The original documents are located in Box 18, folder "1975/01/02 S1418 Herbert Hoover Education Building" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

APPROVED
JAN 2 - 1975

ACTION

THE WHITE HOUSE

WASHINGTON

Last Day: January 4

January 2, 1975

Poole 1/3

Jo Archibald 1/4

MEMORANDUM FOR THE PRESIDENT

FROM: KEN COLE

SUBJECT: Enrolled Bill S. 663 - Judicial Review of Decisions of Interstate Commerce Commission

Attached for your consideration is S. 663, sponsored by Senators Hruska and Burdick, which amends the United States Code with respect to judicial review of decisions of the Interstate Commerce Commission.

The proposed legislation would change the review of ICC orders in several respects. It would provide that:

-- Jurisdiction will be transferred from the district courts to the courts of appeals;

-- review by the Supreme Court will be by the discretionary writ of certiorari instead of as a matter of fact; and

-- multiple suits against the same ICC order will be eliminated and there will be a 60-day limitation for filing petitions with the court of appeals for review of ICC orders.

OMB recommends approval and provides additional background information in its enrolled bill report (Tab A).

Max Friedersdorf and Phil Areeda both recommend approval.

RECOMMENDATION

That you sign S. 663 (Tab B).

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

DEC 27 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 663 - Judicial Review of Decisions of Interstate Commerce Commission
Sponsors - Sen. Hruska (R) Nebraska and Sen. Burdick (D) North Dakota

Last Day for Action

January 4, 1975 - Saturday

Purpose

Amends the United States Code with respect to judicial review of decisions of the Interstate Commerce Commission.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	Approval
Administrative Office of the United States Courts	Approval
Interstate Commerce Commission	Would not recommend disapproval

Discussion

In 1913 Congress enacted the Urgent Deficiencies Act which established the current procedure for review of orders of the Interstate Commerce Commission (ICC). Under the Act orders of the ICC have been reviewed in the United States District Courts by panels of three judges, at least one of whom must be a judge of the court of appeals for the district. Appeals from the three-judge court lie directly to the Supreme Court as a matter of right. This outdated and cumbersome procedure has imposed an unnecessary burden on Federal judicial resources at the district, circuit and Supreme Court level.

In 1950 the Congress enacted the Judicial Review Act, which placed such appeals from the orders of some agencies in single-judge district courts, with further review to be conducted by the circuit courts of appeals. Appeals would go to the Supreme Court only upon the Supreme Court's approval of a writ of certiorari.

The enrolled bill would expand the procedures of the Judicial Review Act to cover the ICC. This would:

-- transfer to the court of appeals the orders now reviewed by a three-judge court;

-- limit review by the Supreme Court to cases taken by the discretionary writ of certiorari; and

-- limit multiple suits against a single agency order.

In addition, the enrolled bill would:

-- make other changes designed to simplify and streamline judicial review of ICC cases while retaining existing procedure in most material respects; and

-- continue the existing practice which allows the ICC to intervene as a party in interest before the Supreme Court as a matter of right, notwithstanding any objection by the Department of Justice.

In a report to the House Committee on the Judiciary in December 1974, the Department of Justice strongly recommended enactment of the enrolled bill.

Wilfred H Rommel

Assistant Director for
Legislative Reference

Enclosures

Interstate Commerce Commission
Washington, D. C. 20423

Office of the Chairman

December 26, 1974

Mr. W. H. Rommel
Assistant Director for Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Rommel:

I have your communication of December 23, 1974, requesting views on an enrolled bill, S. 663, which amends Title 28 of the United States Code to provide a new method for judicial review of decisions of the Interstate Commerce Commission.

On December 10, 1974, I testified before the Subcommittee on Crime of the House Committee on the Judiciary with respect to that legislation. For your information, I am enclosing a copy of my prepared statement which sets forth the views of the Commission in great detail. As you can see from the enclosure, we supported the legislation but expressed two reservations.

The first reservation was that we desired to either amend the bill or make sufficient legislative history to assure our right of independent action vis a vis the Department of Justice. Although the bill was not amended, the legislative history now clearly indicates we have retained that right. Therefore this issue is no longer a matter of concern.

Unfortunately the Committee did not see fit to amend the legislation to take care of our second concern, namely, the provision for optional venue in the United States Court of Appeals for the District of Columbia. We continue to feel that the inclusion of this provision is not in the public interest. However, I do not believe that this deficiency is so serious as to warrant Presidential veto.

Thank you for the opportunity to comment on this enrolled bill.

Sincerely yours,

George M. Stafford, Chairman
Legislative Committee
Vice Chairman Alfred T. MacFarland
Commissioner Robert C. Gresham
Commissioner A. Daniel O'Neal, Jr.

Enclosure

STATEMENT
OF
GEORGE M. STAFFORD
CHAIRMAN, INTERSTATE COMMERCE COMMISSION
BEFORE THE
SUBCOMMITTEE ON CRIME
HOUSE COMMITTEE ON THE JUDICIARY
ON
S. 663

December 10, 1974

Mr. Chairman, Members of the Subcommittee:

I am pleased to appear here today to offer the Commission's views on S. 663, as approved by the Senate. The bill would amend Title 28 of the United States Code, with respect to judicial review of decisions of the Interstate Commerce Commission. It passed the Senate on November 16, 1973.

Presently, judicial review of Interstate Commerce Commission orders is before U. S. district courts of three judges, at least one of whom must be a circuit judge, with the decisions of these three-judge courts reviewable by the Supreme Court by appeal, rather than by writ of certiorari.[1/] In general, S. 663 would change existing law to provide that the Commission's orders shall be reviewed by the U. S. courts of appeals, and that the courts of appeals' decisions, in turn, shall be reviewable by the Supreme Court by the discretionary writ of certiorari rather than by direct appeal as of right.

1/ 28 U.S.C. 1253, 1336, 1398, 2284, and 2321-25.

More specifically, S. 663 would subject the review of Interstate Commerce Commission orders to the Judicial Review Act of 1950 (Hobbs Act),[2/] which currently applies to review of decisions of certain other Federal agencies, including the Federal Communications Commission, Federal Maritime Commission and Atomic Energy Commission.

Before discussing specific provisions of S. 663, I should like to note that the Commission generally is in accord with the concept that its decisions be reviewed by the courts of appeals. In fact, revision of the law has been recommended to the Congress by the Commission since 1963. We fully agree with Chief Justice Burger and others who have commented that the three-judge court procedure is cumbersome and inefficient, and would add that a court of appeals is clearly a more appropriate forum for review of our orders than is a three-judge district court. Not only is the court of appeals the forum for review of orders of nearly all other Federal administrative agencies, but also various features of that review would correct what are presently problems in the three-judge district court procedure. For example, S. 663 would require that judicial review proceedings be instituted within 60 days after entry of the Commission's order, thereby providing a reasonable opportunity to seek review while protecting the integrity of transactions approved by the Commission against belated appeals. Under present law there is no such specific time limit, apart from the general statutes of limitations

2/ Ch. 158, Title 28, 28 U.S.C. 2341 et seq.

and concept of laches, within which review actions must be brought. In addition, providing for review in the courts of appeals would have the further effect of making applicable the provisions[3/] requiring the consolidation of multiple suits against a single order in one court and for the agency to provide the administrative record for the reviewing court. Under present law, there is no requirement that multiple suits be consolidated, and the burden is on the complainant to furnish the administrative record to the court.

For these and other reasons, the Commission believes that judicial review in the courts of appeals would be an improvement over the existing procedure, and it is for this reason that we have long supported the purposes of bills such as S. 663. Nevertheless, we are opposed to S. 663 as approved by the Senate and would urge its defeat unless materially revised.

3/ 28 U.S.C. 2112.

Control of Litigation

There are two specific features of S. 663 as approved by the Senate that occasion objections to the bill. As you are aware, section 8 of the Judicial Review Act,[4/] as amended, provides that "The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter," a provision which does not exist in the judicial review statutes presently applicable to the Commission. Present law provides that the United States shall be named as defendant,[5/] a provision which substantially corresponds to language in the Judicial Review Act to the same effect,[6/] and that "the Attorney General shall represent the Government in the actions."[7/] Our concern is that the first sentence of section 2348 is susceptible of the construction that the Commission would be precluded from taking a position in a case independent of and separate from that of the Department or, under section 2350, filing a petition for a writ of certiorari on its own.

This area is of the utmost importance to the Commission for in a few but significant cases the Department has declined to defend the Commission's orders in court. Sometimes this results from the intervention of some other Federal agency in opposition to the Commission's

4/ 28 U.S.C. 2348.
5/ 28 U.S.C. 2322.
6/ 28 U.S.C. 2344.
7/ 28 U.S.C. 2323.

position. A recent example of this was the recent Supreme Court case of Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade,[8] where the Secretary of Agriculture opposed the Commission's order and the Department elected to remain neutral at the district court level. In the Supreme Court, the Department did support the Commission in part, but not as to the merits of the agency's order.

On other occasions, the Justice Department's reluctance to join in the defense of Commission orders stems from the fact that the Department itself has participated in the Commission proceeding and does not agree with the Commission's ultimate decision. This may result from the Department's representation of the Government as a participant in the transportation process.[9]

But by far the most troublesome area in which the Justice Department may decline to defend Commission orders is where there are differences of opinion on questions of policy and statutory construction. Because carriers acting pursuant to the Commission's orders are generally immune from direct attack under antitrust laws, many of these differences in recent years have

8/ Nos. 72-214 and 72-433, Oct. Term 1972, decided June 18, 1973.
9/ Thus, in a recent district court case, United States v. United States and Interstate Commerce Commission, Civil Action No. 2624-70, D.D.C., decided December 12, 1971, the United States unsuccessfully pursued a claim against certain railroads before the Commission, and, on judicial review, declined in its role as statutory defendant to defend the Commission's order. The Commission ultimately won this case.

involved the issue of competition and its evaluation by the Commission in such complex areas as intermodal rate competition and railroad mergers.[10/]

It follows that the public interest is best served by guaranteeing the Commission the right which it presently has to defend its actions independent of the views of the Department of Justice. To accomplish this,

10/ A case in point is Louisville & Nashville R.R. Co. v. United States and Interstate Commerce Commission (Ingot Molds Case), 392 U.S. 571 (1968). In that case the Commission held that the National Transportation Policy admonition that the inherent advantages of carriers be preserved enabled it to invalidate a proposed railroad rate reduction that would have undermined a bargeline cost advantage, when measured by fully distributed cost. The Department confessed error and contended that this constituted a holding up of a rate to a particular level to protect the traffic of another mode of transportation, in violation of section 15a(3) of the Interstate Commerce Act. The Supreme Court sustained the position of the Commission over the continued objection of the Department of Justice.

In United States v. United States and Interstate Commerce Commission (Northern Lines Merger Case), 396 U.S. 49 (1970), the Commission authorized the merger of the Great Northern, Northern Pacific and Burlington Railroads, upon finding, among other things, that the economies and efficiencies the merger would yield would offset any disadvantages resulting from the loss of competition among the carriers. A suit to set aside the Commission's order was brought by the Department, which also pressed for a stay of consummation of the transaction pending judicial review. The Supreme Court again sustained the position of the Commission.

it is necessary to amend S. 663. The amendment should make it clear that the Commission has the right to defend its actions independent of the Department of Justice. This could be done by adding a new section to the bill which would amend the first sentence of section 2348 of title 28, United States Code, to read:

> The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter, except for a proceeding under paragraph (5) of section 2342 of this Title.

In the past, the Department of Justice has opposed provisions similar to the amendment we propose here on the ground that such changes would, in the Department's view, alter the Attorney General's responsibility for primary control of this class of litigation. This, however, disregards what in fact is the existing procedure. As a practical matter, the Attorney General does not now manage or control the defense of Commission orders. On the contrary, the almost universal practice is the defense of the Commission's orders to be assigned to an attorney in the Office of the General Counsel of the Commission. The answers, briefs and the other pleadings in most of the actions challenging the validity of Commission orders do bear the name of the respective United States Attorneys and that of the Assistant Attorney General in charge of the Antitrust Division and his attorneys.

However, this reflects only the fact that ordinarily the Department of Justice joins in the defense of the Commission's orders and subscribes to the position advanced by the Commission's counsel. In such cases, the role of the Department of Justice is largely passive and leaves to the Commission's counsel the responsibility for fashioning and presenting the written as well as oral arguments before the reviewing courts. At the Supreme Court level, the Solicitor General assumes a more active role in the litigation in cases where the Department and the Commission are in agreement, but even here there has previously been no question that the Commission has an independent right to pursue its own course of action in cases where there are differences between the two agencies.

At this point I hand the Subcommittee a copy of a letter on S. 663 by the Honorable Albert B. Maris, Senior U. S. Circuit Judge of the Court of Appeals for the Third Circuit. Judge Maris, as you will recall, was previously a member of the Judicial Conference and has been involved in questions of judicial review of agency orders for many years. The substance of his suggestion here is that the Commission should be named as respondent in any action, with a right to intervene reserved to the Attorney General. This is, of course, the opposite of present Commission practice and that authorized under the Judicial Review Act, where the United States is named as defendant or respondent and

the agency involved is permitted to intervene.[11/] Judge Maris' view is that the agency whose orders are under attack is the real party respondent in interest, while the Attorney General represents broader policy interests of the Government. While we do not here insist upon the specific amendment Judge Maris advocates, we do feel that his remarks underscore the importance of permitting the Commission to pursue a different course of action from that of the Attorney General at all stages of court review.

I am aware of the letter of Solicitor General Bork, referred to on pages 6 and 7 of the Senate Report (No. 93-500) accompanying the bill, in which he assures us of our right of independent access to the Supreme Court. However, as recently as this past August, one year after Mr. Bork's letter, Assistant Attorney General Robert G. Dixon, Jr., in charge of the Department's Office of Legal Counsel, in a speech to the American Bar Association in Honolulu stated, and I quote:

"The Department of Justice and OMB have favored centralization of litigation in the Attorney General. This insures consistency of government positions on similar issues and provides a pool of experienced litigators. Thus Congress has, in Title 28, placed litigation for the United States under the control of the Attorney General except as otherwise authorized by law. 28 U.S.C. 516-518. Of course, there always have been a certain number of

11/ 28 U.S.C. 2322, 2323, 2344.

agencies authorized to litigate certain matters on their own, but normally not in the Supreme Court,[16/] and others who would like to do so."

"16/ Under existing statutes, some independent regulatory agencies have been granted limited litigation authority. For example, the SEC and the FPC, in addition to possessing subpoena enforcement power, are empowered to bring an action in any federal district court to enjoin practices in violation of its governing statutes or any of its rules or regulation, 15 U.S.C. 77t(b), 79r; 16 U.S.C. 825m, 825f(c) . . .

"On the other hand, Supreme Court litigation is concentrated in the Solicitor General. One exception is the authority given to the Comptroller General to enforce the Presidential Election Campaign Fund Act of 1971, including review in the Supreme Court. 21 U.S.C. 9010(d). Also, although the statutory basis is not altogether clear, (see 28 U.S.C. 2323), as a matter of practice, the ICC has since 1913 represented itself before the Supreme Court."

Because of the foregoing attitude, the Commission urges adoption of the specific statutory direction that we suggest.

Optional Venue

As you know, under existing law, suit to review Commission actions can be brought only in the jurisdiction in which the petitioner resides or has his principal office. As approved by the Senate, S. 663 would change this and also allow for optional venue in the United States Court of Appeals for the District of Columbia.

When we testified before the Subcommittee of the Senate Judiciary Committee, we opposed such an approach, and the Department of Justice concurred. It was on that basis that we supported the legislation. However, when the Committee reported the bill and as the Senate passed it, the optional venue provision was reinstated.

The experience of the other administrative agencies, subject to Hobbs Act and similar review, has been that well above half of their court cases have been brought in the Washington, D.C. Circuit Court of Appeals. The Federal Maritime Commission in a ten year period, from 1965 to 1974, had 52 actions brought assailing the validity of its orders. Of these 37 were brought in the United States Court of Appeals for the District of Columbia Circuit. The Federal Communications Commission in a four year period, 1970 to 1973, was involved in 299 such suits, 237 of them maintained in the District of Columbia. The Atomic Energy Commission during the last year had 18 actions instituted against its order; of these 13 were brought before the United States Court of Appeals for the District of Columbia Circuit.

As a consequence, the United States Court of Appeals for the District of Columbia Circuit has tended to become a super administrative agency, seeming to conceive of itself as being better informed of the issues before them than the administrative agencies whose decisions it reviews, rather than limiting itself to exposing errors of law allegedly committed by the agencies.

I have no doubt that the judges of the Court of Appeals for this Circuit are no less concerned or conscientious than those of any other Circuit, and neither do I doubt that the result I perceive was not one of their deliberate devising.

Rather, I conceive of it as an inevitable result of the concentration of judicial review of administrative agency action in any single court.

I think there is merit in having all of the Circuit Courts of Appeals participate in the task of reviewing the decisions of the administrative agencies; I think there is virtue in encouraging divergent approaches to the resolution of the problems the administrative agencies address, even if at times the courts' opinions smack of a local rather than a national flavoring and if at other times the conflicts between them pose uncertainty and confusion, at least until the Supreme Court passes on the relevant question.

In turn, I think we who are identified with the administrative agencies would better be able to perform our tasks, be more effective in our responses to the Nation's needs if we had the benefit of the reactions of the

several Courts of Appeals rather than if we were accountable, for all practical purposes, to merely the United States Court of Appeals for the District of Columbia Circuit.

The suggestion advanced by a Washington lawyer prominent in practice before the Interstate Commerce Commission and partner in the law firm representing the National Industrial Traffic League that, unless there is optional venue in the District of Columbia, the carriers enjoy a litigation advantage that the shippers are denied, is wholly unfounded. There is only one class I railroad based here, and no truck or barge line, but there are scores of merchants or wholesalers that might be involved in litigation arising out of I.C.C. orders. Moreover, there are far more trade associations domiciled in Washington that include shippers in their membership than there are having carrier members; indeed, the Yellow Pages of the telephone directory go on for eight pages of listings, from the Aerospace Industries Association of America, Inc., to Zero Population Growth, Inc., both of which happen to be quite active in the transportation area. Therefore, access to the Washington, D.C. courts even in the absence of an optional venue provision is no less available to the shippers than the carriers.

Before closing, I would like to make one final observation with respect to optional venue. The volume of litigation arising from orders of the Commission is large. For example, in the last three years, 328 suits

have been filed in various district courts. Of these, 19 have been filed in the District of Columbia. Based upon the experience of other agencies, it seems reasonable to predict that if optional venue is retained a majority of suits involving Commission orders would be filed in the D.C. Circuit Court of Appeals, thus substantially increasing the workload of that Court. It is easy to envision that this increased volume would result in a backlog of cases involving orders of the Interstate Commerce Commission.

Therefore, we oppose S. 663 unless it is amended to delete optional venue in the District of Columbia.

We appreciate the opportunity to present these views today. We are concerned about the Court review of Commission orders and believe that, with the coming of various moves to abolish the three-judge district courts generally, this is a particularly good time to try once again to put review of our orders where it belongs. Accordingly, we would support S. 663, if the amendments we have recommended herein are adopted.

That concludes my formal statement. I and those members of the Commission's staff who are with me will attempt to answer any questions you may have.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
DIRECTOR

WILLIAM E. FOLEY
DEPUTY DIRECTOR

December 23, 1974

W. H. Rommel
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D. C.

Dear Mr. Rommel:

This is in reference to your request of December 23, 1974, transmitting for views and recommendations enrolled bill S. 663, an act "To improve judicial machinery by amending title 28, United States Code, with respect to judicial review of decisions of the Interstate Commerce Commission and for other purposes."

Inasmuch as this legislation carries out a recommendation of the Judicial Conference of the United States, Executive approval is recommended.

Sincerely,

William E. Foley
Deputy Director

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

DEC 24 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D.C. 20503

Dear Mr. Ash:

In compliance with your request, I have examined a facsimile of the enrolled bill S. 663, "To improve judicial machinery by amending title 28, United States Code, with respect to judicial review of decisions of the Interstate Commerce Commission."

A description of S. 663 and the reasons why the Department of Justice recommends Executive approval of the bill are contained in the attached copy of my December 9, 1974 letter to the Chairman of the House Committee on the Judiciary.

Sincerely,

W. Vincent Rakestraw
Assistant Attorney General

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

DEC 9 1974

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on S. 663, a bill to improve judicial machinery by amending Title 28, United States Code, with respect to judicial review of decisions of the Interstate Commerce Commission, and for other purposes, as passed by the Senate.

Judicial review of orders of the Interstate Commerce Commission is now based on the Urgent Deficiencies Act of 1913, 28 U.S.C. 1336, 2321-2325. A suit to set aside such an order, except one solely for the payment of money, is filed in the district court in which plaintiff has his residence or principal office and is heard by a panel of three judges, at least one of whom must be a judge of the court of appeals. There is direct appeal as a matter of right from the three-judge court to the Supreme Court. Since anyone adversely affected may sue to annul the order in the district in which he has his residence or principal office, there may be multiple suits attacking the same order in different districts. There is no express time limitation for filing such a suit. In these suits, which are against the United States, the Attorney General represents the government; however, the Commission and any other party in interest may intervene and be represented by their own counsel. Any party to the suit may continue to prosecute or defend it regardless of any action or nonaction of the Attorney General. (28 U.S.C. 1253, 1336, 1398, 2284, 2321-2325.)

S. 663 would place review of ICC orders, except those for the payment of money, under the Judicial Review Act of 1950, commonly known as the Hobbs Act (28 U.S.C. 2341 et seq.). This Act transferred to the court of appeals the jurisdiction of three-judge district courts to review certain orders of the Federal Maritime Commission, the Federal Communications Commission, and the Department of Agriculture. Notwithstanding the recommendation of the Judicial Conference, the 1950 statute as finally enacted did not apply to the Interstate Commerce Commission. The Atomic Energy Commission was placed under the Act in 1954.

S. 663 would thus change the review of ICC orders in several respects. Jurisdiction will be transferred from the district courts to the courts of appeals. Review by the Supreme Court will be by the discretionary writ of certiorari under 28 U.S.C. 1254 instead of as a matter of right. Multiple suits against the same ICC order will be eliminated and there will also be a 60-day limitation for filing petitions with the court of appeals for review of ICC orders.

The Department of Justice strongly recommends the enactment of this bill. The existing procedure has imposed a substantial burden on the judiciary which should be eliminated.

S. 663 would help to relieve the already full dockets of the federal district courts and reduce the need for district and circuit judges to assemble in special three-judge district court panels. Many of the judges assigned to these ICC cases -- particularly those from the courts of appeals -- were required to lay aside their regular duties to attend these hearings, frequently in distant locations within the circuit, because a full complement of three judges was not regularly assigned to the city in which the cases were filed. As far back as 1941, Mr. Justice Frankfurter described the three-judge procedure as "a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions." Phillips v. United States, 312 U.S. 246, 250 (1941).

The burden on the Supreme Court is comparable. It has to review a number of ICC cases that it ordinarily would decline to do under its certiorari jurisdiction. Because of the limited public importance of most of these cases, as well as the large number of cases involving constitutional or other important questions requiring greater attention, the Supreme Court decides most of them without full briefing and oral argument.

The bill will have several additional desirable consequences. First, it will eliminate multiple suits attacking a single ICC order brought in different locations before different courts. The Hobbs Act provides that the court of appeals in which the agency record is first filed has exclusive jurisdiction to determine the validity of the agency order (28 U.S.C. 2349(a)). Also, 28 U.S.C. 2112(a) requires consolidation of all petitions for review of an agency order in one circuit. Second, the bill will make applicable to the ICC the Judicial Review Act provision which requires that a petition attacking an agency order be filed within 60 days from its entry. (28 U.S.C. 2344)

Third, placing review of ICC orders under the Judicial Review Act will ease the procedural and financial burden on private parties challenging ICC orders by requiring the agency, instead of the plaintiff, to file the administrative record with the reviewing court. The added cost to the government will not be undue, since the new Federal Rules of Appellate Procedure allow the agency to file a certified list of the materials comprising the record in lieu of reproducing or filing the original papers. Fourth, a quorum of the court of appeals will be able to decide a case challenging an ICC order when one of the assigned judges has become incapacitated. See 28 U.S.C. 46(d). A quorum provision does not apply to three-judge district courts, and the Supreme Court has held that the participation of fewer than three judges renders the decision void. See Ayrshire Corp. v. United States, 331 U.S. 132 (1947). This becomes a particular hardship in the rare circumstance of the incapacitation or death of a judge after hearing but prior to decision.

Fifth, the legislation would make specific what is already assumed by litigants and the courts -- rules and regulations of the Commission are reviewed in the same judicial tribunal which has jurisdiction to review adjudicated orders of that agency. See American Trucking v. A.T. & S.F.R. Co., 387 U.S. 397 (1967). The jurisdictional provisions of existing law make no reference to rules and regulations, even though the procedure and the standards for judicial review of rules and orders differ materially. Despite the practice of the Commission to label the promulgation of a rule as an order, parties should not be left with uncertainty as to the nature and jurisdiction for review of the ICC's decisions.

In all other material respects, the existing procedure will continue under the new statute. Thus, actions will be filed against the United States, with the Attorney General managing and controlling the defense of the agency's order. This is in line with existing procedure applicable to the ICC and to agencies already governed by the Judicial Review Act, and simply retains a procedure that was strongly endorsed as critical to the "efficient performance of legal services within the Executive Branch" by the Hoover Commission in 1955. See Commission on Organization of the Executive Branch of the Government, Report on Legal Services and Procedures, p. 6 (1955). The ICC will retain its right to participate independently through all stages of judicial review. In addition, the court of appeals will have the same power as do the three-judge district courts to issue interlocutory orders to stay the effect of a challenged decision pending review on the merits. The only change would be that applications for interlocutory relief will have to be submitted to a three-judge panel of the court of appeals instead of merely one district judge prior to the empaneling of a three-judge court. In practice, this will not amount to any hardship since comparable applications are routinely referred to a panel of the court regularly assigned to hear motions on an expedited basis.

Finally, if review were placed under the Hobbs Act, as the bill provides, litigants and judges would have the benefit of an established and familiar procedure with a sizable body of interpretive case law that has served efficiently and with general approval for nearly

20 years. The Department believes that the time has come for implementation of the long-sought reform of the procedure for reviewing ICC orders. Our experience under the Hobbs Act demonstrates that this statute affords the most simple and effective method for achieving this reform while preserving the salutary relationship between the Attorney General and the Commission which Congress wisely provided for in the Urgent Deficiencies Act of 1913. The Solicitor General, in a letter of August 13, 1973 to Senator Burdick, specifically affirmed that the Interstate Commerce Commission would continue to have the same authority to represent itself independently in the Supreme Court under S. 663 that it now has under the Urgent Deficiencies Act.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's Program.

Sincerely,

(Signed) W. Vincent Rakestraw

W. Vincent Rakestraw
Assistant Attorney General

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 859

Date: December 27, 1974 Time: 7:00 p.m.

FOR ACTION: Geoff Shepard
Max Friedersdorf
Phil Areeda

cc (for information): Warren Hendriks
Jerry Jones

FROM THE STAFF SECRETARY

DUE: Date: Monday, December 30 Time: 1:00 p.m.

SUBJECT:

Enrolled Bill S. 663 - Judicial Review of Decisions of Interstate Commerce Commission

ACTION REQUESTED:

____ For Necessary Action

____ Prepare Agenda and Brief

__X__ For Your Comments

____ For Your Recommendations

____ Draft Reply

____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor West Wing

Sign the bill
P Friedersdorf OK

GERALD R. FORD

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipcte a delay in submitting the required material, please telephone the Staff Secretary immediately.

Warren K. Hendriks
For the President

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR: WARREN HENDRIKS

FROM: MAX L. FRIEDERSDORF

SUBJECT: Action Memorandum - Log No. 859
Enrolled Bill S. 663

The Office of Legislative Affairs concurs in the attached proposal and has no additional recommendations.

Attachment

To H. Nesbitt 12-27-74

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DEC 27 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 663 - Judicial Review of Decisions of Interstate Commerce Commission
Sponsors - Sen. Hruska (R) Nebraska and Sen. Burdick (D) North Dakota

Last Day for Action

January 4, 1975 - Saturday

Purpose

Amends the United States Code with respect to judicial review of decisions of the Interstate Commerce Commission.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	Approval
Administrative Office of the United States Courts	Approval
Interstate Commerce Commission	Would not recommend disapproval

Discussion

In 1913 Congress enacted the Urgent Deficiencies Act which established the current procedure for review of orders of the Interstate Commerce Commission (ICC). Under the Act orders of the ICC have been reviewed in the United States District Courts by panels of three judges, at least one of whom must be a judge of the court of appeals for the district. Appeals from the three-judge court lie directly to the Supreme Court as a matter of right. This outdated and cumbersome procedure has imposed an unnecessary burden on Federal judicial resources at the district, circuit and Supreme Court level.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 859

Date: December 27, 1974 Time: 7:00 p.m.

FOR ACTION: Geoff Shepard
Max Friedersdorf
Phil Areeda

cc (for information): Warren Hendriks
Jerry Jones

FROM THE STAFF SECRETARY

DUE: Date: Monday, December 30 Time: 1:00 p.m.

SUBJECT:

Enrolled Bill S. 663 - Judicial Review of Decisions of Interstate Commerce Commission

ACTION REQUESTED:

____ For Necessary Action

__X__ For Your Recommendations

____ Prepare Agenda and Brief

____ Draft Reply

__X__ For Your Comments

____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor West Wing

Approve
H.C.S.

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Warren K. Hendriks
For the President

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: 859

Date: December 27, 1974 Time: 2:00 p.m.

FOR ACTION: Geoff Shepard
Max Friedersdorf
Phil Areeda

cc (for information): Warren Hendriks
Jerry Jones

FROM THE STAFF SECRETARY

DUE: Date: Monday, December 30 Time: 1:00 p.m.

SUBJECT:

Enrolled Bill H. 663 - Judicial Review of Decisions of Interstate Commerce Commission

ACTION REQUESTED:

____ For Necessary Action
____ Prepare Agenda and Brief
__x__ For Your Comments
__x__ For Your Recommendations
____ Draft Reply
____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

Calendar No. 475

93D CONGRESS
1st Session

SENATE

REPORT
No. 93-500

JUDICIAL REVIEW OF DECISIONS OF THE INTERSTATE COMMERCE COMMISSION

NOVEMBER 14, 1973.—Ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 663]

The Committee on the Judiciary, to which was referred the bill (S. 663) to improve judicial machinery by amending title 28, United States Code, with respect to judicial review of decisions of the Interstate Commerce Commission, and for other purposes, having considered the same, reports the bill favorably with amendments [1] and recommends that the bill as amended do pass.

PURPOSE

S. 663 would modernize the cumbersome and outdated judicial machinery for review of orders of the Interstate Commerce Commission by placing review in the United States courts of appeals pursuant to the Judicial Review Act of 1950, commonly known as the Hobbs Act (28 U.S.C. 2341, et seq.).

Since 1913, with the adoption of the Urgent Deficiencies Act, orders of the Commission—except ones calling solely for the payment of money—have been reviewed in the United States district courts by panels of three judges, at least one of whom must be a judge of the court of appeals for the district. 28 U.S.C. 2321, 2325. Appeals from three-judge courts lie directly to the Supreme Court as a matter of right. S. 663 would transfer review to the circuit courts of appeals with further review in the Supreme Court by writ of certiorari under 28 U.S.C. 1254, 2350.

Thus, the legislation will eliminate a substantial burden on the judiciary by reducing the need for district judges and circuit judges to

[1] The text of the amendments and their purpose appear beginning at page 7 of this report.

assemble in special three-judge panels, by relieving the full dockets of the Federal district courts and by removing a considerable burden from the Supreme Court, which is now required to review by appeal all of these orders of the Commission.

Support for Reform

The replacement of the existing procedure with review by the courts of appeals, with further appeal by the discretionary writ of certiorari to the Supreme Court, has widespread support. At hearings of the Judicial Improvements Subcommittee on July 19, 1973, spokesmen for the Department of Justice indicated that the Department strongly favors passage of this bill. Also, the ICC supports transfer of these cases from the district courts to the courts of appeals. The Judicial Conference of the United States has repeatedly urged such a change.

Similar support has been expressed by the Administrative Conference of the United States, which in 1962 concluded that reasons for preserving present procedures were far less substantial than those arguing in favor of utilizing courts of appeals, stressing that the convening of three-judge district courts placed a heavy strain on judicial manpower, while direct appeals (instead of certiorari) added needlessly to the docket of the Supreme Court. In 1968, and subsequently, the Administrative Conference renewed its recommendation.

The American Bar Association supports the proposal. The House of Delegates at its meetings in 1970 and 1972 adopted resolutions which approved, in principle, legislation which would provide that ICC orders "be judicially reviewable in the United States courts of appeals, with Supreme Court review by writ of certiorari, instead of in the three-judge district courts with Supreme Court review on appeal therefrom as at present . . . ." A letter in support of this bill and a copy of the 1972 resolution are included in the record of the hearings.

The Study Group on the Caseload of the Supreme Court, chaired by Professor Freund of Harvard Law School, also recommended that judicial review of ICC cases be placed in the circuit courts under the Hobbs Act. In particular, they felt that review of these orders in the Supreme Court should be by writ of certiorari rather than by direct appeal from the three-judge district courts.

The Burden of Three-Judge Courts

Among other desirable consequences, S. 663 would help relieve the heavy burden on all three levels of the Federal judiciary. The already full dockets of the Federal district courts would be reduced, and the need for district and circuit judges to assemble in special three-judge panels in these cases would be eliminated. The burden imposed on the district and circuit judges by the existing procedure can be amply demonstrated. In the fiscal year 1972, 52 three-judge courts were convened throughout the country to review ICC orders. This was nearly one-sixth of all the three-judge courts convened that year.[2] Many of

[2] Three-judge courts are also presently required in certain constitutional cases in which an injunction is sought. Note, however, S. 271, which passed the Senate on June 14, 1973. It would repeal the requirement for three-judge courts except in reapportionment cases and where expressly required by act of Congress.

the judges assigned to these cases—particularly those from the courts of appeals—were required to lay aside their regular duties to attend these hearings. Moreover, each such hearing often requires one or more of the three judges to travel to a distant location within the circuit, because a full complement of three judges—one of whom must be a circuit judge—is not regularly assigned to the city in which a particular case was filed. As far back as 1941, Mr. Justice Frankfurter described the three-judge procedure as "a serious drain upon the Federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions." *Phillips* v. *U.S.*, 312 U.S. 246, 250 (1941). The Supreme Court has continued to stress the costs which the three-judge court provisions impose upon efficient operation of the lower Federal courts. See *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 92–93 (1960) (dissenting opinion of Frankfurter, J.); *Kesler* v. *Department of Public Safety*, 369 U.S. 153, 156–157 (1962); *Swift & Co.* v. *Wickham*, 382 U.S. 111, 128–129 (1965).

There likewise has been a comparable burden on the Supreme Court. For example, in its 1969 term, the Court disposed of 22 direct appeals from three-judge courts of decisions reviewing ICC orders. Because of the limited public importance of most of these cases, and the large number of cases involving constitutional or other important questions competing for attention, the Supreme Court decided all but four of the Interstate Commerce Commission cases without full briefing and oral argument. This trend has continued through the just-completed 1972 term, during which the Court disposed of 26 of these appeals while requiring briefing and oral argument in only 5.

In its recent report, the Freund Committee specifically recommended elimination of the three-judge court, and of direct review in cases challenging ICC orders. Their report correctly observed that "[r]eview of ICC orders by a three-judge court with direct appeal to the Supreme Court is an historical anomaly. At one time there was similar review for other agencies, but this was changed in 1950, and review of the other agencies was transferred to the Courts of Appeals. The reasons given for making this change for the other agencies are fully applicable to the ICC." (Report of the Study Group on the Caseload of the Supreme Court, 27 (Federal Judicial Center 1972).)

Procedural Improvements

While the committee believes that the benefits of S. 663 in terms of increased efficiency for all three levels of the Federal judicial system are paramount, there are several additional desirable consequences of the proposed bill.

First, it would eliminate the problem of multiple suits challenging a single ICC order in different locations before different courts. Under the existing venue statute, 28 U.S.C. 1398(a), a party may bring suit only in the district in which he resides or has his principal office, and there is no provision for consolidating multiple suits by transferring them into a single district. This has resulted in delay and duplication of effort. (Occasionally, different district courts reviewing the same order reach opposite results. See *Denver & R.G.W.R. Co.* v. *Union*

Pacific R. Co., 351 U.S. 321, 326–7 (1965). *New York Central R. Co.* v. *U.S.*, 200 F.Supp. 944, 950 (D.C. S.D.N.Y. 1961).) The Hobbs Act, on the other hand, provides that the court of appeals in which the agency record is first filed has exclusive jurisdiction to determine the validity of the agency order. (28 U.S.C. 2349(a).) In addition, 28 U.S.C. 2112(a) requires consolidation of all petitions for review of an agency order in one circuit. The procedural advantage is self-evident.

Second, under existing procedure there is no time limitation for challenging a Commission order. This would be corrected by the bill since the Hobbs Act requires that a petition for review be filed within 60 days from the date of service of the agency order; 28 U.S.C. 2344.

Third, the bill would also ease the procedural burden in challenging ICC orders by requiring the agency, instead of the party seeking review, to file the record of proceedings before the Commission with the reviewing court. The added costs to the Government would not be undue since the Federal Rules of Appellate Procedure, which took effect July 1, 1968, allow the agency to file a certified list of materials comprising the record rather than reproduce or file the original papers. F.R.App.P. 17(b).

Fourth, as a further advantage, the bill would permit a quorum of the court of appeals to decide a case challenging a Commission order when one of the assigned judges has become incapacitated; 28 U.S.C. 46(d). This is not true under the present procedure where the entire three-judge court must participate in the decision. *Ayrshire Collieries Corp.* v. *U.S.*, 331 U.S. 132 (1947). The present requirement becomes a particular hardship in the rare circumstances of the incapacitation or death of a judge after hearing but prior to decision.

Fifth, the bill would make specific what is already assumed by litigants and the courts—rules and regulations of the ICC are reviewed in the same judicial tribunal which has jurisdiction to review adjudicated orders of that agency. *American Trucking* v. *A.T. & S.F.R. Co.*, 387 U.S. 397 (1967). The jurisdictional provisions of existing law make no reference to "rules and regulations," even though the procedure and the standards for judicial review of rules and orders differ materially. Despite the ICC practice of labeling the promulgation of a rule as an order, the bill follows the preferable course of eliminating uncertainty as to the nature and jurisdiction for judicial review of the ICC decisions.

It should be noted that under the bill the courts of appeals would have the power, which now exists in the three-judge courts, to issue interlocutory orders to stay the effect of a challenged decision pending review on the merits; 28 U.S.C. 2349(b). The only change would be that applications for temporary restraining orders would be submitted to a panel of the court of appeals instead of merely to one district judge. This will not amount to a hardship in practice, since comparable applications are routinely referred to panels of the courts of appeals regularly assigned to hear motions on an expedited basis.

VENUE

Section 5 of the bill as originally introduced provided that suits seeking judicial review of ICC decisions could be brought only in the circuit where a petitioner resides or has his principal place of business.

This venue pattern would have differed from the general pattern of alternate venue provided in the judicial review of actions involving other agencies under the Hobbs Act and other legislation.[3] Under the Hobbs Act, a party seeking judicial review has a choice between filing his appeal in the circuit in which he resides or in the U.S. Circuit Court of Appeals for the District of Columbia.

The ICC has urged that venue should be restricted to the circuit in which the petitioner resides. Among other reasons, they stated that "acquainting the courts of appeals of the other circuits [other than the District of Columbia] with the work of the Interstate Commerce Commission and, in turn, having the Interstate Commerce Commission subject to the review of the other circuits has very beneficial results." Testimony of ICC General Counsel Fritz R. Kahn, Hearings on S. 663 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 93d Congress, 1st session 23 (1973). The answer to this suggestion is that optional venue will exist under the bill as reported and thus it can be expected that the various numbered circuits will have the opportunity to review ICC orders. It is important to remember that a party is not forced to seek review in the District of Columbia Circuit. If it is convenient for him, he may file an application for review in the circuit in which he resides.

The ICC also suggested that there would be "a great jamup of cases" in the District of Columbia Circuit if optional venue was provided which would constitute a burden on that court. Hearings on S. 663, supra, at 23. This concern seems to be without foundation since the total number of ICC appeals (52 cases in both 1972 and 1973) constitutes less than 5 percent of the 1,360 total filings in the District of Columbia Circuit Court. Annual Report of the Director of the Administrative Office of the U.S. Courts, Table B1 (1973). In addition, the District of Columbia Court Reform Act has had a significant impact on the number of filings in the District Court for the District of Columbia.[4] A proportionate reduction in the number of appeals filed in the circuit court can be expected in future years. The impact of those changes will be far more significant on the workload of the District of Columbia Circuit Court than any impact resulting from providing alternate venue.

The ICC has also suggested that restricting venue to the circuit court in which the party seeking review resides will be beneficial because the judge of that court will have knowledge of the relevant geographic and commercial conditions involved in the case. Of course, if the party seeking review feels that knowledge of local conditions is a significant factor, he may file his petition for review in the circuit in which he resides.[5]

[3] See, 28 U.S.C. § 2343 (Hobbs Act); 15 U.S.C. § 717r (FPC orders under the Natural Gas Act); 29 U.S.C. § 160 (NLRB orders relating to unfair labor practices); 15 U.S.C. § 771 (SEC orders under the Securities Act); 15 U.S.C. § 78y (SEC orders under the Securities Exchange Act); and 49 U.S.C. § 1463 (CAB orders).

[4] In the U.S. District Court for the District of Columbia, criminal filings fell 49 percent in 1973 from 2,608 to 1,537 and civil filings fell 25 percent from 2,006 to 1,503. Annual Reports of the Director of the Administrative Office of the U.S. Courts, Tables D1 and C3 (1972, 1973).

[5] It should be noted that, even when a petition is filed in the 9th Circuit, for example, a judge of that circuit from California may not be familiar with the particular geography of Montana in question. Similar situations may arise in other circuits. It can be expected that whenever geographical factors play a significant role in a case, both the hearing record and the Commission's order will describe those facts and indicate their relevancy.

After careful consideration, the committee has determined that no exception should be made in the case of the ICC to the general procedure provided for in the Hobbs Act. No strong arguments have been forwarded by the ICC to justify treatment of appeals from their orders different from that of other agencies. The committee believes that parties seeking appellate review of ICC orders should have the same choice regarding alternate venue that is available to parties before other agencies.

In all other material respects, the existing procedure will continue under the bill.

Control of Litigation: Responsibilities of the Attorney General and Rights of the Commission

Under this bill, actions would still be filed against the United States,[6] and the Attorney General would still be responsible for managing the litigation and controlling the defense of the ICC's orders. This accords with existing procedure applicable to the ICC and to agencies already governed by the Hobbs Act. The ICC, of course, would retain its right to participate independently through all stages of judicial review, since the Hobbs Act expressly preserves the right of other parties to "prosecute, defend, or continue the proceeding"—unaffected by the action or inaction of the Attorney General, 28 U.S.C. § 2349(b). The act further provides the ICC with a right to petition independently for Supreme Court review.

The ICC in its prepared statement, submitted for the hearings on this bill—and prepared prior to the receipt of the testimony of the Department of Justice—expressed concern about what it believed to be the understanding of the Department with respect to the Commission's right to participate independently at all stages of judicial review. In spite of the testimony of the Justice Department indicating that a full right to independent participation at all stages of review would continue under the bill, the General Counsel of the Commission expressed concern about the possible implications of certain statements made by representatives of the Department of Justice relating to the Solicitor General's "authorization" of agencies to petition the Supreme Court for review in cases controlled by the Hobbs Act.

In light of this concern, Senator Burdick, chairman of the Subcommittee on Improvements in Judicial Machinery, wrote a letter to the Attorney General seeking further clarification of this point. At the suggestion of the Attorney General, the Solicitor General himself replied, confirming that enactment of this bill would in no way lessen the Commission's current right to present its views to the Supreme Court independently and without specific approval from either the Solicitor General or the Department. In his reply, the Solicitor General emphasized:

> The Interstate Commerce Commission would continue to have the same authority to represent itself independently in the Supreme Court under S. 663 that it now has under the Urgent Deficiencies Act. Under the bill it will have the authority itself to file petitions for writs of certiorari, to oppose such petitions when filed against it, and to take any other action, including the preparation and submission of its own briefs and the presentation of oral argument, in any cases before the Supreme Court in which both it and the United States are parties. (Letter from Robert H. Bork, Solicitor General, to Senator Quentin N. Burdick, August 13, 1973.)

The committee agrees with the opinion expressed by the Solicitor General that the ICC will continue to have the opportunity to present its views independently and intends that the bill have this effect.

[6] The ICC suggested, without insisting, that the Commission be the named party respondent in actions seeking judicial review of ICC orders. However, the suggestion was made in connection with the Commission's strong interest in protecting the right to participate independently in all judicial proceedings. Since this bill clearly preserves that right, as the following text of this report indicates, the committee feels that the present and well-understood practice of naming the United States as the party respondent should be continued.

Costs

It is not expected that this legislation will impose any additional costs on the operations of the Government.

Conclusion

If review of ICC orders were placed under the Hobbs Act, litigants and judges would have the benefit of an established and familiar procedure with a sizable body of interpretive case law that has served efficiently and with general approval for nearly 20 years.

In conclusion, the committee believes that the time has come for implementation of this long-sought reform of the procedure for reviewing ICC orders. Experience under the Hobbs Act demonstrates that this bill affords the most simple and effective method for achieving this reform while preserving the salutary relationship between the Attorney General and the Commission that Congress wisely provided in the Urgent Deficiencies Act of 1913. The committee thus strongly supports passage of S. 663.

Amendments

1. On page 2, lines 5 through 10, strike the existing language and insert instead the following:

> (a) Except as otherwise provided by law, a civil action brought under section 1336(a) of this title shall be brought only in a judicial district in which any of the parties bringing the action resides or has its principal office.

2. On page 3, lines 1 through 7, strike the original section 5 and on page 3 renumber section 6 to read "section 5."

3. On page 4, lines 5 through 11, strike the original section 7 and on pages 4 and 5, renumber the remaining sections 8, 9, 10, 11 and 12 to read "6, 7, 8, 9 and 10."

4. On page 4, lines 21 and 22, strike the existing language and insert the following:

> Sec. 7. Sections 2324 and 2325 of title 28, United States Code, are hereby repealed.

5. On page 5, line 2, strike the following language:

> "2324. Stay of Commission's order."

Purpose of Amendments

1. This amendment is technical in nature. It merely rewords the bill's original revision of section 1398 of title 28, which provides for the venue of actions that will continue to be brought in the district courts upon enactment of this bill. The revised language states directly that the venue of any action brought under section 1336(a) in a district court shall lie only in a judicial district in which any of the parties bringing the action resides or has its principal office.

2. This amendment deletes the original section 5 of the bill, which would have amended section 2343 of title 28 to limit venue in cases involving judicial review of ICC orders to the circuit court in which one of the parties bringing the action resides or has its principal office. Since the committee decided that alternate venue should be provided in judicial review of these cases, no amendment to section 2343 is necessary. The result will be to bring the treatment of venue in ICC cases into conformity with that of other agencies under the Hobbs Act.

3. This amendment deletes section 7 of the bill. In the bill as introduced, that section amended section 2324 of title 28. As it applies to a stay of a Commission order, the section is unnecessary because, under the bill, the matter will be covered by section 2349(b) of this title. Section 2324 is repealed by the amended section 7 of this bill. The recommendation to repeal section 2324 was contained in similar prior legislation to repeal three-judge courts in ICC cases. See, S. 3597, section 7 (91st Cong.). Stays in cases brought in a district court under section 1336 of this title may be granted under existing law. See, 5 U.S.C. 705, and *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4 (1942).

The amendment also renumbers the present sections 8, 9, 10, 11 and 12 to read 6, 7, 8, 9 and 10, to conform with the deletion of the original section 7.

4. Section 7 of the bill (the original section 9) is amended to include the repeal of section 2324 for the reasons explained in connection with amendment number 3 above.

5. This is merely a conforming amendment and deletes, in the chapter analysis, reference to section 2324 which is repealed by section 7 of the bill, as amended.

Analysis of Sections, as Amended

Section 1 amend 28 U.S.C. 1336(a) by restricting the jurisdiction of the district courts to include only civil actions to enforce any order of the Commission and civil actions to enjoin or suspend, in whole or in part, orders of the Commission for the payment of money or the collection of fines, penalties, and forfeitures. Judicial review of other Commission actions (unless otherwise provided by act of Congress) is transferred to the circuit courts by Sec. 3 of this bill.

It should be noted that the words "set aside" and "annul" have been deleted from sec. 1336(a) as they are unnecessary surplussage. There is no intention to curtail either the exercise of judicial review of a Commission order or the power to modify, in whole or in part, or to nullify completely any such order.

Section 2 is a conforming amendment to 28 U.S.C. 1398(a) which specifies the district court venue of ICC judicial review actions. It

narrows the scope of that section to provide venue only for those actions that will continue to be brought in the district courts. Section 1398(a) has been reworded to state directly the actions to which it applies—civil actions involving ICC orders brought in the district courts under sec. 1336(a). Venue is restricted, as is presently provided, to a district in which one of the parties bringing the action resides or has its principal office.

The venue of cases transferred to the courts of appeals is governed by 28 U.S.C. 2343.

Section 3 amends the definition of the term "agency" contained in the Hobbs Act (28 U.S.C. 2341(3)(A)) to include the ICC.

Section 4 amends the provision of the Hobbs Act (28 U.S.C. 2342), which specifies the classes of cases and agencies embraced by the Hobbs Act, by adding a new paragraph (5) and including in it all rules, regulations, or final orders of the Commission made reviewable by 28 U.S.C. 2321 (which, in turn, is amended by sec. 5 of the bill).

Section 5, containing three subsections, confers jurisdiction on the courts of appeals over those cases which, under sec. 1 of this bill, are no longer within the jurisdiction of the district courts.

Subsection (a) provides that the courts of appeals shall have jurisdiction over any proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Commission and specifies that such proceedings shall be brought in the manner prescribed by the Hobbs Act (28 U.S.C. 2341–2351). The clause, "Except as otherwise provided by an Act of Congress," refers to actions to enforce, in whole or in part, any order of the ICC and to enjoin or suspend, in whole or in part, any order of the Commission for the payment of money or the collection of fines, penalties, and forfeitures whose jurisdiction remains in the district courts pursuant to sec. 1 of the bill.

It should be noted that the words "set aside" and "annul" have been deleted from sec. 1336(a) as they are unnecessary surplussage. There is no intention to curtail the exercise of judicial review of a Commission order and the power to modify, in whole or in part, or to nullify completely any such order.

Subsection (b) is identical to the first paragraph of the existing provisions of 28 U.S.C. 2321. It refers solely to actions for enforcement of orders of the Commission. The jurisdiction and procedure for these cases are not altered by the bill.

Subsection (c) is derived from the second paragraph of the existing provisions of 28 U.S.C. 2321 and, with the exception of a minor conforming amendment, effects no change in existing law. The provision for nationwide service of orders, writs, and process of the district courts is retained for those cases whose jurisdiction remains in the district courts.

Section 6 is an amendment to the first paragraph of 28 U.S.C. 2323, designed to retain the Attorney General's existing responsibility to represent the Government in all actions embraced by 28 U.S.C. 2321, as amended by sec. 5 of this bill.

Section 7 repeals sections 2324 and 2325 of title 28. Section 2324, dealing with a stay of a Commission order, is unnecessary since a section of the Hobbs Act, which these cases will be under upon enactment of this bill, already covers that matter. 28 U.S.C. 2349(b). The second section, 2325, now requires that an order of the Commission

can be enjoined only by a court of three judges. Since section 5 of the bill places jurisdiction of these cases in the circuit courts, it is necessary to repeal the existing language of 28 U.S.C. 2325.

Section 8 amends the table of sections of chapter 157 of title 28, U.S.C.

Section 9 is a conforming amendment to section 205(h) of the Motor Carrier Act, as amended (49 Stat. 550; 49 U.S.C. 305(g)), designed to eliminate any reference to the three-judge district court proceedings which have been abolished by section 1 of the bill and to conform the language to the changes affected by section 5.

Section 10 provides that the bill shall become effective only with respect to actions filed after the last day of the first month beginning after the date of enactment. Existing law shall govern all other actions until final disposition, including any appeals, that may be taken.

Changes in Existing Law Made by the Bill as Reported

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

§ 1336. Interstate Commerce Commission's orders

[(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.]

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.

* * * * * * *

§ 1398. Interstate Commerce Commission's orders

[(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside, in whole or in part, an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.]

(a) Except as otherwise provided by law, a civil action brought under section 1336(a) of this title shall be brought only in a judicial district in which any of the parties bringing the action resides or has its principal office.

* * * * * * *

Chapter 157—INTERSTATE COMMERCE COMMISSION ORDERS: ENFORCEMENT AND REVIEW

Sec.

2321. [Procedure generally; process] *Judicial review of Commission's orders and decisions; procedure generally; process.*
2322. United States as party.
2323. Duties of Attorney General; intervenors.
[2324. Stay of Commission's order.]
[2325. Injunction; three-judge court required.]

[§ 2321. Procedure generally; process]

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.]

§ 2321. Judicial review of Commission's orders and decisions; procedure generally; process

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in the cases and proceedings under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43), run, be served and be returnable anywhere in the United States.

* * * * * * *

§ 2323. Duties of Attorney General; intervenors

[The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49 in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.]

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43).

* * * * * * *

[§ 2324. Stay of Commission's order

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.]

[§ 2325. Injunction; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.]

* * * * * * *

§ 2341. Definitions. (3)(A)

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, *the Interstate Commerce Commission* or the Atomic Energy Commission, as the case may be;

* * * * * * *

§ 2342. Jurisdiction of court of appeals

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46; [and]

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42[.] *; and*

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title.

* * * * * * *

205(h) of the Motor Carrier Act, as amended (49 Stat. 550; 49 U.S.C. 305(g))

(g) Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title: *Provided*, That where the Commission, in respect to any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may [file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of Title 28] *commence appropriate judicial proceedings in a court of the United States under those provisions of law applicable in the case of proceedings to enjoin, set aside, annul, or suspend rules, regulations, or orders of the Commission*, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

* * * * * * *

○

93D CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
No. 93-1569

JUDICIAL REVIEW OF DECISIONS OF THE INTERSTATE COMMERCE COMMISSION

DECEMBER 11, 1974.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 663]

The Committee on the Judiciary, to which was referred the bill (S. 663) to improve judicial machinery by amending title 28, United States Code, with respect to judicial review of decisions of the Interstate Commerce Commission, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

S. 663 would modernize the cumbersome and outdated judicial machinery for review of orders of the Interstate Commerce Commission by placing review of such orders in the United States courts of appeals pursuant to the Judicial Review Act of 1950, commonly known as the Hobbs Act (28 U.S.C. § 2341, *et seq.*).

LEGISLATIVE HISTORY

S. 663 was introduced in the other body by Senators Hruska and Burdick on January 31, 1973. The bill was referred to the Senate Committee on the Judiciary, and the Subcommittee on Improvements in Judicial Machinery held a hearing on the legislation on July 19, 1973. That Subcommittee reported the bill to the full Committee on November 13; the Committee favorably reported S. 663 with two fundamental changes (*see* discussion of Senate Amendments, below) to the Senate, which passed it without opposition on November 16. The bill was referred to the House Committee on the Judiciary on November 27, 1973. On December 10, 1974, the Subcommittee on Crime held a hearing on S. 663 and reported the bill to the full Committee, where it passed by voice vote.

Need for This Legislation

One of the most significant tasks facing the Federal judiciary is the modernization of its machinery and procedures to keep pace with the needs of a rapidly changing and increasingly complex society. Sixty-eight years ago, the noted jurist Roscoe Pound told the American Bar Association that the work of the courts in the Twentieth Century could not be carried on with the machinery and methods of the Nineteenth Century. Before the same group in 1970, Chief Justice Warren Burger made this observation:

> If you will read Pound's speech, you will see at once that we did not heed his warning, and today, in the final third of this century, we are still trying to operate the courts with fundamentally the same basic methods, the same procedures and the same machinery he said were not good enough in 1906. In the supermarket age we are trying to operate the courts with cracker-barrel corner grocer methods and equipment—vintage 1900.

Nowhere is this assessment more applicable than in the area of judicial review of decisions of the Interstate Commerce Commission. Since 1913, with the adoption of the Urgent Deficiencies Act, orders of the Commission—except those calling solely for the payment of money—have been reviewed in the United States district courts by panels of three judges, at least one of whom must be a judge of the court of appeals for the circuit in which the district is located. 28 U.S.C. §§ 2321, 2325. Appeals from three-judge courts lie directly to the Supreme Court as a matter of right. Over the years, these provisions have imposed an unnecessary burden upon Federal judicial resources, both at the district and circuit and Supreme Court levels. In 1950, the Hobbs Act superseded the Urgent Deficiencies Act as to judicial review of orders of many administrative agencies, making decisions of the Secretary of Agriculture, the Federal Communications Commission, the Federal Maritime Commission, and the Atomic Energy Commission reviewable by the circuit courts of appeals, with final appeal to the Supreme Court made contingent upon the granting of a petition for writ of *certiorari*. 28 U.S.C. §§ 1254, 2342. Similar provisions elsewhere in the Code subject orders of other agencies to review in like manner. The current result is that the Commission is the only remaining Federal agency whose decisions are routinely reviewed by statutorily-empanelled three-judge courts with expedited appeal to the Supreme Court as a matter of right.

That the reform embodied in S. 663 carries widespread—indeed, virtually unanimous—support cannot be subjected to question. Four years ago, a Committee of the Judicial Conference of the United States recommended that the Conference draft and send to Congress legislation doing away with three-judge courts altogether, primarily because the historical justification for their importance had evaporated and the burden they imposed upon judicial resources could not be otherwise justified. In its Proceedings, the Conference declared that—

> not only has the work of the district and circuit courts been affected by the need to supply judges for three-judge courts but also the direct appeal from such courts to the Supreme Court has often brought that Court into the review process prematurely and placed the burden of direct appeal on the Supreme Court in many cases where the winnowing process of appellate review at the circuit court level would have better served the interests of justice.

A review of cases decided on direct appeal under the Urgent Deficiencies Act illustrates the point. In 1941, Mr. Justice Frankfurter described the three-judge procedure as "a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. All but a few of the great metropolitan areas are such regions." *Phillips* v. *United States*, 312 U.S. 246, 250 (1941). The Supreme Court has continued to stress the costs which the three-judge court provisions impose upon efficient operations of the lower federal courts. See *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 92–93 (dissenting opinion of Frankfurter, J.); *Kesler* v. *Department of Public Safety*, 369 U.S. 153, 156–57 (1962); *Swift & Co.* v. *Wickham*, 382 U.S. 111, 128–29 (1965). Addressing the problem of review of ICC orders in this manner, the Study Group on the Caseload of the Supreme Court, chaired by Professor Paul Freund of the Harvard Law School, concluded that:

> [r]eview of ICC orders by a three-judge court with direct appeal to the Supreme Court is an historical anomaly. At one time there was similar review for other agencies, but this was changed in 1950, and review of the other agencies was transferred to the courts of appeals. 5 U.S.C. § 1032. The reasons given for making this change for the other agencies are fully applicable to the ICC.
>
> The provision for review by the Supreme Court in its discretion upon certiorari, as in the review of other cases from circuit courts of appeals, will save the members of the Supreme Court from wasting their energies on cases which are not important enough to call for their attention, and enable them to concentrate more fully on cases which require their careful consideration. By allowing certiorari, the Court * * * will not any longer be required automatically to hear cases which are not of a nature to merit its consideration. (H. Rept. No. 2122, p. 4, and S. Rep. No. 2618, p. 5, 81st Cong., 2d Sess. (1950).)
>
> In recent years the Commission has abandoned its opposition to similar treatment for its orders. Proposals for review of ICC orders by the courts of appeal, supported by the Judicial Conference of the United States and, so far as we know, opposed by no one, have been before Congress for several years. Since many ICC cases are not of sufficient importance to require review by the Supreme Court, it is clear that the unique treatment of ICC orders is a burden on the Supreme Court that can no longer be justified. *Report of the Study Group on the Caseload of the Supreme Court*, pp. 27–28 (1972).

The records compiled by the Senate Subcommittee and the Subcommittee on Crime indicate that the Study Group's conclusion is

correct. S. 663, as passed by the Senate, carries the enthusiastic support of the Judicial Conference, the Administrative Office of the United States Courts, the Department of Justice (*see* Departmental Communication, below), the House of Delegates of the American Bar Association, the American Association of Railroads, the National Industrial Traffic League and practitioners before the Interstate Commerce Commission. In addition, the Commission itself supports the general concept of appellate reform, confining its objections to the two basic amendments added by the Senate Judiciary Committee (*see* discussion of Senate Amendments, below).

Evidence given in testimony before both Houses further reveals the extent of the inconvenience imposed on the judiciary by this process. Over the last eleven fiscal years, the number of three-judge courts convened to hear appeals from ICC decisions has always constituted a substantial percentage of the total number of such courts empanelled. For example, in fiscal 1973 review of ICC orders made up one-sixth of all such appeals taken; in the fiscal year just completed, 51 of 249 of all such cases, or over 25 percent, were so styled—despite the fact that total petitions sent to three-judge courts declined 22.2 percent. The extent to which expedited appeals to the Supreme Court from the decisions of these specially-constituted panels has taken precious time and effort away from other, more meritorious applications is comparably clear. In its 1969 term, the Court disposed of 22 direct appeals. Because of the limited public importance of most of these cases, and the large number of cases involving constitutional and other important cases competing for attention, the Supreme Court decided all but four of the Interstate Commerce Commission cases without full briefing and oral argument. This trend continued through the October 1972 Term, just completed last year, during the Court disposed of 26 of these appeals while requiring briefing and oral argument in only five.

Under the current appeals procedures, there are mechanical disadvantages that further impose upon already-strained judicial personnel and materiel:

(1) Under the existing venue statute, 28 U.S.C. § 1398(a), a party may bring suit only in the district in which he resides or has his principal office, and there is no provision for consolidating multiple suits by transferring them into a single district. Not only has this resulted in a multiplicity of suits challenging the same ICC order, which cannot effectively be consolidated except through extraordinary efforts at interjurisdictional cooperation, *New York Central R. Co.* v. *United States*, 200 F. Supp. 944, 950 (D.C.S.D.N.Y.). *cf. Penn Central Merger Cases*, 389 U.S. 486, 497, n.2 (1968), different district courts reviewing the same ICC order have reached different results. *See Denver & R.G.W.R. Co.* v. *Union Pacific R. Co.*, 351 U.S. 321, 326–27.

(2) Under existing procedure there is no time limitation for challenging a Commission order. The problems that inhere in this lack of limitation are self-evident.

(3) Currently, the part seeking review carries a substantial procedural burden as he is required to file the record of proceedings before the Commission with the reviewing court. This practice results in considerable cost and inconvenience to petitioning parties, particularly those at great distances from Washington, D.C.

(4) According to existing procedure, *see Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132 (1947), the entire three-judge court must participate in the final decision of the panel, once the determination has been made by a district judge that the case is appropriately before a three-judge panel who then notifies the Chief judge of the circuit of his decision. If he agrees, the Chief Judge designates two other judges to sit with the first, one of whom must be a judge of the United States Court of Appeals for the circuit. The panel members so designated must then shunt aside all their other judicial work, since the hearing to which they have been assigned takes precedence and must be assigned to the earliest practicable day, and travel to another place to decide one case. The time and expense consumed by this aspect of the process was attested to by Chief Judge Harry Phillips of the United States Court of Appeals for the Sixth Circuit, before the Subcommittee on Crime:

> The present procedure requires that ICC cases be heard only in the district of the residence or principal office of any of the parties bringing the action. Unless the case is filed in a city where a circuit judge and two district judges reside, a waste of judicial resources and public funds results because of the travel time that is necessary to convene the three-judge panel, frequently requiring overnight accommodations and meals while in travel status.
>
> To sit on a three-judge district court in Memphis, the round trip traveling distance from my home in Nashville is 444 miles; in Knoxville, 394 miles; in Chattanooga, 248 miles; in Greenville, Tennessee, 406 miles; in Louisville, Kentucky, 360 miles; and in Lexington, Kentucky, 466 miles. This requires one or more days of my time away from other duties.
>
> Travel time is an even more acute problem in those circuits encompassing larger geographical areas.

This view was affirmed by Judge J. Skelly Wright of the D. C. Circuit, Chairman of the Judicial Conference's Committee on Federal Jurisdiction, in his testimony before this Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice earlier this year; Judge Wright makes an additional point:

> [T]he three judges must get together in some way. And in many areas of the country, these three judges will live in different parts of the circuit so that the first burden encountered in the convening of three-judge courts is the actual travel of the judges to the place where the trial will be held.
>
> Then, of course, there is the problem of trying a case with three judges. There is a problem of ruling on evidence as the swift-moving events of the trial take place. Three judges cannot act with the same incisiveness as the single judge in making trial rulings as necessary during the trial of a fast-moving case.

(5) There is a disparity between the assumptions of all concerned with the litigation of ICC orders and present jurisdictional provisions of existing law. Although rules and regulations of the ICC are treated as reviewable in the same judicial tribunal that has jurisdiction to

review adjudicated orders of the agency, there is no such reference made to "rules and regulations" in those provisions, even though the procedure and the standards for judicial review of rules and orders differ materially.

In summary, after a careful review of testimony and evidence presented, the Committee could find no basis in fact or in law for perpetuating the archaic and cumbersome procedure for judicial review of ICC decisions that the United States Code presently provides.

Senate Amendments

The Committee is fully in accord with the two basic amendments to S. 663 by the Senate Judiciary Committee and concurs in the rationale advanced for those amendments:

Amendment to Provide for Alternative Venue

S. 663, as originally introduced, provided that suits seeking judicial review of ICC decisions could be brought only in the circuit where a petitioner resides or has his principal place of business. Because this venue pattern would have differed from the general pattern of alternative venue provided in the judicial review of actions involving other agencies under the Hobbs Act and other legislation, the Senate Committee felt compelled to amend S. 663 as introduced to satisfy the need for conformity. (*See* S. Rept. No. 93–500, pp. 5–7.) Under the current provisions of the Hobbs Act, a party seeking judicial review has a choice between filing his appeal in the circuit in which he resides or in the United States Circuit Court of Appeals for the District of Columbia. 28 U.S.C. § 2343.

Before the Subcommittee on Crime, as they had done in the other body, representatives of the Commission opposed the inclusion of such a provision for optional venue. Chairman George Stafford predicted ". . . as an inevitable result . . . the concentration of judicial review of administrative agency action" in one court, namely the D.C. Court of Appeals, citing "the experience of the other administrative agencies, subject to Hobbs Act and similar review . . ." Chairman Stafford further intimated that:

> [a]s a consequence, the United States Court of Appeals for the District of Columbia Circuit has tended to become a super administrative agency, seeming to conceive of itself as being better informed of the issues before them than the administrative agencies whose decisions it reviews, rather than limiting itself to exposing errors of law allegedly committed by the agencies.

Thus, the Commission argued, the better approach to "acquainting the courts of appeals of the other circuits with the work of the Interstate Commerce Commission and, in turn, having the Interstate Commerce Commission subject to the review of the other circuits" is to foreclose the option altogether, despite the uniform nature of present practice in judicial review of orders of all other Federal agencies. Another recurring fear of the Commission is that the ensuing concentration of litigation in the D.C. Circuit would have the effect of "substantially increasing the workload of that Court", resulting in "a backlog of cases involving the Interstate Commerce Commission."

The Committee could not find sufficient merit in either contention to justify denying petitioners the option afforded them under the terms of the Hobbs Act to file their appeals in either their home circuits or in the D. C. Circuit. In the first place, the Committee feels it would merely perpetuate the "historical anomaly" that the Congress seeks to correct by this legislation if it accorded the ICC an exception that runs counter to existing practice, without the most persuasive evidence. It would make little sense to legislatively "encourage" petitioners to seek relief with more diversity by proscription. Secondly, it seems inappropriate to ask the Congress to settle by legislation what may be a difference of opinion strictly on policy grounds. If the Commission believes that the Court of Appeals for the D. C. Circuit has exceeded its proper authority in fulfilling its prescribed functions, the Committee suggests that the more appropriate remedy lies in vigorous action before the bar of the Supreme Court. In short, the Committee cannot agree that the benefits of fixing the *loci* for appeal outside the D. C. Circuit, whatever they may be, outweigh the interests of statutory conformity and the convenience of prospective petitioners. As to the concern over the Circuit's future workload, there are two indicia of the status of filings there that undercut the Commission's contention. First, the total number of ICC appeals heard by three-judge courts during the past fiscal year pursuant to existing procedures—51—would comprise less than 5 percent of the total number, civil and criminal—1,243—of cases filed in the Circuit last year. Furthermore, as noted above, the total number of ICC appeals filed yearly has tended to remain constant over the last eleven fiscal years. Second, as a result of the District of Columbia Court Reform Act, civil and criminal filings in the United States District Court for the District of Columbia have dropped dramatically. Between fiscal years 1973 and 1974, criminal cases commenced fell 37.5 percent, and civil cases begun dropped 28.7 percent. A proportionate reduction in the number of appeals filed in the circuit court can be expected in future years. The impact of those changes will be far more significant on the workload of the D. C. Circuit Court than any impact resulting from providing alternative venue.

Finally, the Committee is not totally convinced that, even were the D. C. Circuit to become the preferred *locus* for filing appeals from ICC orders, the consequences that would flow from such a situation would be as dire as the Commission has predicted. As has already been pointed out, one of the disadvantages of the present system is its capacity for disparity, even in the interpretation of the same order; clearly, the goal of the Hobbs Act is nothing if not to encourage uniformity. Consequently, the Committee does not look as balefully upon the acquisition of expertise by a particular circuit court in the review of orders of administrative agencies, although it would certainly abhor the usurpation of delegated executive authority by the Third Branch, as does the Commission. Moreover, convenience is a natural advantage of allowing appeals to be taken in the circuit that also enjoys the presence of the agency's headquarters. Since, if this bill is enacted into law, the Government would bear the cost of furnishing the record of proceedings before the Commission, some saving might result if not all such records were required to be sent outside this jurisdiction with agency counsel to follow.

Control Over Litigation

The Commission has asked both houses to guarantee, through an additional section to this bill, its right to continue to defend its actions at all levels of judicial review independent of the discretion of the Attorney General of the United States. Under S. 663, actions would still be filed against the United States, and the Attorney General would still be responsible for managing the litigation and controlling the defense of the ICC's orders. 28 U.S.C. §§ 2321, 2348. This accords with existing procedure applicable to the ICC and to agencies already governed by the Hobbs Act. In essence, the Commission is concerned that, through the Attorney General's—or the Solicitor General's, at the Supreme Court level—discretionary use of his statutory power to "control the interests of the Government," they may suffer a damaging qualification of their right to independent representation which they now enjoy as a matter of right. It is true that chapter 157 is materially amended to vest exclusive jurisdiction for review of ICC orders in the circuit courts of appeals, and that this amendment may be read to nullify the protections for independent defense on the part of the ICC and other interested parties as contained in the second and fourth paragraphs of section 2323. The Committee is quick to point out, however, that virtually identical language appears in chapter 158, which pertains to the jurisdiction of the courts of appeals and the procedure for discretionary review by the Supreme Court. In section 2348 of that chapter, the section that confers the responsibility for and control of litigation in which the United States is a named party, says:

> The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, *may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.* emphasis added.

Section 2350, pertaining to review in the Supreme Court either by certification or *certiorari*, further provides that

> [t]he United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

The Commission cited cases allegedly to illustrate that their right to independent representation had somehow been obfuscated by Department action or inaction; the fact remains that, in every case cited, the Commission was accorded its right to be heard wholly apart from the decisions of either the Attorney General or the Solicitor General as to the direction of appellate litigation. What did appear from these citations was a pattern of disagreement regarding jurisdictional policy and on the merits of particular claims, which varied from case to case.

Once again, the Committee weighed the merits of the Commission's suggestions against the interests to be served by the legislation as drafted. It should be noted here that the ICC was asking that the named party in such cases be the agency rather than the Government

of the United States or, at the very least, that the Attorney General be denied responsibility for and control over litigation involving only the Commission's orders. Objectively, it is difficult to perceive what more the Congress may do legislatively to protect the rights of the ICC and aggrieved parties to be shielded from possible caprice without squandering the primary intent of this legislation. The ICC may still intervene at any level as a matter of right and be represented by its counsel; the Attorney General may not terminate a proceeding over their objection; they may initiate, take part in or continue proceedings without regard to the action or inaction of the Attorney General; and they may file a petition for writ of *certiorari* if they so choose. 28 U.S.C. §§ 2348, 2350. The intent and meaning of the above provisions could not be stated with more clarity; the Committee is compelled to conclude that any such activity on the part of the Attorney General, resulting in an abridgement of any of those statutorily-conferred rights and whether witting or unwitting, would be subject to challenge in court. Moreover, the ICC has twice received the assurance of the Department, through the Solicitor General and the Assistant Attorney for Legislative Affairs (*see* Letters attached to this Report), that the independence of the Commission with respect to its ability to participate fully and equally in all proceedings affecting its interests will not be tampered with in any respect. The Committee might feel constrained to consider such an exception if the evidence disclosed any complained-of wrongdoing or indicated that there might be a reasonable expectation of such conduct in the future; it can find neither in its record or in the one built in the other body. To ask for protection where it is found not to exist or to be wanting is one thing; to ask for an exception that is not only unnecessary but may serve to defeat the primary intentions behind the suggested reform is quite another.

Conclusion

If review of ICC orders were placed under the Hobbs Act, the following procedural advantages would obtain:

(1) The problem of multiple suits challenging a single ICC order in different locations before different courts, would disappear and with it the potential for disparity in results and nonuniformity. S. 663 amends sections 1336(a) and 2321 of title 28, United States Code, to vest exclusive jurisdiction in the court of appeals in which the agency record is first filed;

(2) Bringing the orders of the ICC under the Hobbs Act would subject petitioners to the requirement that a petition for review must be filed within 60 days from the date of service of the agency order. 28 U.S.C. § 2344;

(3) S. 663, by so amending the Code to include the ICC in the more familiar review process, would ease the procedural burden that inheres in challenge by requiring the Commission, rather than the party seeking review, to file the record of proceedings before the Commission with the reviewing court. The added costs to the Government would not be undue since the Federal Rules of Appellate Procedure, which took effect July 1, 1968, allow the agency to file a certified list of materials comprising the record rather than reproduce or file the original papers. F.R.App.P. 17(b);

(4) As a further advantage, the bill would permit a quorum of the court of appeals to decide a case challenging a Commission order when one of the assigned judges hase become incapacitated. 28 U.S.C. 46(d). As it is now, if such an occurrence takes place, the proceedings must be halted if they have proceeded beyond hearing but no decision has yet been reached by the specially-convinced panel; and

(5) The bill would make specific what is now only assumed by all litigants and courts—that the rules and regulations of the ICC are reviewed in the same judicial tribunal which has jurisdiction to review adjudicated orders of that agency.

More importantly, in terms of assuring the overall efficiency of practice and the ultimate end of uniformity, litigants and judges would have the benefit of an established and familiar procedure with a sizeable body of interpretive case law that has served efficiently and with general approval for nearly 20 years.

To sum up, the Committee thinks it indisputable that the benefits to be reaped by enacting this reform are as enormous as they are obvious. Savings in time that judges spend on the road between points alone will be substantial. In any event, the hazards that the Commission foresees—which are speculative, at best—pale into insignificance, when placed in the balance and tested against the need for these amendments.

The Committee believes that the time has come for implementation of this long-desired elimination of what has come to be an anachronism in the law governing judicial review of administrative agency decisions. In supporting the enactment of S. 663, the Committee also intends to demonstrate that the Congress, as a partner in seeing that the Federal judiciary has the methods and equipment it needs to operate in the Twentieth Century, has a responsibility to exercise future vigilance to prevent mechanisms from becoming anachronisms.

Cost of This Legislation

It is not expected that this legislation will impose any additional costs on the operations of the Government.

Committee Approval

By voice vote, a quorum being present, the Committee on the Judiciary voted on December 10, 1974 to favorably recommend S. 663 without amendment to the full House.

Departmental Communication

The following is attached to this Report and made a part thereof:

Department of Justice,
Washington, D.C., December 9, 1974

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

Dear Mr. Chairman: This is in response to your request for the views of the Department of Justice on S. 663, a bill to improve judicial machinery by amending Title 28, United States Code, with respect to

judicial review of decisions of the Interstate Commerce Commission, and for other purposes, as passed by the Senate.

Judicial review of orders of the Interstate Commerce Commission is now based on the Urgent Deficiencies Act of 1913, 28 U.S.C. 1336, 2321–2325. A suit to set aside such an order, except one solely for the payment of money, is filed in the district court in which plaintiff has his residence or principal office and is heard by a panel of three judges, at least one of whom must be a judge of the court of appeals. There is direct appeal as a matter of right from the three-judge court to the Supreme Court. Since anyone adversely affected may sue to annul the order in the district in which he has his residence or principal office, there may be multiple suits attacking the same order in different districts. There is no express time limitation for filing such a suit. In these suits, which are against the United States, the Attorney General represents the government; however, the Commission and any other party in interest may intervene and be represented by their own counsel. Any party to the suit may continue to prosecute or defend it regardless of any action or nonaction of the Attorney General. (28 U.S.C. 1253, 1336, 1398, 2284, 2321–2325.)

S. 663 would place review of ICC orders, except those for the payment of money, under the Judicial Review Act of 1950, commonly known as the Hobbs Act (28 U.S.C. 2341 *et seq.*). This Act transferred to the court of appeals the jurisdiction of three-judge district courts to review certain orders of the Federal Maritime Commission, the Federal Communications Commission, and the Department of Agriculture. Notwithstanding the recommendation of the Judicial Conference, the 1950 statute as finally enacted did not apply to the Interstate Commerce Commission. The Atomic Energy Commission was placed under the Act in 1954.

S. 663 would thus change the review of ICC orders in several respects. Jurisdiction will be transferred from the district courts to the courts of appeals. Review by the Supreme Court will be by the discretionary writ of certiorari under 28 U.S.C. 1254 instead of as a matter of right. Multiple suits against the same ICC order will be eliminated and there will also be a 60-day limitation for filing petitions with the court of appeals for review of ICC orders.

The Department of Justice strongly recommends the enactment of this bill. The existing procedure has imposed a substantial burden on the judiciary which should be eliminated.

S. 663 would help to relieve the already full dockets of the federal district courts and reduce the need for district and circuit judges to assemble in special three-judge district court panels. Many of the judges assigned to these ICC cases—particularly those from the courts of appeals—were required to lay aside their regular duties to attend these hearings, frequently in distant locations within the circuit, because a full complement of three judges was not regularly assigned to the city in which the cases were filed. As far back as 1941, Mr. Justice Frankfurter described the three-judge procedure as "a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions." *Phillips* v. *United States*, 312 U.S. 246, 250 (1941).

The burden on the Supreme Court is comparable. It has to review a number of ICC cases that it ordinarily would decline to do under its certiorari jurisdiction. Because of the limited public importance of most of these cases, as well as the large number of cases involving constitutional or other important questions requiring greater attention, the Supreme Court decides most of them without full briefing and oral argument.

The bill will have several additional desirable consequences. First, it will eliminate multiple suits attacking a single ICC order brought in different locations before different courts. The Hobbs Act provides that the court of appeals in which the agency record is first filed has exclusive jurisdiction to determine the validity of the agency order (28 U.S.C. 2349(a)). Also, 28 U.S.C. 2112(a) requires consolidation of all petitions for review of an agency order in one circuit. Second, the bill will make applicable to the ICC the Judicial Review Act provision which requires that a petition attacking an agency order be filed within 60 days from its entry. (28 U.S.C. 2344.)

Third, placing review of ICC orders under the Judicial Review Act will ease the procedural and financial burden on private parties challenging ICC orders by requiring the agency, instead of the plaintiff, to file the administrative record with the reviewing court. The added cost to the government will not be undue, since the new Federal Rules of Appellate Procedure allow the agency to file a certified list of the materials comprising the record in lieu of reproducing or filing the original papers. Fourth, a quorum of the court of appeals will be able to decide a case challenging an ICC order when one of the assigned judges has become incapacitated. See 28 U.S.C. 46(d). A quorum provision does not apply to three-judge district courts, and the Supreme Court has held that the participation of fewer than three judges renders the decision void. See *Ayrshire Corp.* v. *United States*, 331 U.S. 132 (1947). This becomes a particular hardship in the rare circumstance of the incapacitation or death of a judge after hearing but prior to decision.

Fifth, the legislation would make specific what is already assumed by litigants and the courts—rules and regulations of the Commission are reviewed in the same judicial tribunal which has jurisdiction to review adjudicated orders of that agency. See *American Trucking* v. *A.T. & S.F.R. Co.*, 387 U.S. 397 (1967). The jurisdictional provisions of existing law make no reference to rules and regulations, even though the procedure and the standards for judicial review of rules and orders differ materially. Despite the practice of the Commission to label the promulgation of a rule as an order, parties should not be left with uncertainty as to the nature and jurisdiction for review of the ICC's decisions.

In all other material respects, the existing procedure will continue under the new statute. Thus, actions will be filed against the United States, with the Attorney General managing and controlling the defense of the agency's order. This is in line with existing procedure applicable to the ICC and to agencies already governed by the Judicial Review Act, and simply retains a procedure that was strongly endorsed as critical to the "efficient performance of legal services within the Executive Branch" by the Hoover Commission in 1955. See

Commission on Organization of the Executive Branch of the Government, *Report on Legal Services and Procedures*, p. 6 (1955). The ICC will retain its right to participate independently through all stages of judicial review. In addition, the court of appeals will have the same power as do the three-judge district courts to issue interlocutory orders to stay the effect of a challenged decision pending review on the merits. The only change would be that applications for interlocutory relief will have to be submitted to a three-judge panel of the court of appeals instead of merely one district judge prior to the empaneling of a three-judge court. In practice, this will not amount to any hardship since comparable applications are routinely referred to a panel of the court regularly assigned to hear motions on an expedited basis.

Finally, if review were placed under the Hobbs Act, as the bill provides, litigants and judges would have the benefit of an established and familiar procedure with a sizable body of interpretive case law that has served efficiently and with general approval for nearly 20 years. The Department believes that the time has come for implementation of the long-sought reform of the procedure for reviewing ICC orders. Our experience under the Hobbs Act demonstrates that this statute affords the most simple and effective method for achieving this reform while preserving the salutary relationship between the Attorney General and the Commission which Congress wisely provided for in the Urgent Deficiencies Act of 1913. The Solicitor General, in a letter of August 13, 1973 to Senator Burdick, specifically affirmed that the Interstate Commerce Commission would continue to have the same authority to represent itself independently in the Supreme Court under S. 663 that it now has under the Urgent Deficiencies Act.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's Program.

Sincerely,

W. VINCENT RAKESTRAW,
Assistant Attorney General.

The Letter of the Solicitor General referred to above is reproduced at this point for informational purposes:

OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C., August 13, 1973.

Hon. QUENTIN N. BURDICK,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BURDICK: This is in reply to your letter of July 25, 1973, to the Attorney General, in which you refer to statements by former Solicitor General Griswold and Deputy Assistant Attorney General Wilson that the Solicitor General had "authorized" the Interstate Commerce Commission and the Federal Maritime Commission to represent themselves in the Supreme Court in cases where they were taking a position contrary to that of the United States. You asked whether you correctly understood that their statements were not intended to suggest that without such authorization those agencies could not themselves have appeared.

Your understanding of the purport of the statements is correct. The Interstate Commerce Commission would continue to have the same authority to represent itself independent in the Supreme Court under S. 663 that it now has under the Urgent Deficiencies Act. Under the bill it will have the authority itself to file petitions for writs of certiorari, to oppose such petitions when filed against it, and to take any other action, including the preparation and submission of its own briefs and the presentation of oral argument, in any cases before the Supreme Court in which both it and the United States are parties.

Sincerely,

ROBERT H. BORK,
Solicitor General.

STATEMENT OF GEORGE M. STAFFORD, CHAIRMAN, INTERSTATE COMMERCE COMMISSION, DECEMBER 10, 1974

Mr. Chairman, members of the subcommittee, I am pleased to appear here today to offer the Commission's views on S. 663, as approved by the Senate. The bill would amend Title 28 of the United States Code, with respect to judicial review of decisions of the Interstate Commerce Commission. It passed the Senate on November 16, 1973.

Presently, judicial review of Interstate Commerce Commission orders is before U.S. district courts of three judges, at least one of whom must be a circuit judge, with the decisions of these three-judge courts reviewable by the Supreme Court by appeal, rather than by writ of certiorari.[1] In general, S. 663 would change existing law to provide that the Commission's orders shall be reviewed by the U.S. courts of appeals, and that the courts of appeals' decisions, in turn, shall be reviewable by the Supreme Court by the discretionary writ of certiorari rather than by direct appeal as of right. More specifically, S. 663 would subject the review of Interstate Commerce Commission orders to the Judicial Review Act of 1950 (Hobbs Act),[2] which currently applies to review of decisions of certain other Federal agencies, including the Federal Communications Commission, Federal Maritime Commission and Atomic Energy Commission.

Before discussing specific provisions of S. 663, I should like to note that the Commission generally is in accord with the concept that its decisions be reviewed by the courts of appeals. In fact, revision of the law has been recommended to the Congress by the Commission since 1963. We fully agree with Chief Justice Burger and others who have commented that the three-judge court procedure is cumbersome and inefficient, and would add that a court of appeals is clearly a more appropriate forum for review of our orders than is a three-judge district court. Not only is the court of appeals the forum for review of orders of nearly all other Federal administrative agencies, but also various features of that review would correct what are presently problems in the three-judge district court procedure. For example, S. 663 would require that judicial review proceedings be instituted within 60 days after entry of the Commission's order, thereby providing a reasonable opportunity to seek review while protecting the integrity

[1] 28 U.S.C. 1253, 1336, 1398, 2284, and 2321–25.
[2] Ch. 158, Title 28, 28 U.S.C. 2341 *et seq.*

of transactions approved by the Commission against belated appeals. Under present law there is no such specific time limit, apart from the general statutes of limitations and concept of laches, within which review actions must be brought. In addition, providing for review in the courts of appeals would have the further effect of making applicable the provisions [3] requiring the consolidation of multiple suits against a single order in one court and for the agency to provide the administrative record for the reviewing court. Under present law, there is no requirement that multiple suits be consolidated, and the burden is on the complainant to furnish the administrative record to the court.

For these and other reasons, the Commission believes that judicial review in the courts of appeals would be an improvement over the existing procedure, and it is for this reason that we have long supported the purposes of bills such as S. 663. Nevertheless, we are opposed to S. 663 as approved by the Senate and would urge its defeat unless materially revised.

CONTROL OF LITIGATION

There are two specific features of S. 663 as approved by the Senate that occasion objections to the bill. As you are aware, section 8 of the Judicial Review Act,[4] as amended, provides that "The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter," a provision which does not exist in the judicial review statutes presently applicable to the Commission. Present law provides that the United States shall be named as defendant,[5] a provision which substantially corresponds to language in the Judicial Review Act to the same effect,[6] and that "the Attorney General shall represent the Government in the actions." [7] Our concern is that the first sentence of section 2348 is susceptible of the construction that the Commission would be precluded from taking a position in a case independent of and separate from that of the Department or, under section 2350, filing a petition for a writ of certiorari on its own.

This area is of the utmost importance to the Commission for in a few but significant cases the Department has declined to defend the Commission's orders in court. Sometimes this results from the intervention of some other Federal agency in opposition to the Commission's position. A recent example of this was the recent Supreme Court case of *Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade*,[8] where the Secretary of Agriculture opposed the Commission's order and the Department elected to remain neutral at the district court level. In the Supreme Court, the Department did support the Commission in part, but not as to the merits of the agency's order.

On other occasions, the Justice Department's reluctance to join in the defense of Commission orders stems from the fact that the Department itself has participated in the Commission proceeding and does not agree with the Commission's ultimate decision. This may result

[3] 28 U.S.C. 2112.
[4] 28 U.S.C. 2348.
[5] 28 U.S.C. 2322.
[6] 28 U.S.C. 2344.
[7] 28 U.S.C. 2323.
[8] Nos. 72–214 and 72–433, Oct. Term 1972, decided June 18, 1973.

from the Department's representation of the Government as a participant in the transportation process.[9]

But by far the most troublesome area in which the Justice Department may decline to defend Commission orders is where there are differences of opinion on questions of policy and statutory construction. Because carriers acting pursuant to the Commission's orders are generally immune from direct attack under antitrust laws, many of these differences in recent years have involved the issue of competition and its evaluation by the Commission in such complex areas as intermodal rate competition and railroad mergers.[10]

It follows that the public interest is best served by guaranteeing the Commission the right which it presently has to defend its actions independent of the views of the Department of Justice. To accomplish this, it is necessary to amend S. 663. The amendment should make it clear that the Commission has the right to defend its actions independent of the Department of Justice. This could be done by adding a new section to the bill which would amend the first sentence of section 2348 of title 28, United States Code, to read:

> The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter, except for a proceeding under paragraph (5) of section 2342 of this Title.

In the past, the Department of Justice has opposed provisions similar to the amendment we propose here on the ground that such changes would, in the Department's view, alter the Attorney General's responsibility for primary control of this class of litigation. This, however, disregards what in fact is the existing procedure. As a practical matter, the Attorney General does not now manage or control the defense of Commission orders. On the contrary, the almost universal practice is the defense of the Commission's orders to be assigned to an attorney in the Office of the General Counsel of the Commission. The answers, briefs and the other pleadings in most of the actions challenging the validity of Commission orders do bear the name of the respective United States Attorneys and that of the Assistant Attorney General in charge of the Antitrust Division and his attorneys. However, this reflects only the fact that ordinarily the Department of Justice joins in the defense of the Commission's orders and subscribes

[9] Thus, in a recent district court case, *United States* v. *United States and Interstate Commerce Commission*, Civil Action No. 2624–70, D.D.C., decided December 12, 1971, the United States unsuccessfully pursued a claim against certain railroads before the Commission, and, on judicial review, declined in its role as statutory defendant to defend the Commission's order. The Commission ultimately won this case.

[10] A case in point is *Louisville & Nashville R.R. Co.* v. *United States and Interstate Commerce Commission* (Ingot Molds Case), 392 U.S. 571 (1968). In that case the Commission held that the National Transportation Policy admonition that the inherent advantages of carriers be preserved enabled it to invalidate a proposed railroad rate reduction that would have undermined a bargeline cost advantage, when measured by fully distributed cost. The Department confessed error and contended that this constituted a holding up of a rate to a particular level to protect the traffic of another mode of transportation, in violation of section 15a(3) of the Interstate Commerce Act. The Supreme Court sustained the position of the Commission over the continued objection of the Department of Justice.

In *United States* v. *United States and Interstate Commerce Commission* (Northern Lines Merger Case), 396 U.S. 49 (1970), the Commission authorized the merger of the Great Northern, Northern Pacific and Burlington Railroads, upon finding, among other things, that the economies and efficiencies the merger would yield would offset any disadvantages resulting from the loss of competition among the carriers. A suit to set aside the Commission's order was brought by the Department, which also pressed for a stay of consummation of the transaction pending judicial review. The Supreme Court again sustained the position of the Commission.

to the position advanced by the Commission's counsel. In such cases, the role of the Department of Justice is largely passive and leaves to the Commission's counsel the responsibility for fashioning and presenting the written as well as oral arguments before the reviewing courts. At the Supreme Court level, the Solicitor General assumes a more active role in the litigation in cases where the Department and the Commission are in agreement, but even here there has previously been no question that the Commission has an independent right to pursue its own course of action in cases where there are differences between the two agencies.

At this point I hand the Subcommittee a copy of a letter on S. 663 by the Honorable Albert B. Maris, Senior U.S. Circuit Judge of the Court of Appeals for the Third Circuit. Judge Maris, as you will recall, was previously a member of the Judicial Conference and has been involved in questions of judicial review of agency orders for many years. The substance of his suggestion here is that the *Commission* should be named as respondent in any action, with a right to intervene reserved to the Attorney General. This is, of course, the opposite of present Commission practice and that authorized under the Judicial Review Act, where the United States is named as defendant or respondent and the agency involved is permitted to intervene.[11] Judge Maris' view is that the agency whose orders are under attack is the real respondent in interest, while the Attorney General represents broader policy interests of the Government. While we do not here insist upon the specific amendment Judge Maris advocates, we do feel that his remarks underscore the importance of permitting the Commission to pursue a different course of action from that of the Attorney General at all stages of court review.

I am aware of the letter of Solicitor General Bork, referred to on pages 6 and 7 of the Senate Report (No. 93–500) accompanying the bill, in which he assures us of our right of independent access to the Supreme Court. However, as recently as this past August, one year after Mr. Bork's letter, Assistant Attorney General Robert G. Dixon, Jr., in charge of the Department's Office of Legal Counsel, in a speech to the American Bar Association in Honolulu stated, and I quote:

> The Department of Justice and OMB have favored centralization of litigation in the Attorney General. This insures consistency of government positions on similar issues and provides a pool of experienced litigators. Thus Congress has, in Title 28, placed litigation for the United States under the control of the Attorney General except as otherwise authorized by law. 28 U.S.C. 516–518. Of course, there always have been a certain number of agencies authorized to litigate certain matters on their own, but normally not in the Supreme Court,[16] and others who would like to do so.

[11] 28 U.S.C. 2322, 2323, 2344.

[16] Under existing statutes, some independent regulatory agencies have been granted limited litigation authority. For example, the SEC and the FPC, in addition to possessing subpoena enforcement power, are empowered to bring an action in any federal district court to enjoin practices in violation of its governing statutes or any of its rules or regulation, 15 U.S.C. 77t(b), 79r; 16 U.S.C. 825m, 825f(e) . . .

On the other hand, Supreme Court litigation is concentrated in the Solicitor General. One exception is the authority given to the Comptroller General to enforce the Presidential Election Campaign Fund Act of 1971, including review in the Supreme Court, 21 U.S.C. 9010(d). Also, although the statutory basis is not altogether clear, (see 28 U.S.C. 2323), as a matter of practice, the ICC has since 1913 represented itself before the Supreme Court.

Because of the foregoing attitude, the Commission urges adoption of the specific statutory direction that we suggest.

OPTIONAL VENUE

As you know, under existing law, suit to review Commission actions can be brought only in the jurisdiction in which the petitioner resides or has his principal office. As approved by the Senate, S. 663 would change this and also allow for optional venue in the United States Court of Appeals for the District of Columbia.

When we testified before the Subcommittee of the Senate Judiciary Committee, we opposed such an approach, and the Department of Justice concurred. It was on that basis that we supported the legislation. However, when the Committee reported the bill and as the Senate passed it, the optional venue provision was reinstated.

The experience of the other administrative agencies, subject to Hobbs Act and similar review, has been that well above half of their court cases have been brought in the Washington, D.C. Circuit Court of Appeals. The Federal Maritime Commission in a ten year period, from 1965 to 1974, had 52 actions brought assailing the validity of its orders. Of these 37 were brought in the United States Court of Appeals for the District of Columbia Circuit. The Federal Communications Commission in a four year period, 1970 to 1973, was involved in 299 such suits, 237 of them maintained in the District of Columbia. The Atomic Energy Commission during the last year had 18 actions instituted against its order; of these 13 were brought before the United States Court of Appeals for the District of Columbia Circuit.

As a consequence, the United States Court of Appeals for the District of Columbia Circuit has tended to become a super administrative agency, seeming to conceive of itself as being better informed of the issues before them than the administrative agencies whose decisions it reviews, rather than limiting itself to exposing errors of law allegedly committed by the agencies.

I have no doubt that the judges of the Court of Appeals for this Circuit are no less concerned or conscientious than those of any other Circuit, and neither do I doubt that the result I perceive was not one of their deliberate devising.

Rather, I conceive of it as an inevitable result of the concentration of judicial review of administrative agency action in any single court.

I think there is merit in having all of the Circuit Courts of Appeals participate in the task of reviewing the decisions of the administrative agencies; I think there is virtue in encouraging divergent approaches to the resolution of the problems the administrative agencies address, even if at times the courts' opinions smack of a local rather than a national flavoring and if at other times the conflicts between them pose uncertainty and confusion, at least until the Supreme Court passes on the relevant question.

In turn, I think we who are identified with the administrative agencies would better be able to perform our tasks, be more effective in our

responses to the Nation's needs if we had the benefit of the reactions of the several Courts of Appeals rather than if we were accountable, for all practical purposes, to merely the United States Court of Appeals for the District of Columbia Circuit.

The suggestion advanced by a Washington lawyer prominent in practice before the Interstate Commerce Commission and partner in the law firm representing the National Industrial Traffic League that, unless there is optional venue in the District of Columbia, the carriers enjoy a litigation advantage that the shippers are denied, is wholly unfounded. There is only one class I railroad based here, and no truck or barge line, but there are scores of merchants or wholesalers that might be involved in litigation arising out of I.C.C. orders. Moreover, there are far more trade associations domiciled in Washington that include shippers in their membership than there are having carrier members; indeed, the Yellow Pages of the telephone directory go on for eight pages of listings, from the Aerospace Industries Association of America, Inc., to Zero Population Growth, Inc., both of which happen to be quite active in the transportation area. Therefore, access to the Washington, D.C. courts even in the absence of an optional venue provision is no less available to the shippers than the carriers.

Before closing, I would like to make one final observation with respect to optional venue. The volume of litigation arising from orders of the Commission is large. For example, in the last three years, 328 suits have been filed in various district courts. Of these, 19 have been filed in the District of Columbia. Based upon the experience of other agencies, it seems reasonable to predict that if optional venue is retained a majority of suits involving Commission orders would be filed in the D.C. Circuit Court of Appeals, thus substantially increasing the workload of that Court. It is easy to envision that this increased volume would result in a backlog of cases involving orders of the Interstate Commerce Commission.

Therefore, we oppose S. 663 unless it is amended to delete optional venue in the District of Columbia.

We appreciate the opportunity to present these views today. We are concerned about the Court review of Commission orders and believe that, with the coming of various moves to abolish the three-judge district courts generally, this is a particularly good time to try once again to put review of our orders where it belongs. Accordingly, we would support S. 663, if the amendments we have recommended herein are adopted.

That concludes my formal statement. I and those members of the Commission's staff who are with me will attempt to answer any questions you may have.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted

is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

* * * * * * *

Part IV.—JURISDICTION AND VENUE

* * * * * * *

Chapter 85.—DISTRICT COURTS; JURISDICTION

* * * * * * *

§ 1336. Interstate Commerce Commission's orders.

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, [enjoin, set aside, annul or suspend,] in whole or in [any] part, any order of the Interstate Commerce Commission, *and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.*

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

* * * * * * *

§ 1398. Interstate Commerce Commission's orders.

[(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.]

(a) Except as otherwise provided by law, a civil action brought under section 1336(a) of this title shall be brought only in a judicial district in which any of the parties bringing the action resides or has its principal office.

(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue.

* * * * * * *

Part VI.—PARTICULAR PROCEEDINGS

* * * * * * *

Chapter 157.—INTERSTATE COMMERCE COMMISSION ORDERS; ENFORCEMENT AND REVIEW

Sec.

[§ 2321. Procedure generally; process.]

§ 2321. Judicial review of Commission's orders and decisions; procedure generally; process.

(a) Except as otherise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, [suspend, enjoin, annul or set aside] in whole or in part, any order of the Interstate Commerce Commission other than for [the] payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in [this section] *subsection (b)* and in the cases and proceedings under [sections 20, 23, and 43 of Title 49,] *section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43)*, run, be served[,] and be returnable anywhere in the United States.

* * * * * * *

§ 2323. Duties of Attorney General; intervenors.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under [sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.] *section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43).*

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

[§ 2324. Stay of Commission's order.

[The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

[§ 2325. Injunction; three-judge court required.

[An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.]

Chapter 158.—ORDERS OF FEDERAL AGENCIES; REVIEW

* * * * * * *

§ 2341. Definitions.

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communciations Commission, the Federal Maritime Commission, *the Interstate Commerce Commission*, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture; and

(C) the Administration, when the order was entered by the Maritime Administration.

§ 2342. Jurisdiction of court of appeals.

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46; [and]

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42[.]; *and*

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

* * * * * * *

SECTION 205 OF THE MOTOR CARRIER ACT

ADMINISTRATION

SEC. 205. (a) * * *

* * * * * * *

(g) Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I: *Provided*, That, where the Commission, in respect to any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may [file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of title 28 of the United States Code,] *commence appropriate judicial proceedings in a court of the United States under those provisions of law applicable in the case of proceedings to enjoin or suspend rules, regulations, or orders of the Commission* and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

* * * * * * *

○

S. 663

Ninety-third Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-first day of January, one thousand nine hundred and seventy-four

An Act

To improve judicial machinery by amending title 28, United States Code, with respect to judicial review of decisions of the Interstate Commerce Commission and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1336(a) of title 28, United States Code, is amended to read as follows:

"(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures."

SEC. 2. Section 1398(a) of title 28, United States Code is amended to read as follows:

"(a) Except as otherwise provided by law, a civil action brought under section 1336(a) of this title shall be brought only in a judicial district in which any of the parties bringing the action resides or has its principal office.

SEC. 3. Section 2341 (3)(A) of title 28, United States Code, is amended by inserting following "Federal Maritime Commission," the words "the Interstate Commerce Commission,".

SEC. 4. Section 2342 of title 28, United States Code, is amended as follows:

(a) In the paragraph designated "(3)", following the semicolon, strike "and";

(b) In the paragraph designated "(4)", strike the period and insert in lieu thereof a semicolon followed by the word "and";

(c) Add a new paragraph "(5)" as follows:

"(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title."

SEC. 5. Section 2321 of title 28, United States Code, is amended to read:

"§ 2321. Judicial review of Commission's orders and decisions; procedure generally; process

"(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

"(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

"(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in the cases and proceedings under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43), run, be served and be returnable anywhere in the United States."

SEC. 6. The first paragraph of section 2323 of title 28, United States Code, is amended to read as follows:

"The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56

Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43)."

SEC. 7. Sections 2324 and 2325 of title 28, United States Code, are hereby repealed.

SEC. 8. The table of sections of chapter 157 of title 28, United States Code, is amended to read:

"Chapter 157.—INTERSTATE COMMERCE COMMISSION ORDERS; ENFORCEMENT AND REVIEW

SEC. 9. The proviso in section 205(g) of the Motor Carrier Act, as amended (49 Stat. 550; 49 U.S.C. 305(g)), is amended by striking "file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of title 28 of the United States" and inserting in lieu thereof "commence appropriate judicial proceedings in a court of the United States under those provisions of law applicable in the case of proceedings to enjoin or suspend rules, regulations, or orders of the Commission".

SEC. 10. This Act shall not apply to any action commenced on or before the last day of the first month beginning after the date of enactment. However, actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this Act becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.