action. Earlier this year the National Highway Safety Advisory Committee's Ad Hoc Task Force on Adjudication concluded that traffic offense handling, as presently constituted, has made little contribution toward the promotion of traffic safety and the improvement of driver behavior. The Task Force was especially critical of traditional criminal court traffic case processing. It concluded that the reclassification of lower risk traffic offenses from crimes to traffic infractions, and the establishment of court ordered rehabilitation efforts are essential to improving highway safety. The National Advisory Commission on Criminal Justice Standards and Goals has reached the same conclusion.

Especially significant to me, as a lawyer, was the all-lawyer Task Force's belief that the recommended traffic adjudication subsystem could reduce traffic accidents and fatalities far more than the customary

court adjudication process. No longer should traffic adjudication be a disinterested bystander involved only in legal niceties. Rather, it must become involved directly in the struggle for improved highway safety.

Particularly encouraging to me are the tentative draft Standards Relating to Court Organization of the American Bar Association's Commission on Standards of Judicial Administration. These provide for processing of "non-criminal traffic cases" by judicial officers who are not full-fledged judges. The ABA Commission underlined the view that smaller criminal cases "require different legal skills, experience, and authority, particularly the capacity to function fairly and efficiently in handling large volumes of cases."

Traffic case adjudication must be both streamlined and designed to modify negligent driver behavior. It is axiomatic that the more habitual a traffic offender becomes, the more difficult it is to modify his behavior. Some success has occurred in reducing violation recidivism through driver improvement programs.

The States face a tremendous challenge to develop traffic adjudication and driver improvement programs that reduce crashes. However, we much recognize that, in spite of increases in funds and improved methods of treatment, there will remain a small group of extremely

reckless drivers. Severe measures must be taken to remove excessively negligent and habitual drinking drivers from the highways. Most State laws provide for mandatory jail sentences for those convicted of driving with a suspended or revoked license or second or third offense drunk driving. Most States also mandate suspension of licenses of persons convicted for drunk driving. Research conducted on the subsequent violation and accident records of drivers mandatorily suspended demonstrate that these suspensions are highway safety effective. Thirteen States, including Florida, Ohio, and Rhode Island, have enacted the ultimate reckless driver law called the habitual offender act. The various State laws are based on the original habitual offender law passed in Virginia in 1968. Under the Virginia law, drivers who have accumulated within any ten-year period a record of convictions of three serious violations or twelve lesser violations, or of any combination, are subject to a court order indefinitely revoking their drivers' privileges. License reinstatement is allowed on petition after ten years. Any driver who is convicted of driving during this period of revocation is a felon and can be sentenced to the penitentiary for a term not to exceed five years. It is extremely important that the courts enforce these laws.

The new National Highway Traffic Safety Administration's Special Adjudication for Enforcement project, with its first site in Seattle, Washington, provides for the testing and evaluation of non-criminal case processing integrated with driver improvement efforts. It contains elements which can guide us in achieving effective highway safety adjudication. Maximum violation deterrence is practical through speedy and inexpensive trials without jury or counsel. Trials of persons accused of serious offenses, both traffic and criminal, are expedited through reduced caseload. Implementation of driver license sanction and ret raining and rehabilitation measures are improved by integration with adjudication. Driver control features of State highway safety programs are strengthened by pooling resources and improving system management.

Scheduled to speak about the challenge of advanced traffic adjudication and driver improvement programs are authorities from around the Nation. Mr. Ron Coppin will discuss California's advanced driver improvement programs and evaluation. Dr. B. J. Campbell of the Highway Safety Research Center in North Carolina will present his research on statistical association between past and future accidents and violations. Dr. Leon Goldstein, former special assistant to the Director of the National Transportat ion Safety Board, will review his

perspectives on problem drivers. Messrs. Blumenthal and Ross of the University of Denver College of Law will introduce their findings on the effect of traffic law sanctions on highway safety. The special leadership given by the State of New York under the able guidance of former Commissioner of Motor Vehicles, and now President of the National Safety Council, Vincent L. Tofany, in the establishment of administrative adjudication of traffic infractions will receive special attention.

Over the next three days, you, ladies and gentlemen, will be participating in work sessions. These will provide you with the latest research information on effective adjudication and driver improvement. I know you will find these sessions highly provocative and productive. When you return to your States and communities to carry out your statements of goals, I trust you will begin to encourage the development of habitually safe drivers on our Nation's highways.