

STATEMENT OF JOAN CLAYBROOK, ADMINISTRATOR, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMMITTEE ON THE JUDICIARY, CONCERNING CITIZEN PARTICIPATION IN RULEMAKING, JULY 20, 1979.

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before your Committee to discuss the benefits of programs to permit meaningful participation in rulemaking actions by all affected parties. Public participation funding in the Department of Transportation was begun by former Secretary Coleman in 1977, and it has proved highly beneficial in issuing regulations that are fully justified and grounded in a complete assessment of relevant information and viewpoints.

Our form of government has always been conceived of as a grant of limited powers to a central government by the people, rather than the exercise of sovereign authority by an all-powerful government subject only to specified constitutional restraints. The concept that the power to govern resides in the people themselves was unique when our constitution was framed in the late 18th century, but it has survived as a fundamentally correct and workable approach.

The complexity of life in the 20th century has led to a larger, more active governmental presence, and has tended to obscure the principle that the people's will is pre-eminent. Indeed, it becomes more and more difficult to determine what the people's will might be on the issues that dominate modern-day life.

Actually, the creation and growth of rulemaking agencies is one of the major governmental responses to the difficulties of public policy-making. Rulemaking agencies are a necessary mechanism by which to meet the technological and economic challenges that face us.

It was originally assumed that the agencies, as an extension of the government created by the people, would necessarily represent and serve the people's interest as their natural function. I would agree that the agencies are empowered and designed to carry out such a function. But they cannot do it in a vacuum. My experience with agencies, from both outside and inside government, is that while agencies are good at analysing issues from the perspective of regulators, they do not and cannot have the crucial perspective of user of the regulated product or service. Only the public does.

It would be illogical and impractical to expect the decision-maker to maintain all relevant perspectives on a proposal, or to make a reasoned decision by advocating just one among many perspectives. Rather, the decision-maker must reach conclusions on a record that contains the varied perspectives of all affected parties. Just as in a courtroom, the clash of conflicting views leads to a better understanding of the truth of a matter. This process is analogous in some respects to our separation-of-powers doctrine, which presumes

that the division of authority among three branches leads to better solutions than entrusting all power to a single authority with a limited perspective.

My experience has also been that the public, as end user of the products we regulate, exercises the most effective oversight of our regulatory activities. Our activities are certainly more closely scrutinized by the Congress and the press because of the objections raised by members of the public who have more than a strictly economic interest in our proceedings. I have been picketed, sued, challenged by the press, and been "visited" unexpectedly by groups accompanied by reporters ready to see a confrontation. Much as this complicates our work, it is one of the healthiest "winds of change" that blows through our agency.

Without hearing the public's view, the insistence and thoroughness with which well-financed or politically sensitive interests make their point in the rulemaking process effectively creates an imbalance where there should be none. I do not think that the results are legally defective or a failure to carry out the agency's mission, but I do know that significantly better balance is both possible and desirable.

There are numerous means to broaden the process for the benefit of all parties that have a stake in rulemaking. One of the most potent means to attract comment is earlier and more widespread notice of our intentions. We use the Advance

Notice of Proposed Rulemaking more often than in the past, and we use press releases and direct telephone notification to alert interest groups that do not read the Federal Register regularly. We try to provide a minimum 60-day comment period on proposals, and write our notices in a way that presents complex technical matters as simply as possible. In accordance with E.O. 12044, the Department publishes a semi-annual rulemaking agenda that provides further notice of our future intentions. We have also published a 5-Year Plan of our regulatory intentions. Additionally, we have held public meetings in various areas of the country to learn more of the public's position on our programs generally.

All these techniques help to make a broader spectrum of the interested public aware of our activities, but this is only a part of the problem of obtaining balanced response to rulemaking. The more important part is to receive views from affected citizens at the proper time that are based on substantive analysis. It is not enough, for example, to have a letter full of opinion from a child safety group about the value of instructing fathers and mothers in the proper use of child restraint systems. Of far greater value are well-documented, concrete suggestions on how to accomplish

this objective, with proposed alternatives, and examples of devices which are safe and convenient. Representatives of the public need resources in order to effectively present their points-of-view on technical subjects of this type.

Public participation funding is unique in providing the modest but necessary resources that non-profit groups, individuals, and some very small businesses need to substantiate their observations about Departmental proposals, and to do so in a timely and effective manner. Typically, only large organizations affected either favorably or unfavorably by Departmental proposals can justify the expenditure of funds to substantiate a position on either side of a particular question. Achievement or avoidance of a technological regulatory change for them is a business objective for which funds are allocated as a regular business expense, for which a tax deduction can be taken, and which can be passed on the consumer. The public, as taxpayer and consumer, foots the bill.

However, a group with a small economic interest in the outcome of the rulemaking, or a small business with a stake in the outcome but with very limited financial resources, can rarely make significant expenditures of time and resources in support of their viewpoints. Necessary funding can be quite modest yet be beyond the budgets of such groups and similarly situated individuals.

NHTSA's public participation program was begun as a demonstration by the Department in January 1977 to determine its potential for improving rulemaking. NHTSA is presently operating under an appropriation of \$125,000 for fiscal year 1979, and at the direction of the appropriations committees we are providing a full report on the mechanics of these programs. The NHTSA experience has been extremely positive, significantly strengthening the rulemaking program for the past two years. Thanks to our citizen participation funding, we are able to make a more complete assessment of competing arguments, thereby increasing the validity and fairness of agency decisions. We obtain a wider range of well-documented views, which necessarily allows us better to fulfill our statutory mandate to establish standards for safer, more fuel-efficient, and "consumerworthy" automobiles.

For example, in the rulemaking to establish fuel economy standards for passenger cars in 1977, the Environmental Defense Fund and the Citizens for Clean Air analysed the interaction and compatibility of automobile emission control standards with the proposed fuel economy standards. In a comparable proposal for light trucks and vans, the Citizens for Clean Air evaluated the potential health effects of diesel engine emissions and current research by the EPA, in arguing

against reliance on that technology by the agency in establishing fuel economy levels.

In upgrading occupant restraint requirements in 1977, several individuals testified about the impacts of such rulemaking on individuals, both pro and con. In the proceeding on safety performance of electric and hybrid vehicles, a former electric car dealer testified on the design deficiencies in lighting, handling, and durability of the vehicles that he had sold. Also, unbiased, independent evaluation of the operational features of these vehicles was prepared by a graduate engineering student who had no connection with the electric car industry.

Probably the greatest concern with funding public views is fear that the selection of participants might be biased toward the agency's proposal. The Department recognized this issue and dealt with it by leaving selection of participants in the hands of an evaluation board whose three members are not involved in developing the regulation's substance. In fact, one board member is from the Department's Office of Consumer Affairs rather than from the NHTSA. Such an arrangement is not perfect protection against the possibility of abuse, but it has worked well in our case. Indeed, the rulemaking decision-makers have no knowledge of who applies or who receives grants prior to their awards.

As evidence of unbiased selection, individuals we funded

have opposed our proposals, and small businesses have brought forth criticisms of specifics in our economic analysis.

Also, there are basic philosophical differences among the public interest groups we have funded. The Public Interest Campaign, for instance, argued for inclusion of diesel technology in setting light trucks standards, while the Citizens for Clean Air opposed inclusion.

Because some critics suggest public participation funding, despite the tiny size of the awards, fosters selection of supportive commenters, I support the provision of S. 755 that places responsibility for selection of participants in an office independent of the rulemaking program, and believe that the provision for oversight in the Administrative Conference to assure independent selection may also be beneficial. However, I am not sure that transfer to actual selection of participants from the substantive agencies to a central "neutral" agency such as the Administrative Conference would be wise, because detailed substantive familiarity with the agency program is necessary to properly choose rulemakings for funding and to evaluate proposals for participation.

The institution of formal participation funding programs is most valuable because it would bring basic order and fairness to a process that has been in place for a long time. The agencies have always had the basic need for and authority to let contracts to obtain the recommendations

and guidance of consultant groups or individuals. They have always been able to fund the travel and subsistence expenses of participation in proceedings held in Washington or elsewhere. A public funding program simply brings fairness and order to this process, because it requires public notice and an objective choice of participants according to established agency regulation. This puts everyone on notice of the competition for funding, and actually limits any tendency toward agency arbitrariness.

I encourage the Committee to adopt the Administration's legislative proposal as contained in S. 755 for formally setting up a public funding program government-wide. In particular, the explicit authority for advance payments and the ability to fund those with a small economic stake in the outcome of a proceeding will realistically broaden the reach of the program. The suggested \$20 million annual authorization should be sufficient to institute adequate programs throughout the government.

Our public participation funding has been of real benefit in more broadly evaluating the effects of NHTSA rulemaking, particularly on those who do not have the wherewithal to substantiate their views and bring them to our attention.

We would be less able to do our job properly if we had to discontinue this valuable source of views and data. While the Comptroller General has made clear in Opinion B-180224 our authority to conduct public participation funding as a necessary adjunct to administrative proceedings, a view concurred in by the Justice Department, I would welcome the provisions of S. 755 to put all government public funding on the same footing.

This completes my statement. I would be pleased to answer any questions you may have.