

**STATEMENT OF JIM BURNLEY  
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BEFORE THE  
UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS  
JUNE 22, 1983**

**Mister Chairman and Members of the Subcommittee:**

I am very pleased to be here this morning to discuss the regulatory relief program of the Department of Transportation and the impact on that program of regulatory reform legislation now before the Congress. With me is Neil Eisner, my Assistant General Counsel for Regulation and Enforcement, who heads up our regulatory relief program.

My statement is divided into three parts. The first is a brief history of regulatory relief at the Department of Transportation("DOT"); I include it because the evolution of the process to its current state is an instructive example of the benefits accorded by administrative flexibility. The second is a discussion of the current status of the program and its recent achievements; it is at this stage of my presentation that I will discuss the Department of Transportation's response to the Subcommittee's questionnaire which accompanied the Chairman's letter to Secretary Dole of April 25, 1983. The third is a discussion of current legislative proposals on regulatory reform.

**I. History of Regulatory Relief at the Department of Transportation.**

In 1975 Secretary William Coleman convened a group composed of a lawyer, an economist, a program analyst, and an engineer, all from the Office of the Secretary (as differentiated from a program agency) and charged them with devising a system whereby he could be informed of significant rulemakings by

any agency of the Department of Transportation and of what costs those rulemakings were imposing. That system was adopted (and published in the **FEDERAL REGISTER**) in 1976. It had two particularly significant aspects. First, it emphasized the Notice of Proposed Rulemaking (NPRM) as the key stage in the process. The group that devised the system believed strongly that regulatory reform efforts should be directed at the development of the NPRM because, once it was published, both law and human nature worked to limit the flexibility to make changes. Second, financial assistance programs -- of which there were many at the Department then as now -- were included because it was believed that they are as much regulatory as are traditional "command-and-control" regulations and because it was believed that their costs could be more readily ascertained, since Federal funds paid part of those costs. The head of each agency at the Department was charged with applying the system to his rulemakings and apprising the Secretary of those that met the criteria. The process was overseen by program review specialists in the Office of the Secretary (OST) assisted by the General Counsel's office.

The chief defect of the process was that it was re-active rather than pro-active -- that is, the Secretary did not get involved until someone else triggered that involvement. Since few of us like having others look over our shoulders, the Department's program agencies were understandably reluctant to draw the Secretary's attention to their important rulemakings. At the same time, as one of his last official acts, Secretary Coleman promised a number of public interest groups that, in order to aid them in planning their involvement in DOT rulemakings, the Department would publish what we now call an "agenda" of rulemakings which it had under development. Both of these mechanisms were thereafter utilized in the development of the program of

regulatory reform at the Department. For internal as well as public use, an agenda of all rulemakings was established; those that were "major" under Executive Order 12044 were subjected to regulatory analysis under that Order, with the analysis reviewed by specialists in the Office of the Secretary. What was perhaps most noteworthy about the Department's process was that it required that "significant" rulemakings -- those of less moment than "major" but still of enough impact to merit structured evaluation -- have their costs and benefits evaluated, with the evaluations reviewed in the Office of the Secretary and included in the public rulemaking docket. (In fact, every DOT rulemaking, whether major, significant, or other, must be evaluated to some extent before it can be issued.) The responsibility for overseeing the process was transferred to the General Counsel's office where it has resided ever since, with particular responsibility for policy and economic analysis review being in the OST policy office.

When the Reagan Administration took office, further developments were made. First, instead of "cost effectiveness" analysis under Executive Order 12044, we have full "cost-benefit analysis" under Executive Order 12291, a more comprehensive and useful way of testing a regulation's net worth to society. Second, we have a somewhat disinterested party -- the President's Task Force on Regulatory Relief -- overseeing our entire regulatory effort and identifying specific rulemakings needing additional review and analysis. (In this respect, the Task Force plays a role similar to that played by the Office of the Secretary in DOT's regulatory relief process; removed from the daily pressures of carrying out a specific program, it can bring a more objective perspective to regulation.) Third, we have a central coordinator -- the Office of Management and Budget -- for all the previously disjointed regulations of all the executive agencies. An example here may be helpful. In

the very early days of the Reagan Administration, DOT played a large role in the work of the Auto Task Force, which was chaired by Secretary Drew Lewis. One of the most illuminating aspects of that Task Force's work was the discovery of all of the agencies -- both executive and independent -- which issued and enforced regulations affecting the automobile industry. Among these were the Departments of Defense, Labor, and Transportation; the Federal Trade Commission; and the Environmental Protection Agency (EPA). Further, one of the most burdensome of these regulations was one from EPA which did not even apply specifically to the automobile industry; it concerned discharges into secondary waste water treatment facilities and affected many industries in our economy. Despite interagency regulatory liaison groups and regulatory calendars, agencies were still imposing costs in relative isolation from each other, with no requirement or convenient mechanism to coordinate their actions. That problem exists to a much smaller degree today because of OMB's role in reviewing agencies' rulemaking documents.

II. **Current Status and Recent Achievements of Regulatory Relief at the Department of Transportation.** Two attachments to my statement exemplify the Department of Transportation's commitment to regulatory relief. The first -- **Department of Transportation Regulatory Reform Achievements** -- provides an overview of the Department's approach to its responsibilities. It briefly discusses both our procedures for developing new regulations and our ongoing reviews of existing regulations. Although its orientation is general rather than specific, there is one specific point there that I wish to emphasize; as discussed at the bottom of page 3, DOT has surpassed by 16 percentage points OMB's goal for paperwork reduction for the years 1980 to 1983. The second attachment -- **Examples of Department of Transportation Regulatory Reform**

Accomplishments -- describes by DOT agency specific regulatory reform accomplishments which we have made by application of the procedures and reviews outlined in the first attachment.

I would now like to turn to the Department's response to the Subcommittee's questionnaire. Some of the more notable statistics from Table 1, Department-wide Summary, are these:

1. As we moved from the Ford to the Carter to the Reagan Administrations, we proposed fewer regulations and issued fewer regulations. (The 1981-82 figures include final rules issued during January 1981, the final month of the Carter Administration.)

2. On the average, we devote more resources to Regulatory Impact Analysis under Executive Order 12291 than we did to Regulatory Analysis under Executive Order 12044. (All dollar amounts are expressed in 1983 dollars and represent 1983 Federal employee pay levels.) This is not surprising, given the inherent differences between cost-effectiveness analysis (under Executive Order 12044) and full cost-benefit analysis (under Executive Order 12291).

3. Regulatory analysis was, and regulatory impact analysis now is, so useful in developing rulemakings that some DOT agencies performed these analyses on regulations that did not qualify as major under the applicable Executive Order.

III. Comments on Current Legislative Proposals on Regulatory Reform. In this final portion of my statement I would like to speak less to any specific bill -- deferring to OMB for the Reagan Administration position on H.R. 2327 -- and more to some general principles which I feel should guide the further development of regulatory relief or reform.

The first principle is flexibility. As I have discussed, the flexibility to try new approaches is very valuable in this area. Unvarying mandates for minimum comment periods, content of rulemaking files, and the like do not work because they too often impede an agency's ability to respond constructively and quickly to the wide array of problems which it must confront, including, most particularly in regard to a safety agency such as DOT, emergency situations.

The second principle is that there is a valuable difference between formal and informal rulemaking; too much engrafting of the strict procedures of formal rulemaking onto the process of informal rulemaking will negate the value of informal rulemaking as a device to formulate general policy. The best analogy I can devise of the difference between informal and formal rulemaking -- and of the dangers of confusing the two -- is the difference between the process which the Congress employs to decide that an act shall be a crime and the process which a court uses to decide that one specific person shall be found guilty of that crime. A trial does not make law and a legislative hearing -- such as this one today -- does not assess individual liability, either civil or criminal. The Congress -- and this country -- would be much the worse off if the legislative process had to conform to strict procedural rules such as apply to a trial so that its decisions can be reviewed by higher

authority. Similarly, the process for setting general policy -- informal rulemaking -- is properly different from the process for applying that policy to a specific person or determining whether a specific person shall be held accountable for violating that policy -- formal rulemaking. Attempts to blur those distinctions -- as by requiring that informal rulemaking include decisions on the record after opportunity for hearing and examination and cross-examination of witnesses -- are misguided.

The third principle is the need for finality. Competing interests now fight out the policy choices inherent in enacting legislation before the committees of Congress, then the choices inherent in implementing that legislation before administrative agencies. Ultimately, they have recourse to the courts. In addition, are they to have additional recourse to the same committees of Congress under a legislative veto construct? The American people consistently express their concern at what they perceive as an inability or unwillingness of their political leaders to make the difficult choices that circumstances often require. What will they think of an established policy to give every participant four bites of the same apple? Legislative oversight -- of which today's hearing is an integral part -- and the budget process are effective processes available to the Congress to assure that its will as expressed in legislation is carried out. We see little good -- and much potential for bad -- in formal legislative veto.

Mr. Chairman and Members of the Subcommittee, this concludes my formal statement. I would be happy to answer any questions which you may have.