"ADMINISTRATION" v. "PARTICIPATION"? THE "PUBLIC HEARING" IN THE URBAN TRANSPORTATION DECISION PROCESS

ROBERT W. CURRY*

CONTENTS

* Special Ass't. to Secretary, Executive Office of Transportation and Construction, Boston, Mass. A.B., *magna cum laude*, N.Y. Univ., 1969. J.D., Harvard Law School, 1972.

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."[1]

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 a "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 concommitant delegation of vast amounts of policy-making power to bureaucracies performing diverse societal tasks.[2] 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."

---

1. *Report to Governor Sargent, Part II,* Governor's Task Force on Transportation, Commonwealth of Massachusetts, June, 1970, p. 1.

2. See Samuel Huntington, *Congressional Responses to the Twentieth Century,* in Truman, ed., THE CONGRESS AND AMERICA'S FUTURE. (1965) at 23.

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 out lives.[3] 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."[4]

This phenomenon has several aspects. First, given that lawyers have often considered themselves reasonably equipped for the task of "arrangement-framing,"[5] 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.[6] 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

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 on 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."

4. See Arthur Miller, THE SUPREME COURT AND AMERICAN CAPITALISM (1968) pp. 104-109. See generally Martin Shapiro, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES (1967); Reich, *The Law of the Planned Society*, 75 Yale Law Journal 1227 (1966); Jeffery Jowell, *Law and Bureaucracy in the City: Welfare, Antidiscrimination Laws* and *Urban Renewal: A Study of the Limits of Legal Action*, S.J.D. Thesis, Harvard Law School, 1970 (unpublished).

5. Hart and Sacks, THE LEGAL PROCESS (tentative ed. 1958) pp. 198 206.

6. See Alan Altshuler, THE POLITICS OF THE FEDERAL BUREAUCRACY, (1968) Section IV-B, "The Responsible Exercise of Discretion."

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."[7]

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."[8] 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."[9]

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-

8. See James Q. Wilson, *The Urban Unease: "Community v. City"*, 12 THE PUBLIC INTEREST 25 (Summer, 1968); also, Edward Banfield, *Why Government Cannot Solve the Urban Problem*, in Meyerson, ed., THE CONSCIENCE OF THE CITY (Daedalus, Fall, 1968) 1231.

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"[10] 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.[11] 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 concommitant 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

10. See Norton Long, *The Local Community as an Ecology of Games*, in Banfield, ed. URBAN GOVERNMENT (1969) at p. 465.

11. See Dewees and Hines, *Mass Transit and the Highway Trust Fund*, a Report prepared under the auspices of the URBAN MASS TRANSPORTATION STUDY, Harvard Law School, 1970. Comments in the text on the significance of present financing policies are substantially based on this report.

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,[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.[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[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-

12. See generally Anthony Downs, INSIDE BUREAUCRACY (1967); Martin Shapiro, *supra* note 5; Charles Lindblom and David Braybrooke, STRATEGY OF DECISION (1963).

13. See Downs, *supra* note 13, at 44.

14. See Office of Management and Budget (formerly Bureau of the Budget) Circular No. A-95, July 24, 1969.

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.[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

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 articularted by Mr. Justice Holmes in the *Bi-Metallic* case[17]

> "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 service[18] 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 "rights" 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 consideration of highway location and design proposals before submission to the FHWA for approval" and "to provide a medium for free and open discussion designed to encourage early and amicable resolution of controversial 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), enumerated "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 Passett, 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*, ___ F. Supp. ___, (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-149682, 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.

21. 434 F2d 436, (1970)

Sisters Bridge comply with all applicable provisions of Title 23 of the United States Code."[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 individious 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.

---

22. The Three Sisters Bridge is a multi-lane span across the Potomoc 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 *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,[23] 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*,[24] 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[25] the plaintiffs urged non-compliance with the public hearings requirements. Yet, notwithstanding that the public hearing which was conducted involved certain procedural defects,[26] the court held that these

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.

24. 309 F.Supp. 1189; *aff'd* 432 F2d 1307; *rev'd* 402 U.S. 402 (1971).

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.[27]

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.[28] Language to the effect that the hearing is not to be

---

due to a malfunction of recording equipment. Individuals whose comments were not transcribed were later notified by certified mail of an opportunity to submit written statements and about forty persons did so.

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."

28. *See Nashville I-40 Steering Committee v. Ellington*, 387 F2d 179 (6th Cir., 1968); *Hoffman v. Stevens*, 177 F.Supp. 898 (D.C.Pa., 1959); *Linnecke v. Department of Highways*, 348 P2d 235 (1969) *Moskow* v. *Boston Redevelopment Authority*, 349 Mass. 1213 (1965). See also H. Report No. 91-1554, 91st Congress, 2nd Session, accompanying H.R. 19504, Federal-Aid Highway Act of 1970, p. 6. Cf. Sen. Report No. 91-1254, 91st Congress, 2nd Session, accompanying S. 4418, Federal-Aid Highway Act of 1970, pp. 5, 21-22.

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 indiscrimnately 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 doctranaire 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."[29] 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 incresed 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.[30] However, of agency action.[31] 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 Tennesese 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.

30. For example, see Sax, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971). Cf. *Comment: The Role of the Judiciary in Confrontation with Problems of Environmental Quality*, 17 U.C.L.A. L. Rev. 1070. But see Jaffe, *Book Review* of Sax, *supra* in 84 Harvard L. Rev. 1562 (1971).

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.[31] 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."[32] 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 GOVERNS (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 agency[34] 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 being "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.[35] 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

---

ing" an agency about private needs, and the process of developing "private influence" in the decision process, particularly if one concludes, as do I, that no administrator is going to take seriously into consideration private values about which he has been informed unless moved to do so via interaction with private groups having some ability to exercise "power" in a political influence process. One may observe that many of the same processes enhancing the objectively determined agency needs for information will augment private power in the administrative process.

35. See James Wilson, *Planning and Politics: Citizen Participation in Urban Renewal*, in Wilson, ed., URBAN RENEWAL: THE RECORD AND THE CONTROVERSY, (1966) at 407.

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 re 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 Wofford, *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

National Academy of Sciences Transportation Planning Study, March, 1971 (unpublished), p. 2.

38. Some prefer a rationalistic model; others react strongly against the "unreality" of that description by advocating the validity of "incrementalism." Still another has suggested the usefulness of "mixed scanning." See Braybrooke and Lindblom, *supra* note 13; Downs, *supra* note 13; Etzioni, *Mixed Scanning: A "Third" Approach to Decision-Making*, in Public Administration Review, Dec., 1967. Cf. Meyerson and Banfield, POLITICS, PLANNING AND THE PUBLIC INTEREST, (1955), p. 314.

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, ie., as initial forays leading possibly to a full-scale invasion of bureau policy territory.[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."[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,"[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-

41. See Downs, *supra* note 13 at 211.
42. *Id.* at 113.
43. See Davidoff, *The Planner as Advocate*, in Banfield, ed., *supra* note 10 at 544, 555.

ing of influence: "advocacy planning" represents a "repoliticization" of the planning process.[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.[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 transportation 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 reconciliation impossible short of total agency surrender.[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.[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.[48]

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

44. Lisa Peattie, *Reflections of an Advocate Planner,* in Banfield, ed., *supra* note 10 at 55 .

45. *Id.*

46. See 66 Columbia L. Rev. 485, 592.

47. See Jowell, *supra* note 4, at 312.

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, ie., reports, reviews, comments, etc. which are now required to be included at varying times during a multiphased 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 concommitantly, 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;"

50. A public, citizen-agency exchange can take several forms. See infra, pp. 57 at seq.

51. Executive Order No. 75, issued by His Excellency Governor Francis W. Sargent, Commonwealth of Mass., August 4, 1970.

> —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.[52] 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.

lieves might be interested in or affected by the proposal."[55] The notices should also be specific in advising the public as to what subjects shall be considered at the meeting and when and where relevent 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[56] 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"[57] 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]

58. See Lon Fuller, THE MORALITY OF LAW, (1969) pp. 170-177.

However, Professor Fuller has argued that the fact that adjudication must meet a test of rationality not applied to other decisional techniques[59] 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.[60] 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.

---

59. Others include democratic participation by voting and contractual participation via negotiation/bargaining. See Fuller, *The Forms and Limits of Adjudication*, unpublished paper presented to the Harvard Law School Faculty Roundtable on Jurisprudence, (1959).

60. See Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication*, 118 Univ. of Pa. L. Rev. 485.

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 gether 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.
   3. Recommendation/analysis of tribunal.**
   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.[61]

Transportation planning operates on several scales. Planning effectively at one level demands that certain, key decisinos 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 transportaton 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 forseeable 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.[62]

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

62. Effective participation at the project level should involve bargaining with respect to alternative program packages which consider (i) designs of a given, modal faiclity 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 *preplanning* 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[63]

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.[64] 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.

64. See Chapter 704, Acts of 1969, Commonwealth of Mass., *An Act Establishing a Governor's Cabinet.*

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 eminating 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.

****

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.