JUDICIAL REVIEW OF I.C.C. ORDERS

HEARING

BEFORE THE

SUBCOMMITTEE ON SURFACE TRANSPORTATION

OF THE

COMMITTEE ON COMMERCE
UNITED STATES SENATE

NINETIETH CONGRESS

SECOND SESSION

ON

S. 2687

TO AMEND SECTION 17 OF THE INTERSTATE COMMERCE ACT TO PROVIDE FOR JUDICIAL REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION, AND FOR OTHER PURPOSES

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JUDICIAL REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

TUESDAY, JUNE 25, 1968

U.S. SENATE,
SENATE COMMITTEE ON COMMERCE,
SURFACE TRANSPORTATION SUBCOMMITTEE,
Washington, D.C.

The subcommittee met at 9 a.m. in room 5110, New Senate Office Building, the Honorable Frank J. Lausche presiding.

Present: Senators Frank J. Lausche (presiding), Frank E. Moss, and James B. Pearson.

OPENING STATEMENT BY THE CHAIRMAN

Senator LAUSCHE. The hearing will come to order.

This morning's hearing is on S. 2687, a bill which I introduced at the request of the Interstate Commerce Commission to amend section 17 of the Interstate Commerce Act intending to provide for judicial review of orders of the Interstate Commerce Commission.

S. 2687 proposes to change existing judicial review procedures in several respects. The most important proposed change would be to substitute judicial review of ICC orders in the courts of appeals rather than three-judge district courts.

The decisions of the courts of appeals woul be reviewable in the Supreme Court by petition of certiorari rather than by appeal.

S. 2687 also proposes to change the provisions of present law respecting venue, petitions for review, the record on review, and other matters.

There will be inserted in the record at this point a copy of the justification of the Commission, the comments of the Department of Justice and Department of Transportation, and a copy of the bill.

(The bill and comments follow:)

[S. 2687, 90th Cong., first sess.]

A BILL To amend section 17 of the Interstate Commerce Act to provide for judicial review of orders 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 17 of the Interstate Commerce Act (49 U.S.C. 17) is amended—

(1) by redesignating subsections (10) through (12) as subsections (11) through (13), respectively; and

(2) by inserting immediately after subsection (9) the following new subsection:

"(10) (a) The United States courts of appeal shall have exclusive jurisdiction to enjoin, set aside, annul, or suspend, in whole or in part, all final orders of the Interstate Commerce Commission made reviewable in accordance with the pro-

Staff member assigned to this hearing: Stanton P. Sender.

visions of subsection (9) of this section: *Provided*, That orders of the Commission involving only the payment of money shall be subject to judicial review only in the district courts of the United States pursuant to sections 1336(a) and 1398(a) of title 28, United States Code, and orders of the Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims shall be subject to judicial review only in accordance with sections 1336 (b) and (c) and 1398(b) of title 28, United States Code. Such jurisdiction shall be invoked by the filing of a petition as provided in this subsection.

"(b) The venue of any proceeding under this section shall be in the judicial circuit in which the residence or principal office of any of the parties filing the petition for review is located.

"(c)(i) Any party aggrieved by a final order reviewable under this subsection may, within sixty days from the date of service, file in the court of appeals, in which the venue prescribed by paragraph (b) lies, a petition to review such order. The petition shall contain a concise statement of (A) the nature of the proceedings as to which review is sought, (B) the facts upon which venue is based, (C) the grounds on which relief is sought, and (D) the relief requested. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the Commission. The clerk of the court of appeals shall serve, by registered or certified mail, a true copy of the petition upon the Commission and the Attorney General of the United States.

"(ii) Unless the proceeding has been terminated following grant of a motion to dismiss the petition, the Commission shall file in the office of the clerk of the court of appeals in which the proceeding is pending the record on review, as provided in section 2112 of title 28, United States Code. Until such record has been filed by the Commission, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any order, report, or decision made or issued by it and which is attached in a petition for review. Upon the filing of such record with it, the jurisdiction of the court of appeals to enjoin, set aside, annul, or suspend orders of the Commission shall be exclusive.

"(d) Petitions to review orders reviewable under this section, unless determined on a motion to dismiss the petition, shall be heard in the court of appeals upon the record of the pleadings, evidence adduced, and proceedings before the Commission. If a party to a proceeding to review shall apply to the court of appeals, in which the proceeding is pending, for leave to adduce additional evidence and shall show to the satisfaction of such court (1) that such additional evidence is material, and (2) that there were reasonable grounds for failure to adduce such evidence before the Commission, such court may order such additional evidence and any evidence the opposite party desires to offer to be taken by the Commission. The Commission may modify its findings of fact, or make new findings, by reason of the additional evidence so taken and may modify or set aside its orders and shall file in the court such additional evidence, such modified findings or new findings, and such modified order or the order setting aside the original order.

"(e) The Commission may be represented by its own counsel, and the United States, through the Attorney General, shall be enitled to intervene in any proceeding. Any party or parties in interest in the proceeding before the Commission whose interests will be affected if an order of the Commission is or is not enjoined, set aside, or suspended, may appear as parties of their own motion and as of right, and be represented by counsel in any proceeding to review such order. Communities, associations, corporations, firms, and individuals whose interest are affected by the Commission's order may intervene in any proceeding to review such order.

"(f) The filing of the petition to review shall not of itself stay or suspend the operations of the order of the Commission, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. Where the petitioner makes application for an interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this section, at least five days' notice of the hearing thereon shall be given to the Commission and to the Attorney General of the United States. In cases where irreparable damage would otherwise ensue to the petitioner, the court of appeals may, on hearing, after reasonable notice to the Commission and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the Commission for

not more than sixty days from the date of such order pending the hearing on the application for such interlocutory injunction, in which case such order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of such damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, upon a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing upon such an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application provided for above. Upon the final hearing of any proceeding to review any order under the provisions of this subsection the same requirements as to precedence and expedition shall apply.

"(g) An order granting or denying an interlocutory injunction under paragraph (f) of this subsection and a final judgment of the court of appeals shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254(1) of title 28, United States Code: *Provided*, That application therefor be duly made within forty-five days after the entry of such order and within ninety days after entry of the judgment, as the case may be. The United States, the Commission, or an aggrieved party may file such petition for a writ of certiorari. The provisions of sections 1254(3) and 2101(e) of title 28, United States Code, shall also apply to proceedings under this subsection.

"(h) The orders, writs, and process of the courts of appeals arising under this subsection and, of the district courts in cases arising under sections 20, 23, and 43 of this Act may run, be served, and be returnable anywhere in the United States."

SEC. 2. Chapter 157 of title 28, United States Code, and any other provision of law inconsistent with this Act are hereby repealed: *Provided*, That any proceeding or case pending before a district court under such chapter on the effective date of this Act shall remain under the jurisdiction of such court until a final order, judgment, decree, or decision is rendered by such court: *Provided further*, That any such cases or proceedings referred to in the first proviso may be appealed to the Supreme Court as provided by section 1253 of title 28, United States Code, and, if remanded, such case may be referred back to the court from which the appeal was taken or to the court of appeals for further proceedings as the Supreme Court may direct.

SEC. 3. This Act shall take effect on the sixtieth day after the date of the enactment of this Act.

Revised to reflect stylistic changes in bill as introduced.

JUSTIFICATION TO ACCOMPANY A DRAFT BILL TO PROVIDE FOR JUDICIAL REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

Judicial review of orders of the Interstate Commerce Commission is governed presently by 28 U.S. Code 1253, 1336, 1398, 2284, 2321–2325. Briefly, such review is in a district court of three judges, at least one of whom shall be a circuit judge. The decisions of such courts are reviewable in the Supreme Court by appeal, rather than by certiorari.

The draft bill would provide for judicial review in the United States courts of appeals, with review by the Supreme Court by the discretionary writ of certiorari. In so doing, the draft bill would make orders of the Interstate Commerce Commission reviewable in the same general manner as the orders of all other major Federal regulatory agencies, i.e., FPC, CAB, FCC, SEC, FMC, FTC, and NLRB. This change was recommended in 1962 by the Special Advisory Committee on Interstate Commerce Commission Practices and Procedures (an advisory committee on practitioners established by the Commission). It was also recommended in 1962 by the Administrative Conference of the United States.

The present statutory provisions for judicial review of the Commission's orders originated in the Urgent Deficiences Act of 1913 (38 Stat. 219) which, in abolishing the Commerce Court, transferred its jurisdiction to the district courts. The following year, in the Federal Trade Commission Act of 1914, the Congress designated the Circuit Courts of Appeals to review orders of that agency. Thereafter, as new regulatory agencies were created, Congress usually provided for judicial review of their orders in the Courts of Appeals. At the same time, certain orders of the Federal Communications Commission, Maritime Commission, and the Department of Agriculture were made reviewable under the Urgent Deficiencies

Act procedure. The so-called Hobbs Act or Judicial Review Act of 1950, 28 U.S.C. 2341–52 (Supp. II, 1967), transferred review of the orders of these agencies to the courts of appeals, thus leaving only orders of the Interstate Commerce Commission reviewable in the three-judge district courts.

There would be certain advantages in providing for judicial review in the courts of appeals. Those courts are regularly engaged in the review of orders of various Federal agencies, while most district judges rarely do so. The courts of appeals have rules governing judicial review proceedings and, before long, may be applying uniform rules for all of the courts of appeals, promulgated by the Supreme Court under section 2072 of the Judicial Code, 28 U.S.C. 2072 (Supp. II, 1967). In contrast, there are no court rules governing judicial review proceedings in the three-judge courts, with the result that their procedures are on an *ad hoc* basis. Again, the courts of appeals hold their sessions in the larger cities, which simplifies the travel arrangements of out-of-town counsel.

The draft bill is cast as an amendment to section 17 of the Interstate Commerce Act so that the statutory provisions for the review of the Commission's orders will appear in the same statute which gives the Commission authority to make such orders, thus following the general pattern with respect to statutes creating administrative agencies and providing for judicial review of their orders. See, for example, section 1006 of the Federal Aviation Act, 49 U.S.C. 1486; section 5, as amended, of the Federal Trade Commission Act, 15 U.S.C. 45(b)–(j); and section 9, amended, of the Securities Act of 1933, 15 U.S.C. 77i.

Specifically, the draft bill amends section 17 of the Act by redesignating the present subsections 17(10) through 17(12), 49 U.S.C. 17(10)–(12) as subsections 17(11) through 17(13) respectively and inserting immediately after subsection 17(9) a new subsection 17(10) which sets for the provisions, more particularly described below, for judicial review of the Commission's orders.

JURISDICTION

Paragraph (a) of the bill generally sets forth the provisions for judicial review of all Commission proceedings arising under subsection 17(9) except reparations and other cases involving the payment of money and orders of the Commission made pursuant to the referral of a question by a district court or the United States Court of Claims. Cases involving the payment of money would still be reviewable in a single-judge district court in accordance with present practices. *United States* v. *Interstate Commerce Commission*, 337 U.S. 426; *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576. Similarly, orders of the Commission made pursuant to a referral of a question or issue by a district court or by the Court of Claims would remain reviewable pursuant to 28 U.S.C. 1336 (b) and (c) and 1398(b), only in the court which referred the question or issue. Cases involving only fines, penalties or civil forfeitures for violations of the Act would also remain in the district courts.

VENUE

The draft bill provides that a petition for review shall be filed in the judicial circuit which is the residence or principal office of any of the parties filing the petition. This is derived from the present venue provision in 28 U.S.C. 1398(a) governing review of orders of the Commission. As pointed out below, if the Commission's orders are made reviewable in the courts of appeals, 28 U.S. Code 2112 will automatically provide a desirable procedure for consolidating into a single court multiple suits in different courts against the same order. It has been held that such a consolidation procedure is not available under existing law in many situations. *New York Central R. Co.* v. *United States*, 200 F. Supp. 944(S.D. N.Y. 1961).

PETITIONS FOR REVIEW

Paragraph (c)(i) of the draft bill sets out the manner for review of the Commission's orders. First, it provides that a petition for review must be filed within 60 days from the date of service of the order complained of. Under present law, except for the uncertain and rarely applied doctrine of laches, there is no limit upon the time within which judicial review of the Commission's orders must be sought. The 60-day limitation proposed by the draft bill is found in the Hobbs Act and many other modern judicial review provisions. It will be useful in protecting, after a reasonable oportunity for challenge, the security of transactions authorized by the Commission. Second, since this bill does not provide for the

proceeding to be brought against the United States as presently required by 28 U.S.C. 2322, any petition for judicial review will be brought automatically against the Commission as the named respondent. This change brings the Commission into conformity with the present practice of such agencies as SEC, NRLB, FPC, CAB, and FCC in that those agencies are named as the respondents in suits seeking judicial review of their orders. It will reflect the fact that the Commission's attorneys today assume the primary and principal responsibility for the defense of its orders in the courts. The draft bill would also provide that the petition for review must be served upon both the Commission and the Attorney General. Third, this paragraph prescribes the contents of the petition for review in the same way as does the Hobbs Act (28 U.S.C. 2344).

RECORD ON REVIEW

Under existing case, though not satutory, law, a person seeking judicial review of an order of the Commission has the burden of filing with the three-judge court a certified copy of the record of the proceedings before the Commission. *Mississippi Barge Line Co.* v. *United States*, 292 U.S. 282, 286; *Visceglia* v. *United States*, 24 F. Supp. 355, 356. The draft bill provides that the Commission shall file in the office of the clerk of the court of apeals in which the proceeding is pending the record on review, as provided in 28 U.S.C. 2112. Providing for review of the Commission's orders in the courts of appeals would make applicable automatically (i.e., even without specific reference) the provisions of 28 U.S.C. 2112 (and the rules adopted thereunder by the courts of appeals), and would bring about the following changes in procedures for judicial review of the commission's orders:

(a) It would provide a procedure for the consolidation of multiple suits against a single Commission order. Such suits would be consolidated in the court in which the first suit is filed, although this court, for the sake of convenience, could transfer the proceeding to another court of appeals. This is clearly a desirable procedure.

(b) Upon the commencement of a review proceeding, the Commission would be required to file with the court the original or a certified copy of the record of the proceedings before the Commission, except that the court may permit the filing of a certified list of the contents of the record in lieu of the record itself, a practice now widely followed and expected to be made uniform. Under our present review procedure, the plaintiff bears the burden of filing with the three-judge court a certified copy of the record before the Commission. Although this change may impose some additional burden on the Commission, it will bring its practice into line with present procedures for the review of all other Federal agency orders.

(c) In the first instance, it might be thought that placing upon the Commission the burden of supplying the record will encourage court challenges to Commission orders. However, any such tendency will be offset by the requirements of the courts of appeals for the parties to reproduce, by printing or otherwise, the portions of the Commission record on which they are relying. Under the present three-judge court procedure, reproduction of the record is not required. In the experience of other agencies, most of this reproduction costs falls upon the private appellants.

The record filing and reproduction requirements of the various courts of appeals are about to be standardized in a uniform rule which is well on its way to promulgation by the Supreme Court. This uniform rule will permit reproduction of briefs and records by "any duplicating or copying process capable of producing a clear black image on white paper."

PETITIONS TO REVIEW—PROCEEDINGS

Paragraph (d) provides that the proceedings in the court of appeals shall be based upon the record made in the proceedings before the Commission. It would further provide (as does the Hobbs Act and other judicial review statutes) that the court may require the Commission to receive additional evidence where it is shown that there were reasonable grounds for failure to adduce it earlier.

REPRESENTATION: INTERVENTION

Because the bill does not provide, as does the present 28 U.S.C. 2322, that such proceedings shall be brought against the United States, it follows automatically

that petitions to review must name the Commission as respondent. The United States would not be a party, but the bill would provide that "the United States, through the Attorney General, shall be entitled to intervene in any proceeding." The Commission and other parties may be represented by their own counsel. The provision for intervention is taken from 28 U.S.C. 2323.

JURISDICTION OF PROCEEDING

Paragraph (c) (ii) of the draft bill would clarify and define the Commission's power under Section 15(2) in Part I of the Interstate Commerce Act and comparable provisions in Parts II, III, and IV of the Act to modify an order which is attacked by a petition to review. Some doubt was created as to the propriety of such an assertion of power in *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 231 F. Supp. 422, 426 (N.D. Ill. 1964); however, the exercise of such power was approved in *Alamo Express, Inc.* v. *United States*, 239 F. Supp. 694 (W.D. Texas 1965). The bill would provide that the filing of a petition for review shall not cut off the Commission's power to modify its order, but that the filing of the record with the court of appeals will terminate such power (except, of course with leave of the court). In brief, the Commission would have a reasonable but not unlimited opportunity to correct its own errors.

STAYS: INTERLOCUTORY INJUNCTIONS

Paragraph (f) deals with this subject substantially as does existing law in 28 U.S.C. 2284. The only change is that a stay or temporary restraining order could be issued only by the court, and not be a single judge as permitted by 28 U.S.C. 2284.

REVIEW IN THE SUPREME COURT

Under the present law, 28 U.S.C. 1253, a decision of a three-judge district court is subject to a right of direct appeal to the Supreme Court. This is a so-called appeal as of right, in the sense that the Supreme Court does not purport to exercise a discretion as to whether or not to review the case on its merits. Instead, if the Supreme Court does not set the case for briefing and argument (i.e., plenary considerations), it will issue an order summarily affirming (or, more rarely, reversing) the decision of the lower court. In most of the appeals from the three-judge courts, the Supreme Court issues a brief order, reading as follows: "The motions to affirm are granted and the judgment is affirmed." Thus, whether cases come to the Supreme Court by appeal or by the discretionary writ of certiorari, the Court selects the cases which it considers to warrant full briefing and oral argument.

Paragraph (g) of the proposed bill would provide for Supreme Court review by certiorari, rather than by appeal. This conforms to the method of seeking Supreme Court review which is applicable to all other Federal agencies. It can hardly be contended that *all* matters arising under the Interstate Commerce Act are so much more important than power, labor communications, etc., problems as to warrant a preferred status as to review in the Supreme Court. It must be assumed that the Court can and will identify the cases which warrant plenary consideration by that Court.

Paragraph (g) would also preserve the Commission's present right to seek review in the Supreme Court with or without the concurrence of the Department of Justice by stating that, "The United States or the Commission or an aggrieved party may file such petition for a writ of certiorari."

Paragraph (h) of the draft bill preserves the second paragraph of 2321 of the Judicial Code, 28 U.S.C. 2321, the balance of which is repealed by section 2 of the draft bill. The section provides for nationwide service of process for orders and writs issued by the courts of appeals in cases arising under section 1 of the draft bill and proceedings arising in the district courts under sections 20 and 23 of the Act and section 3 of the Elkins Act, 49 U.S.C. 43, all of which deal with the enforcement of various accounting, reporting, and tariff requirements of the Act and, the rights of shippers to nondiscriminatory treatment by the carriers.

This provision is an exception to the general rule that a court's process does not run outside the State in which it is located, in the case of the district courts, or the circuit, in the case of the courts of appeals. Its retention is believed desirable because of the widespread operations of the nation's carriers.

Section 2 of this bill repeals sections 2321–2325 of the Judicial Code, 28 U.S.C. 2321–25, which set out the present procedure for review of the Commission's orders in the district courts. With the exception of the second paragraph of sec-

tion 2321, which is preserved as paragraph (h) of this bill, all of these sections of the Judicial Code would be superseded by the provisions of section 1 of this bill and thus be rendered obsolete unless repealed. No change is required in other sections of the Judicial Code, e.g., sections 1336 and 1398 which also deal with the review and enforcement of the Commission's orders since they will still be applicable to cases involving reparations, fines, penalties and forfeitures which are not transferred to the courts of appeals by this bill. In order to insure an orderly transition from the present mode of review in the district courts to the courts of appeals, this bill provides for a 60-day transitional period and that cases pending in the district courts on the effective date of this Act will be processed to conclusion in such courts with the right of direct appeal to the Supreme Court as under the present law.

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., May 15, 1968.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 2687, a bill "To amend section 17 of the Interstate Commerce Act to provide for judicial review of orders of the Interstate Commerce Commission, and for other purposes."

Under existing law, suits to set aside orders of the Interstate Commerce Commission, other than those involving only the payment of money or made pursuant to a referral by a district court or the Court of Claims, are filed in the district court in the district in which any of the plaintiffs has his residence or principal office. Such a suit is heard by a three-judge court, with direct appeal to the Supreme Court, and the Attorney General represents the government. 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. 2687 would change existing law in several respects. It would substitute the courts of appeals for three-judge district courts; review of the court's decision would be sought on petition for certiorari rather than appeal to the Supreme Court; and the proceeding would be against the Interstate Commerce Commission represented by its own counsel, rather than against the United States represented by the Attorney General. However, the United States could intervene through the Attorney General. The bill also provides a 60-day limitation for filing petitions with the courts of appeals for review of Commission orders; at present there is no express time limitation. The court in which the record is filed would have exclusive jurisdiction; if petitions are filed in more than one court, under section 2112 of title 28, United States Code, the court which received the petition would have jurisdiction. Under existing law it is possible for more than one district court to review the same order when different parties file independent actions to set it aside, and this multiplicity has occasionally created problems.

Section 2 of the bill repeals chapter 157 of title 28, United States Code, in toto instead of only to the extent that its provisions conflict with those of S. 2687. Chapter 157 applies not only to civil actions to set aside orders of the Commission but to those brought to enforce such orders or to collect fines, penalties and forfeitures. S. 2687 does not appear to seek to modify existing law with respect to enforcement of Commission orders or collection of fines, penalties and forfeitures.

The Department of Justice favors the underlying purposes of the proposed legislation—substitution of the courts of appeals for three-judge district courts in the review of Commission orders and elimination of appeals as a matter of right to the Supreme Court. Such provisions would eliminate the heavy strain on our trial court resources imposed by the convening of three-judge district courts and lighten the docket of the Supreme Court provided under existing law.

However, the legislation is objectionable insofar as it would remove the United States as the statutory defendant and repeal the Attorney General's responsibility for primary control of this class of litigation. Such dispersion of responsibility for the conduct of litigation involving the government conflicts with prior efforts of the Executive Department and the Congress to centralize control of the government's litigation in the Attorney General.

Instead of enactment of S. 2687, the Department of Justice recommends that since the principal objectives of this legislation may be accomplished by amending chapter 158 of title 28, United States Code, which relates to the review of orders of certain designated federal agencies, relevant references to the Interstate Commerce Commission and its orders be incorporated in that chapter.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

WARREN CHRISTOPHER,
Deputy Attorney General.

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., March 15, 1968.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of this Department on S. 2687, a bill to amend section 17 of the Interstate Commerce Act to provide for judicial review of orders of the Interstate Commerce Commission, and for other purposes.

The bill would amend section 17 of the Interstate Commerce Act by adding a new subsection which provides that orders of the Interstate Commerce Commission would be subject to review in the United States courts of appeals, with any further review by the Supreme Court pursuant to writ of certiorari.

The provisions of Title 28, United States Code, which now govern Commission orders prescribe review in a district court of three judges, at least one of whom is a circuit judge. Supreme Court review of such decisions is by appeal, rather than by certiorari. The proposed new subsection would repeal existing jurisdictional statutes and add provisions which deal with jurisdiction, venue, and various administrative requirements which would be applicable to review of Commission actions in the courts of appeals. The bill would not alter present practices in reparations cases, which would still be reviewable in a single-judge district court, or as to cases involving referral of a question by the Court of Claims or a district court, which would be reviewable only in the court which referred the question.

In past decades, statutes provided that certain administrative actions would be reviewed by special three-judge courts. However, legislation over the years has made review in the courts of appeals the usual and preferred method of review. Today orders of the Interstate Commerce Commission are the only orders of an administrative agency which are reviewed by a three-judge court.

The Department of Transportation believes that the judicial reform which the bill would produce is most desirable and long overdue. The Department, therefore, strongly recommends enactment of S. 2687.

This change has been recommended by the Administrative Conference of the United States. It would assign the responsibility for review of Commission orders to a forum which is regularly engaged in the review of the actions of Federal agencies. Further, the change would place this responsibility in courts which have rules applicable to judicial review proceedings, rather than permitting a continuation of *ad hoc* proceedings before the three-judge courts. Supreme Court review of Commission orders by certiorari, rather than by appeal as-of-right, would properly reflect that those matters are not inherently of greater importance than cases involving other subject matter; it would conform I.C.C. practice in this respect to that of other Federal administrative agencies.

The bill would, in the judgment of this Department, lead to an efficiency of appellate process and uniformity of practice respecting I.C.C. actions which argues for prompt enactment.

The Bureau of the Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report for the consideration of the Committee.

Sincerely yours,

JOHN L. SWEENEY,
Assistant Secretary for Public Affairs.

Senator LAUSCHE. The first witness this morning will be the Honorable Paul J. Tierney, Chairman of the Interstate Commerce Commission.

It is my understanding that he is accompanied by Robert W. Ginnane, General Counsel of the Interstate Commerce Commission.

Mr. Tierney, we are prepared to hear your testimony.

Who else is accompanying you?

STATEMENT OF HON. PAUL J. TIERNEY, CHAIRMAN, INTERSTATE COMMERCE COMMISSION; ACCOMPANIED BY ROBERT W. GINNANE, GENERAL COUNSEL, INTERSTATE COMMERCE COMMISSION, AND FRITZ R. KAHN, DEPUTY GENERAL COUNSEL, INTERSTATE COMMERCE COMMISSION

Mr. TIERNEY. Mr. Fritz Kahn, Deputy General Counsel on my far right.

Senator LAUSCHE. Good.

All right you may proceed.

Mr. TIERNEY. Thank you, Mr. Chairman.

On behalf of the Commission, I wish to thank the subcommittee for this opportunity to present our views on S. 2687, introduced at our request by Senator Lausche.

The basic purpose of S. 2687 is to modernize and make more efficient the statutory provisions governing the judicial review of the Commission's orders. Its provisions make a number of desirable and long-overdue reforms in this area. Before describing the specific provisions of S. 2687 and the changes it would make in existing law, it may be useful to first generally describe the present procedures for judicial review of our orders to place the provisions of this bill in perspective. Because of the technical nature of both existing law and the changes made in it by S. 2687, we have provided the committee with a chart, labeled as "Appendix B," which shows the existing law and the provisions of S. 2687 on a comparative basis by major subject matter categories.

At the present time, judicial review of the Commission's orders is governed by various sections of title 28 of the United States Code which are summarized in appendix A. Briefly, such review is in a U.S. district court of three judges, at least one of whom must be a circuit judge. The decisions of such courts are reviewable by the Supreme Court by appeal, rather than by the discretionary writ of certiorari. These provisions were initially enacted as part of the Urgent Deficiencies Act of 1913 and, with minor changes, have remained unchanged since that time.

The following year, in the Federal Trade Commission Act, the Congress designated the then circuit court of appeals to review orders of that agency. Thereafter, as new regulatory agencies were created, Congress usually provided for judicial review of their orders in the courts of appeals. While certain orders of the Federal Communications Commission, the Federal Maritime Commission, and the Department of Agriculture were originally made reviewable under the Urgent Deficiencies Act procedure, the so-called Hobbs Act or Judicial Review Act of 1950 transferred review of the orders of these agencies to the courts of appeals, thus leaving only orders of the Interstate Commerce Commission reviewable in the three-judge district courts.

In recent years, this procedure has been criticized by members of the Federal judiciary in the course of reviewing orders of the Com-

mission as being cumbersome and inefficient. In an opinion dealing with a phase of the complex litigation arising out of the Commission's order approving the Penn-Central merger, the court observed that counsel for all the parties participating in that litigation,

> * * * have demonstrated that the long outmoded machinery for review of orders of the Interstate Commerce Commission by a suit before a three-judge court can be made to work although with creaks and strains that ought to be eliminated.

In commenting on a provision requiring review by a three-judge court, the Supreme Court has stated that this mode of review

> * * * particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice * * * [D]islocates the normal operations of the system of lower federal courts.

The existing procedures have also been criticized by the Administrative Conference of the United States which, in its report to Congress in 1962, recommended legislation similiar to that proposed in S. 2687. Legislation of this type was also recommended in 1962 by the Special Advisory Committee on Interstate Commerce Commission Practice and Procedure, an advisory committee of practitioners established by the Commission, and by several sessions of the Judicial Conference of the United States. In this regard, we are pleased to note that the Judicial Conference has, this year, specifically endorsed S. 2687.

The most fundamental change in existing law made by S. 2687 would be to shift judicial review of the great majority of the Commission's cases from the district courts to the U.S. courts of appeals. In place of the existing law, which permits direct appeals from the district courts to the Supreme Court, review by that Court would be by the discretionary writ of certiorari. In so doing, this bill would make orders of the Interstate Commerce Commission reviewable in the same general manner as the orders of all other major Federal regulatory agencies, such as FPC, CAB, FCC, SEC, FMC, FTC, and NLRB.

Senator LAUSCHE. Let's pause for a moment.

If S. 2687 is adopted, it will abolish the isolated procedure of obtaining review that now exists with respect to the decisions of the Interstate Commerce Commission, and put those petitions for review in the same category as review is obtained from other Commissions of a similar nature.

Mr. TIERNEY. That is correct, Mr. Chairman.

Senator LAUSCHE. It will establish uniformity in the field of obtaining review of decisions of the FPC, CAB, FCC, SEC, FMC, FTC, and the National Labor Relations Board.

Mr. TIERNEY. That is correct.

Senator LAUSCHE. It will establish uniformity.

Mr. TIERNEY. Yes, sir; uniformity in appeals to a court of appeals and then to the Supreme Court by writ of certiorari.

Senator LAUSCHE. All right.

You may proceed.

Mr. TIERNEY. Thank you.

There are a number of advantages in providing for judicial review in the courts of appeals. These courts are regularly engaged in the review of orders of various other Federal agencies, while most district judges rarely do so. The courts of appeals have rules governing judi-

cal review proceedings. Before long, they will be applying uniform rules for all of the courts of appeals, promulgated by the Supreme Court under the authority granted by Congress. In contrast, there are no court rules governing judicial review proceedings in the three-judge courts, with the result that their procedures are on an ad hoc basis.

S. 2687 has been cast as an amendment to section 17 of the Interstate Commerce Act, designated as section 17(10), so that the statutory provisions for the review of the Commission's orders will appear in the same statute which gives the Commission authority to make such orders, thus following the general pattern with respect to many other statutes creating administrative agencies and providing for judicial review of their orders.

I would now like to turn to a brief description of the major features of S. 2687. As I will be comparing the provisions of this bill with existing judicial review provisions, the committee may find it helpful to refer to the comparative analysis set forth in the chart, labeled as appendix B. Since all of the changes made by S. 2687 are detailed therein, my remarks will be confined to a discussion of the more important ones.

JURISDICTION

As I have previously indicated, the major change made by S. 2687 is the shifting of judicial review of the Commission's orders from district courts of three judges to the several courts of appeals. This change, summarized as item 1 on the chart, is set forth in paragraph (a). With certain specified exceptions, S. 2687 covers judicial review of all final orders of the Commission issued under any of the four parts of the Interstate Commerce Act. Specifically exempted from this paragraph are:

1. Final orders involving reparations or other orders for the payment of money.

2. Final orders made pursuant to a referral from a district court or the Court of Claims.

The purpose of these two specific exemptions is to preserve existing practice wherein cases in these two categories are initially heard in either single-judge district courts or the Court of Claims as the case may be. Because claims for reparations and other actions for money damages are essentially private actions and analogous to other types of civil damage actions, it seems desirable to retain jurisdiction in the district courts for these cases. In addition, I should also point out that nothing in S. 2687 changes the present jurisdiction of the district courts over criminal or civil cases involving only fines, penalties or civil forfeitures for violations of the Interstate Commerce Act. The jurisdiction of a court of appeals would be invoked by the filing of a petition for review.

VENUE

The venue for filing a petition is set forth in paragraph (b) of S. 2687, summarized as item 2 of the chart. This provision is derived from existing law and provides that venue for a petition shall be in the judicial circuit wherein the party filing the petition for review either resides or has his principal office.

Paragraphs (c) and (d), summarized in item 3 of the chart, make a number of important changes in existing law and practice. Together, these two provisions specify the initial and subsequent procedural steps to be followed in a proceeding involving a Commission order.

First, any party aggrieved by an order of the Commission will be required to file a petition for judicial review with the appropriate court of appeals within 60 days of the service order complained. This cures an omission in the existing law which, except for the uncertain and rarely applied doctrine of laches, imposes no statute of limitations for judicial review of the Commission's orders. The 60-day limitation is found in most modern judicial review provisions.

Senator LAUSCHE. Under existing law is there no time specified within which a petition for review must be filed?

Mr. TIERNEY. That is correct, Mr. Chairman.

Senator LAUSCHE. So the time is unlimited unless there are elements of laches by the party failing to file the petition for review and resulting in a condition that if review would be allowed at the end of a protracted period of delay, unjustified harm would come to the appellee.

Mr. TIERNEY. Yes, sir.

Senator LAUSCHE. That is the doctrine of laches, as I understand it, Mr. Tierney.

Mr. TIERNEY. That is right.

Senator LAUSCHE. Now then, instead of no time being specified as the condition exists in existing law, S. 2687 places a limitation of 60 days within which the appeal must be filed.

Mr. TIERNEY. That is correct.

Senator LAUSCHE. All right. Proceed.

Mr. TIERNEY. While still providing a reasonable opportunity for an appeal to be taken, such a provision is both desirable and useful in protecting the security of transactions authorized by the Commission and providing assurance to parties affected by a Commission order that it will not be challenged by a belated appeal.

Second, it attempts to deal with the problem of appeals being taken in different courts over a single Commission order. As I have previously indicated, the venue provisions of S. 2687, as with existing law, permit an appeal to be taken in any court wherein any of the parties resides or has his principal office. Pursuant to this provision, any aggrieved party may pick any court meeting these requirements. Although this poses no problem in the majority of cases, in large and complex proceedings, such as a large railroad merger, this freedom in choosing a forum can, and has, created serious problems because of the bringing of suits in different courts over a single Commission order.

Senator LAUSCHE. Will you illustrate this last statement that suits may be brought in different courts by different parties related to a single Commission order? Illustrate that if you will.

Mr. TIERNEY. For example, we have one pending now, Mr. Chairman, involving basic per diem on railroad freight cars. There is presently a suit pending in Boston brought by essentially the eastern railroads and a suit pending in Omaha brought essentially by the western railroads relating to one Commission order; that is, setting basic per diem rates.

Another example is the Penn-Central case where we had appeals on orders pending in New York, in Virginia and in Scranton, Pa.

Senator LAUSCHE. Same issues involved?

Mr. TIERNEY. Yes, sir.

Senator LAUSCHE. Same issues in each of the suits?

Mr. TIERNEY. Yes, sir.

Senator LAUSCHE. What happens under the present law when different courts might render different decisions?

Mr. TIERNEY. I guess the solution to that is go to the Supreme Court, really. We have been able under certain circumstances to stay disposition of suits in certain courts pending disposition of the case in one of the other courts.

Senator LAUSCHE. All right.

Proceed.

Mr. TIERNEY. I have gone over this part about the example so I will pass over that.

While the Commission has usually been successful in consolidating multiple proceedings in one court by persuading the other courts to stay their proceedings, the process involved is wasteful and time consumming for all concerned. Providing for judicial review in the courts of appeals would largely put an end to this problem. Upon the filing of a petition, any subsequent suits would, by virtue of 28 U.S.C. 2112, which governs the procedure in the court of appeals in appeals from administrative agencies, be consolidated in the court in which the first suit is filed. This change in the present law is clearly desirable.

Senator LAUSCHE. That is, under the provisions of S. 2687, conditions still could arise where because of the venue provisions more than one suit would be filed for review.

Mr. TIERNEY. That is correct.

Senator LAUSCHE. Have you included language in the bill that if and when that occurs, the court in which the petition first was filed shall proceed to ultimate disposition of the issue.

Mr. TIERNEY. Yes. As a matter of fact, that is existing law which we are incorporating into this.

I might add there, Mr. Chairman, that as I understand it, it wouldn't be confined to where the suit is first filed. Conceivably the court might order, for the convenience of the parties, that it be consolidated in another court.

Senator LAUSCHE. All right.

Mr. TIERNEY. This bill also changes existing case law with regard to the submission of the complete record of proceeding before the Commission to a reviewing court. Under existing practice, the person seeking review has the burden of filing a certified copy of the record with the reviewing court. Under S. 2687, the Commission would be required to file the record with the clerk of the court of appeals in which the proceeding is pending.

Upon the commencement of a review proceeding, the Commission would be required to file with the court the original or a certified copy of the record of the proceedings before the Commission except that the court may permit the filing of a certified list of the contents of the record in lieu of the record itself, a practice now widely followed and expected to be made uniform. Under our present review procedure, the plaintiff bears the burden of filing with the three-judge court a certified copy of the record before the Commission. Although this change may impose some additional burden on the Commission, it will

bring its practice into line with present procedures for the review of all other Federal agency orders. While the placing upon the Commission the burden of supplying the record could encourage court challenges to Commission orders, any such tendency will be offset by the requirements of the courts of appeals for the parties to reproduce, by printing or otherwise, the portions of the Commission record on which they are relying. Under the present three-judge-court procedure, reproduction of the record is not required. If the experience of other agencies, most of this reproduction cost falls upon the private appellants.

S. 2687 makes a further important change in existing law in the elimination of the United States as a statutory defendant, shown in item 4 of the chart, thus eliminating the present requirement whereby all court challenges to an order of the Commission are formally brought against the United States rather than the Commission itself. The elimination of the United States as a named respondent means that any petition for judicial review would be brought automatically against the Commission as the named respondent. This change brings the Commission into conformity with the present practice of such agencies as SEC, NLRB, FPC, CAB, and FCC, which are named as the respondents in suits seeking judicial review of their orders. It reflects the fact that the Commission's attorneys today assume the primary and principal responsibility for the defense of its orders in the courts.

This feature of S. 2687, among others, is opposed by the Department of Justice. In a letter to the committee, dated May 15, 1968, from Deputy Attorney General Warren Christopher, the Department states:

> However, the legislation [S. 2687] is objectionable insofar as it would remove the United States as the statutory defendant and repeal the Attorney General's responsibility for primary control of this class of litigation. Such dispersion of responsibility for the conduct of litigation involving the Government conflicts with prior efforts of the executive department and the Congress to centralize control of the Government's litigation in the Attorney General.

Senator LAUSCHE. In appeals taken from orders issued by other Commissions of a similar nature as the ICC, is the U.S. Government made the party defendant?

Mr. TIERNEY. I guess the precise answer to that is that it varies. In the five agencies I just listed here, SEC, NLRB, FPC, CAB, and FCC, in those instances the entity itself is the statutory defendant.

Senator LAUSCHE. Who acts as counsel for the statutory defendant, the Commission, in those instances?

Mr. TIERNEY. I am presuming counsel for the Commission itself.

Senator LAUSCHE. So you do have precedent now for a situation where the Attorney General of the United States does not act as counsel for the Commission?

Mr. TIERNEY. That is correct.

Senator LAUSCHE. And with respect to which commissions does that fact exist? Did you identify——

Mr. TIERNEY. Yes. Those five I just listed.

Senator LAUSCHE. All right.

Proceed.

Mr. TIERNEY. In the alternative, the Department suggests that the Commission be brought under the Hobbs Act, after which S. 2687 is modeled.

With all respect, we are opposed to the suggestion of the Department. Aside from reflecting the fact that the Commission's attorneys are largely responsible for defense of the Commission's orders even though conducted formally in the name of the United States, more compelling considerations require this change to be made. Generally, the Department of Justice and the Commission have worked together in the defense of the Commission's orders. However, from time to time, there have been differences of opinion between the Commission and the Department as to questions of policy and statutory construction with the result that the Department has declined to defend the Commission's order in court. There have been a number of such cases. Because Commission orders are generally immune from direct attack under the 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. Although the Supreme Court has held that in such a case the duty of the Commission to administer and enforce the act carries with it the right to defend its orders in its own name when the Department declines to do so, it is nevertheless embarrassing and inefficient to continue the present practice. From this standpoint as well as to give a reviewing court the most assistance, we believe that the defense of our orders should be placed directly with the Commission. As shown in item 3(b) and 4 of the chart, this bill fully protects the rights of the United States by requiring that a copy of the petition for review be served on the Attorney General as well as the Commission and by permitting the Attorney General to intervene in a Commission case as a matter of right.

The balance of this bill deals with review of decisions by the courts of appeals in the Supreme Court and certain miscellaneous provisions.

Senator LAUSCHE. That is, while the Commission advocates that it be given the right to defend its own orders because of the complex facts that exist in many cases, the bill, S. 2687, does allow the Attorney General of the United States as a matter of right to become counsel—to intervene in a Commission hearing as a matter of right.

Mr. TIERNEY. That is correct. In other words, under the terms of the proposed bill the Commission would be the party defendant, the statutory defendant, but the Department of Justice, as a matter of right, would be permitted to intervene in these cases. They would not be deprived in any fashion at all.

Senator LAUSCHE. In what capacity would it intervene? As a party or as counsel?

Mr. TIERNEY. As a party of interest.

Mr. GINNANE. As a party. For example, Mr. Chairman, the United States in one way or another is the largest shipper in the country. In all sorts of rate cases it would have a perfectly legitimate interest. Perhaps a very large interest. We would not want to gag the United States from being heard under any circumstances.

Mr. TIERNEY. Turning to review in the Supreme Court.

Under the present law, a decision of a three-judge district court is subject to a right of direct appeal to the Supreme Court. This is a so-called appeal as of right, in the sense that the Supreme Court does not purport to exercise discretion as to whether or not to review the case on its merits.

Paragraph (b) of S. 2687, summarized as item 6 of the chart, would provide for Supreme Court review by certiorari, rather than by appeal. This conforms to the method of seeking Supreme Court review which is applicable to all other Federal agencies. This paragraph would also preserve the Commission's present right to seek review in the Supreme Court with or without the concurrence of the Department of Justice by stating that, "The United States or the Commission or an aggrieved party may file such petition for a writ of certiorari."

MISCELLANEOUS PROVISIONS

Paragraph (h) of S. 2687, shown in item 7 of the chart, preserves a portion of the existing law, the balance of which is repealed by section 2 of this bill. This paragraph provides for nationwide service of process, orders, and writs issued by the courts of appeals in cases arising under final orders of the Commission covered by this bill and proceedings arising in the district courts under sections 20 and 23 of the act and section 3 of the Elkins Act, all of which deal with the enforcement of various accounting, reporting, and tariff requirements of the act and, the rights of the shippers to nondiscriminatory treatment by the carriers. This provision is an exception to the general rule that a court's process does not run outside the State in which it is located, in the case of the district courts, or the circuit, in the case of the courts of appeals. Its retention is believed desirable because of the widespread operations of the Nation's carriers. In connection with this paragraph, I should like to call the committee's attention to a minor stylistic error on line 25 of page 6. This line should read as follows:

in cases arising under Sections 20, 23, of this Act and Section 3 of the Act of February 19, 1903 (49 U.S.C. 43).

This change required to reflect the fact that the last cited section, section 3 of the Elkins Act, is not a part of the Interstate Commerce Act although its provisions are enforced by the Commission.

As shown in item 8, section 2 of S. 2687 repeals those parts of existing law which contain the present procedure for review of the Commission's order in three-judge district courts. All of these provisions are superseded by the provisions of section 1 of this bill and thus would be rendered obsolete unless repealed. No change is made in other sections of existing law which also deal with the review and enforcement of the Commission's orders since they will still be applicable to cases involving reparations, fines, penalties, and forfeitures which are not transferred to the courts of appeals by this bill. In order to insure an orderly transition from the present mode of review in the district courts to the courts of appeals, this bill provides for a 60-day transitional period and that cases pending in the district courts on the effective date of this act will be processed to conclusion in such courts with the right of direct appeal to the Supreme Court as under the present law.

This concludes my prepared comments, Mr. Chairman.

Senator LAUSCHE. In the petition for review to the court of appeals, under the provisions of the bill, does the court have jurisdiction in all issues of law and of fact? I speak relative to the difference between a hearing de novo and a hearing on review in which only the law comes within the jurisdiction of the court to review.

I follow that question by asking the result that is obtained when the petition for a writ of certiorari is filed.

Mr. TIERNEY. I think I better refer that question to General Counsel.

Mr. GINNANE. This bill would not change the present scope or nature of judicial review. As in the three-judge courts, so in the court of appeals, all questions of law would be open to determination by the court of appeals, including the question of whether the Commission's findings are supported by substantial evidence.

Senator LAUSCHE. It would not be a hearing de novo because it would be a hearing on the basis of the record developed by the Commission.

Mr. GINNANE. Exactly. There would be no change in existing law and practice in that respect.

Senator LAUSCHE. What is the situation as it prevails when the action finally goes to the Supreme Court?

Mr. GINNANE. That too is a review on the record previously made.

Senator LAUSCHE. All right.

Thank you very much.

Mr. TIERNEY. Thank you, Mr. Chairman.

(Appendix A and B referred to follow:)

APPENDIX A.—GENERAL SUMMARY OF EXISTING LAW AND S. 2687 DEALING WITH JUDICIAL REVIEW AND ENFORCEMENT OF MATTERS ARISING UNDER THE INTERSTATE COMMERCE ACT AND RELATED STATUTES

I. SINGLE-JUDGE UNITED STATES DISTRICT COURTS

1. All cases arising under the Interstate Commerce Act involving fines, penalties or civil forfeitures not arising out of an order of the Commission and cases involving reparations or other final orders for the payment of money, 28 U.S.C. § 1336, 1398. Appeals in these cases are heard by the United States courts of appeal whose decisions are reviewable in the Supreme Court by a writ of certiorari. 28 U.S.C. § 1254 (1)

II. THREE-JUDGE UNITED STATES DISTRICT COURTS

1. Appeals from all final judgments and orders of the Commission arising under section 17(9) of the Interstate Commerce Act. Appeals in these cases go directly to the Supreme Court. 28 U.S.C. § 2284, § 2321–25

NOTE.—This procedure would be changed upon the enactment S. 2687, since, as shown in Appendix B, it would repeal the present provisions for review by a three-judge court and substitute in lieu thereof review by the courts of appeal with appeal to the Supreme Court by a writ of certiorari. (Section 1 of S. 2687)

III. COURT OF CLAIMS

1. Suits by carriers against the United States for reparations or other matters involving damages under the Interstate Commerce Act. The Commission does not participate in these cases unless the matter is referred to the Commission by the court under 28 U.S.C. § 1398 (b). In those cases where an appeal is permitted, appeal is direct to the Supreme Court.

APPENDIX B.—COMPARATIVE SUMMARY OF PROVISIONS OF S. 2689 WITH EXISTING LAW

EXISTING LAW	S. 2687
Item 1.—Jurisdiction	[p. 1, lines 1–10; p. 2, lines 1–14] [1]
a) All orders appealable to three-judge district courts with right of direct appeal to Supreme Court (28 U.S.C. § 2284, 2321–25, 1253), *except* orders involving 1) to payment of money damages and 2) the collection of fines, penalties, and forfeitures.	a) Substitutes the court of appeals for all cases now heard by three-judge district courts. Appeal to Supreme Court by writ of certiorari.

APPENDIX B.—COMPARATIVE SUMMARY OF PROVISIONS OF S. 2689 WITH EXISTING LAW—Continued

EXISTING LAW	S. 2687
Item 1.—Jurisdiction—Continued	
b) Cases involving the payment of money or the collection of fines, etc., are initially heard by a single-judge district court. Appeals may be taken to courts of appeals and thence to the Supreme Court by a writ of certiorari 28 U.S.C. § 1331, 1336, 1398, 1254(1). Similar appellate procedure applies to cases referred to the Commission by the Court of Claims, 28 U.S.C. § 1398 (b).	b) Makes no change in existing law with regard to 1) orders involving the payment of money; 2) cases prosecuted directly in court involving fines, penalties, etc., or 3) referrals from the Court of Claims.
c) Jurisdiction invoked upon the filing of an application for injunction or "other relief", 28 U.S.C. § 2284.	c) Jurisdiction invoked by the filing of a petition for review.
Item 2.—Venue	[1] Refers to page and lines of S. 2687.
	[p. 2, lines 15–18]
a) Provides that venue shall be in the district wherein the party filing petition for review either resides or has his principal office. 28 U.S.C. § 1398(a).	a) Makes no change except to expand venue to entire judicial circuit.
b) Makes no provision for consolidation of multiple suits brought against the same order in different courts.	b) In addition, by virtue of paragraph (c)(ii) [p. 3, lines 19–20] of this bill, which incorporates by reference 28 U.S.C. § 2112, permits the consolidation of multiple suits.
Item 3.—Practice and Procedure	
	[p. 2, lines 19–25; p. 3, lines 1–23]
a) No specified requirements for application review.	a) As set forth in paragraph (c)(i), requires that petition for review be filed within 60 days from date of service and specify (1) nature of proceeding, (2) facts upon which venue is based, (3) grounds for seeking relief and (4) relief requested.
b) Requires that the Attorney General and Commission be notified five days in advance of hearing, 28 U.S.C. § 2284(2) and the copies of the complaint be served on all defendants. Federal Rules of Civ. Proc. 4, 28 U.S.C. Appendix. No fixed rules of procedure.	b) Requires that copy of petition be served on Attorney General and Commission. All procedure subject to rules promulgated by the Supreme Court under 28 U.S.C. § 2072.
c) Requires complaining party to submit record of Commission proceeding to clerk of the court.	c) Unless terminated on motion to dismiss, Commission must provide the record, as provided in 28 U.S.C. § 2112, to clerk of the court.
d) Present statutory law is silent as to the right of Commission to correct its own errors after appeal is filed.	d) Permits Commission to correct own errors until record is filed.
e) No counterpart in existing statutory law although permitted in practice.	e) Requires appeal to be determined on record unless, for cause, the parties request the right to adduce additional evidence.
Item 4.—Representation	
	[p. 4, lines 14–25]
a) All appeals brought in the name of the United States with intervention, as of right, by the Commission and permission to intervene for other interested parties 28 U.S.C. § 2322–23.	a) Paragraph (e) eliminates the United States as a statutory defendant, replacing it with the Commission. The Attorney General and other parties to a proceeding before the Commission would be permitted to intervene as of right with permission to intervene being granted others not parties to the proceeding as under existing law.

APPENDIX B.—COMPARATIVE SUMMARY OF PROVISIONS OF S. 2689 WITH EXISTING LAW—Continued

EXISTING LAW	S. 2687
Item 5.—Stays and Preliminary Injunctions	[p. 5, lines 1–25; p. 6, lines 1–9]
a) Provides for a stay of a Commission order by a single district judge and a preliminary injunction by a three-judge court 28 U.S.C. 2284(3) and 2284 (5).	a) Paragraph (f) is similar to existing law except that stays could be granted by the court rather than a single judge.
Item 6.—Review by the Supreme Court	[p. 6, lines 10–21]
a) Provides for direct appeal from a three-judge court 28 U.S.C. § 1253.	a) Paragraph (g) provides that appeals from a decision of court of appeals shall be by writ of certiorari within 45 days after entry of the lower courts judgment.
Item 7.—Service of Process, etc.	[p. 6, lines 23–25; p. 7, lines 1–2]
a) Provides for nationwide service of orders, writs and process of the district courts in matters arising out of an order of the Commission, the enforcement of sections 20 and 23 of the Interstate Commerce Act and section 3 of the Elkins Act. 28 U.S.C. § 2321.	a) Paragraph (h) is the same as existing law except that section 3 of the Elkins Act, 49 U.S.C. § 43 is shown *erroneously* as "section 43" of the Interstate Commerce Act.
Item 8.—Repeals	[p. 7, lines 3–9]
Not applicable.	a) Section 2 repeals existing three-judge court provisions, 28 U.S.C. § 2321–25, and so much of other existing laws as are inconsistent with S. 2687.
Item 9.—Effective Date	[p. 7, lines 10–17]
Not applicable.	a) Section 3 provides for this Act to become effective 60 days after enactment while the proviso in section 2 deals with handling cases pending in the district courts or the Supreme Court as of the date of enactment.

Senator LAUSCHE. The next witness is Judge John Biggs, Jr., Court of Appeals of the Third Circuit, Judicial Conference of the United States. Judge, we are glad to hear your testimony.

STATEMENT OF JUDGE JOHN BIGGS, JR., SENIOR UNITED STATES CIRCUIT JUDGE OF THE THIRD JUDICIAL CIRCUIT OF THE UNITED STATES AND CHAIRMAN OF THE COMMITTEE ON COURT ADMINISTRATION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Judge BIGGS. I have a prepared statement.

Senator LAUSCHE. Your statement will be fully printed in the record. You may read it or you may discuss the highlights of it knowing that the record will contain your full statement.

Judge BIGGS. Thank you very much, Mr. Chairman.

First, let me express my pleasure at being invited to be here today. I consider it an honor and I am grateful. The conference will be grateful and so will the judges of this country.

I have been here most of the time when counsel and the Chairman of the Interstate Commerce Commission were testifying. And they have covered the matter so thoroughly that I think I can make my remarks very brief indeed.

Senator LAUSCHE. Judge, for the purpose of the record, I believe it would be well for you to define the Judicial Council which you are representing here.

Judge BIGGS. I will.

The Judicial Conference of the United States is a statutory body which consists of the chief judges of the 11 courts of appeals, 11 representatives of district judges who are selected by the Judicial Conferences of their circuits, and the Chief Judge of the Court of Customs and Patent Appeals, and the Chief Judge of the Court of Claims. The Chief Justice of the United States is Chairman. I think it can be stated accurately that the Judicial Conference of the United States is really the policymaking body for the lower Federal courts. It meets, at the present time, twice a year.

The Conference is required to meet once a year, but as a matter of fact, it meets twice a year. It met last February and it will meet again this September.

The Conference proceeds or endeavors to proceed by way of committees on the pattern which Congress has adopted. There are a number of committees, 15 or 16 which are now, by the way, in the course of being reorganized because it has been some 10 years since they were set up.

Various matters are referred by the Conference to these committees or the committees themselves may present proposed changes in substantive law to the Conference and the Conference either approves them or disapproves them or requires further study of them.

Twice a year the Chief Justice of the United States makes a report to the Congress on the Conference's resolutions and this also is required by statute. The Conference really is a policymaking body but it is also, in a sense, a housekeeping body. I need not go into great detail about that. But it is aided by the Administrative Office of the United States Courts which is presently headed by Director Ernest Friesen, Jr., and by Deputy Director William Foley.

Now one of the committees of the Conference is the Committee on Court Administration. I have been chairman of that committee since its inception, which was about 11 years ago.

I have served on many of the Conference committees and I have been chairman of a number of them. I have been on the bench about 31 years and for about 28 years of that time I was either senior circuit judge or chief judge of the Third Judicial Circuit which, as you are well aware, includes and consists of Pennsylvania, New Jersey, Delaware, and the Virgin Islands.

I am no longer a member of the Conference because there is a statute which provide that when a judge reaches 70 he shall no longer serve as chief judge. The next man moves up. The retiring chief judge retains all his judicial powers except he is no longer chief judge and does not conduct administration.

I have been on senior judge status since October 6, 1965. I am still chairman of the Committee on Court Administration and serve on other committees of the Conference. Is this a sufficient explanation of the functioning of the judicial conference?

Now the Committee on Court Administration for many years, 7 or 8 years at least, has been endeavoring to get changed the provisions of the Interstate Commerce Commission Act insofar as they relate to review of Commission orders. And, as has been well stated here by both the chairman of the Interstate Commerce Commission and the chief counsel, the present method of review is an anomaly, a rather odd anomaly.

Out of all of the commissions of which I am aware—certainly out of all of the larger commissions which were set forth in the memorandum of the ICC filed here today—review is always to the courts of appeals which have venue rather than to the U.S. district courts as prescribed.

I think in the last 31 years I must have sat in, conservatively, 20, at least, of the cases arising from the ICC determinations. And I have always thought that it was a rather curious procedure.

First of all, one circuit judge must sit with two district judges and the method of proceeding is simply to go forward upon the record of the Interstate Commerce Commission, and as has been stated here, the district court passes upon issues of law and also, of course, on the issue as to whether or not there is substantial evidence to support the position which the ICC has taken in making its determination.

Then, as a matter of right under the act, there is an appeal to the Supreme Court of the United States which, when the appeal is taken, ordinarily issues a rule to show cause on a motion generally filed by the winning party as to why the decision of the three-judge court should be sustained.

Contrarywise of course there is an answering motion, if the appealing party desires to state a contrary legal position. In most instances the appeals to the Supreme Court which are, as I say, direct appeals as of right, are disposed of on these motions to dismiss the appeal. The ones that require hearing in the judgment of the Supreme Court go formally on the docket and are heard and opinions are written and that is the end of the matter.

We have on an average of these ICC cases—I would think the average is close to 70 a year. In my statement I have set up from the report of the Director of the Administrative Office the number of reviews.

These are on page 4 of my statement. For example, in 1966 there were 72 such cases. And in 1967, I refer to the fiscal years, Mr. Chairman—there were 64. There is no reason that I can see—any substantial reason—why the Interstate Commerce Commission review of orders of the Interstate Commerce Commission should not be put upon the same basis of review as are most of the other agencies.

One question was raised during the disposition of this matter by the Conference. This was what would happen in respect to cases in which there was an application for a stay or restraining order. As you know, Senator, most of the courts of appeals do not have court reporters. Well, this is a very simple matter. Actually, in our court, where we need a court reporter, we call one in. Most of the issues requiring a reporter relates as to whether or not there should be a stay and are disposed of on affidavits instead of oral testimony. In the many numerous cases in which I have sat, I can recall only one where it was necessary to have a court reporter present. This was where there was an application for a stay.

This matter was brought before the Judicial Conference at the session in February 1968, and the bill was approved—that is, S. 2687—was approved as written.

It had previously come before the Judicial Conference at an earlier session, as set out in my memorandum, where it was approved in principle.

After it was approved in principle, various conferences took place between the counsel for the ICC and myself. And we reached the conclusion that the bill, as written, was a most desirable one. Thereafter, at the February 1968 conference, it was approved in the form in which it is presently before you.

Now I think I have said all I need to, but I will answer any questions that the Chairman may have.

Senator LAUSCHE. Senator Moss.

Senator Moss. No; I just wonder how this got started in the first place, being assigned to the three-judge court. I came in late.

Judge BIGGS. I can inform you as to that. This is set out, incidentally, in my memorandum. There was a court known as the Commerce Court and the ICC, when it was first conceived, was considered a rather radical body. It seems a little strange to look back on it now and the ICC was considered a very radical body by the railroads.

The Commerce Court was set up to review orders of the ICC. Congress thought these orders consisted of a specialized subject and their review needed a specialized court, but the Commerce Court existed for a comparatively brief time.

The public and the railroads were no more in favor of the Commerce Court and its decisions than they were in favor of the ICC decisions. It meant regulation of the railroads in some respects. And I hope my sainted grandfather will forgive me for saying that regulation was needed. He was general counsel for the Pennsylvania Railroad and felt quite contrary.

Well, the Commerce Court was simply wiped out by an act of Congress and the judges were allowed to select where they would sit as circuit judges. Congress turned them into circuit judges, judges of the circuit courts of appeals, overnight. And they sat around the United States in places where they chose.

Judge Mack, for example, decided he would sit in the Second Circuit in New York City because he was a New Yorker and he sat there.

Well, that left no reviewing body. At that point, an Urgent Deficiencies Act was about to be passed. The provisions for these three-judge district courts, one of whom had to be a circuit judge, was simply appended to that Urgent Deficiencies Act, the particular one which is set forth in my memorandum, and the three-judge district court has continued ever since.

Senator Moss. This puzzled me, not knowing that background. I appreciate your filling me in.

Judge BIGGS. It is an interesting history and historical legal "sport," if I may use that phrase.

Senator Moss. This sometimes happens here. Something gets appended on as an amendment to a bill and there it is. It is drafted into the law and goes on indefinitely. That is very interesting. I appreciate being informed a little bit on it. I don't have any detailed questions. I really don't know much about the subject. I am just learning.

Senator LAUSCHE. For the purposes of punctuating the fact, I wish that you would repeat the membership of the Judicial Conference.

Judge BIGGS. I will do this. The Judicial Conference consists of the chief judges of the courts of appeals of the 11 judicial circuits. The District of Columbia of course counts as a circuit in that array. Also there are 11 district judges from the respective 11 circuits which are chosen by the vote of the judges of the particular circuit. All the judges of the particular circuit meet in executive session at the annual conference of the circuit.

I think I better point out to make it clear that there are three bodies which really should be noted here. First of all, there is the Judicial Conference of the United States, a statutory body. Second, each judicial conference of its own also statutory. Ours, for example, meets at Atlantic City once a year and has a program that lasts 2½ days.

Every judge in the circuit is required to be present except senior judges unless excused by the chief judge of the circuit.

Then there is a third body also statutory which does not figure in this particular situation, but I think I should refer to it. That is the judicial council of a circuit. This is an administrative body for the circuit and consists of the chief judge of the circuit ex officio as chairman and all of the circuit judges in active commission in the circuit.

For example, we have at the present time six judges—in active commission. We have three vacancies. The judges inactive are members of our commission judicial councils and the chief judge of our circuit is the chairman. There is also an appointed secretary, but that is beside the point here.

Now back to the Judicial Conference of the United States. After these district judge members of the judicial conference have been selected by the judicial conferences of their circuits, they become members of the Judicial Conference of the United States for terms of 3 years.

Then, in addition to those 11 district judges and the 11 chief judges of the circuit there has been added to the Conference the Chief Judge of the Court of Claims, the Chief Judge of the Court of Customs and Patent Appeals and of course the Chief Justice of the United States who is the presiding officer and the chairman of the Conference. That is the constituency of the Conference.

Senator LAUSCHE. Chief Justice of the United States.

Judge BIGGS. Of course.

Senator LAUSCHE. It is this body of judges that has considered this problem and recommends the adoption of this bill?

Judge BIGGS. That is correct. First, as I say, in principle and in the February session of this year the Conference approved the bill as drawn and as you have it before you.

Senator LAUSCHE. I observe from your written statement a proposal to this effect came before the Committee on Court Administration at its August, 1967, meeting and the Committee recommended to the Judicial Conference in its report that the Conference approve in principle S. 2687.

Judge BIGGS. That is correct. That was followed by—this year—by an approval of the bill.

I might add the reason for the delay was this. As you are well aware, Senators, this is a fairly complicated subject and I wanted to make absolutely certain that the bill was in proper form as drafted.

I became convinced that it was and I suggested that it was in as good a form as it could be to my committee and suggested the committee recommend its adoption by Judicial Conference. And the Conference approved it as it is in its present form.

Senator LAUSCHE. One final question. Does it feel any different to act as a judge as distinguished from acting as a witness? [Laughter.]

Judge BIGGS. Yes, it does. Yes, it does. I think that is a very entertaining question. It does make some difference.

I always feel freer as a witness than I do as a judge. On occasion one could make some odd remarks from the bench and I can tell you an amusing little story. This better be off the record.

(Discussion off the record.)

Judge BIGGS. Thank you for hearing me, gentlemen.

Senator LAUSCHE. Thank you, very much.

(The prepared statement of Judge Biggs follows:)

STATEMENT BY JUDGE JOHN BIGGS, JR.

Mr. Chairman, Gentlemen of the Committee, my name is John Biggs, Jr., and I am a Senior United States Circuit Judge of the Third Judicial Circuit of the United States, and Chairman of the Committee on Court Administration of the Judicial Conference of the United States. I was appointed to the Court of Appeals in 1937 and served as chief judge of that court from early in 1938 until I became 70 years of age on October 6, 1965. I have been Chairman of the Committee on Court Administration since its inception. The Committee on Court Administration in the 12 years of its existence has dealt with needs and problems of court management, and problems relating to the tenure and salaries of judges, annuities to judges' survivors, the creation of additional judgeships, places of holding court, and similar matters. I am delighted to be here today and honored by your request to express views respecting Senate Bill 2687, First Session, 90th Congress, introduced by Senator Lausche of the Commerce Committee.

The Committee on Court Administration for a long time had been considering amendments to Section 17 of the Interstate Commerce Act, 49 U.S.C. § 17, and corresponding changes in the provisions of Chapter 157, Title 28, U.S.C., so that orders of the Interstate Commerce Commission might be reviewed by the courts of appeals instead of three-judge district courts consisting of at least one circuit judge and two district judges. A propsal to this effect came before the Committee on Court Administration at its August 1967 meeting, and the Committee recommended to the Judicial Conference in its report that the Conference approve "in principle" S. 2687. The Conference adopted the Committee's recommendation. See Rept. Proceedings Judicial Conference of the United States Sept. Sess. '67, pp. 64–65.

The approval of the Conference was expressed to the Commerce Committee by a letter written by Deputy Director William E. Foley of the Administrative Office of the United States Courts. The Judicial Conference Report referred to stated:

"Judge Biggs called the attention of the Conference to the fact that I.C.C. orders are now reviewed by district courts comprising three judges, one of whom is required to be a circuit judge. Appeals from the judgment of such courts lie directly to the Supreme Court. He stated that this system is an anomaly since in almost every instance the agency reviews are brought to the courts of appeals of the respective circuits and are reviewed by the Supreme Court on certiorari. The Conference approved, in principle, the draft bill providing for review of I.C.C. orders by the respective courts of appeals and for the review by certiorari to the Supreme Court of the United States. It agreed that the Committees on Court Administration and on Revision of the Laws should reexamine the draft bill, particularly those provisions relating to the issuance of stays and interlocutory injunctions, and should present to the Conference a bill in final form at a later session."

At the February Session 1968, the Judicial Conference went further and stated as follows:

"The Conference approved the joint recommendation of the Committee on Court Administration and the Committee on Revision of the Laws to approve

S. 2687 which would provide that instead of review of orders of the Interstate Commerce Commission by three-judge district courts, jurisdiction for review of I.C.C. orders would be placed in the respective United States courts of appeals, thereby eliminating direct appeal to the Supreme Court of the United States from orders of the Interstate Commerce Commission. The Conference agreed with a motion by Judge Harper that the Committee study, in advance, the establishment of machinery (court reporters, clerks, etc.) to take care of this change should the legislation be enacted." (Conf. Rept. Feb. Sess. '68, pp. 12–13).

It follows that S. 2687 has the full approval of the Judicial Conference of the United States.

The number of three-judge court cases for the years 1966 and 1967 is as set out in the following tables:

For the year 1967, the table is as follows:

3-JUDGE COURT CASES HEARD DURING THE FISCAL YEAR 1966, BY CIRCUIT AND NATURE OF SUIT

Circuit	Total	Review of ICC orders	Civil Rights	Suits involving State or local laws or regulations	
				Reapportionment	Other actions
Total	162	72	40	28	22
District of Columbia	3	2	1		
1st	6	4			2
2d	12	4	4	1	3
3d	5	3		2	
4th	14	4	5	4	1
5th	45	15	21	4	5
6th	17	8	4	3	2
7th	8	3		3	2
8th	19	12	1	5	1
9th	[1] 16	10	1	3	4
10th	[1] 17	7	3	3	2

[1] [Sic.]

Source: Report, Director, Administrative Office, 1966, p. 106.

For the year 1967, the table is as follows:

Circuit	Total	Review of ICC orders	Civil Rights	Suits involving State or local laws or regulations	
				Reapportionment	Other actions
Total	171	64	55	10	42
District of Columbia	11	3	7		1
1st	5	2	1		2
2d	21	10	9		2
3d	14	5	2	1	6
4th	9	4	2		3
5th	44	7	21	5	11
6th	19	11	2	3	3
7th	10	8	1		1
8th	6	3			3
9th	24	6	9	1	8
10th	8	5	1		2

Source: Report, Director Administrative Office 1967, p. 127.

I believe the tables are quite indicative of what will be the average number of cases to be handled by Three-Judge Courts throughout the United States. Their numbers vary a little, but not very much.

The present system of having the review of I.C.C. orders conducted by Three-Judge Courts is indeed anomalous. The system was set up by the 63rd Congress, 1st Session, in the year 1913 as part of the Urgent Deficiencies Act of that year (see 38 Stat. 219, et seq.) and was, of course, incorporated in Title 28 of the Judicial Code at the time of the codification of 1948. See Chapter 155, "Injunctions: Three-Judge Courts," §§ 2281 to 2284. These provisions are presently embodied in the 1968 Edition of Title 28. S. 2687 simply transfers the substance

of the provisions relating to the rights and duties of Three-Judge Courts to review orders of the Interstate Commerce Commission to the United States Courts of Appeals which will be given by the legislation the powers and duties of the Three-Judge District Courts. I can foresee no difficulty in the operation of the system proposed to be followed for it corresponds with that employed to review the orders of almost all governmental agencies.

You will note, however, as appears from the Report of the Judicial Conference, February Session 1968, pp. 12–13, quoted above, that Chief Judge Roy W. Harper of United States District Court for the Eastern and Western Districts of Missouri, at St. Louis, raised the question as to whether provision should be made for court reporters and clerks at hearings before the Courts of Appeals to review orders of the Interstate Commerce Commission. At the direction of the Judicial Conference I wrote a letter to the Chief Judges of the eleven Judicial Circuits, a copy of which is attached to this report and marked Exhibit A, to ascertain whether or not they thought any difficulties might be presented in respect to hearings in Interstate Commerce Commission cases in the Courts of Appeals, and whether or not machinery, *i.e.*, court reporters, clerks, etc., should specially be set up to take care of such hearings. Chief Judge Harper envisaged a situation where an application might be made for a stay in a Court of Appeals and it might be necessary to have a court reporter present to take down and transcribe evidence for decision and for appeal. I have received answers to my letter from the Chief Judges of the Courts of Appeals for the Second Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, Seventh Circuit, Eighth Circuit and Ninth Circuit. I have not yet heard from the Chief Judges of the First, Sixth and Tenth Circuits and the District of Columbia Circuit. None of the Judges who has replied perceives any difficulty in the management of his court when reviewing Interstate Commerce Commission orders.

It is the custom in the Court of Appeals for the Third Circuit when appeals are heard to bring in a court reporter to have the oral argument taken down and transcribed where either the court or the parties deem it desirable, and the court reporter's compensation is charged against the parties. Ordinarily, however, no court reporter is present and the case is simply heard on the briefs and the oral arguments of the parties. I am convinced that most of the Interstate Commerce Commission review cases would be heard in this manner. It should be noted that in almost every instance the appeals are heard solely on the record which is made by the Commission and if that record is deemed to be insufficient, the case may be remanded by the court to the Commission for further evidence.

In my view, the proposed change is desirable and would lift some of the burden from the Supreme Court, the United States District Courts, and would add very little to that of the United States Courts of Appeals, since these cases would be handled by the latter courts in the routine manner employed for every other appeal.

EXHIBIT A

CHAMBERS OF JOHN BIGGS, JR.,
SENIOR U.S. CIRCUIT JUDGE, THIRD JUDICIAL CIRCUIT.
Wilmington, Del., May 17, 1968.

To the Chief Judges of the Eleven Judicial Circuits:

Enclosed you will find a copy of S. 2687, 90th Congress 1st Session. In the Report of the Judicial Conference of February 27–28, 1968, pp. 12–13, the following was stated:

"The Conference approved the joint recommendation of the Committee on Court Administration and the Committee on Revision of the Laws to approve S. 2687 which would provide that instead of review of orders of the Interstate Commerce Commission by three-judge district courts, jurisdiction for review of I.C.C. orders would be placed in the respective United States courts of appeals, thereby eliminating direct appeal to the Supreme Court of the United States from orders of the Interstate Commerce Commission. *The Conference agreed with a motion by Judge Harper that the Committee study, in advance, the establishment of machinery (court reporters, clerks, etc.) to take care of this change should the legislation be enacted.*" (Emphasis added)

I have given this matter some thought and it would seem to me that the occasions on which a court reporter would be needed in the Court of Appeals would be rare indeed. Such occasions might arise where there was a motion for the stay

or suspension of the operation of the order of the Interstate Commerce Commission (see p. 5, lines 12 to 24, inclusive of S. 2687) and the proceeding was not based on affidavits, or where the Court of Appeals or a Judge thereof desired a transcript of the oral argument. I would assume that a transcript of oral argument would be as rare in the review of Interstate Commerce Commission orders as it is in a case presently argued before a Court of Appeals.

As to clerks, I see no reason why any work required of a clerk could not be disposed of by the Clerk of the Court of Appeals or one of his Deputies if the Clerk was sitting in court himself.

Would each of you be good enough to give me your views respecting this matter so that the Committee on Court Administration can report your views to the Judicial Conference at its September 1968 Session.

Cordially,

JOHN BIGGS, Jr.,
Chairman, Committee on Court Administration.

Senator LAUSCHE. The next witness is Harry Breithaupt, Jr., general solicitor, Association of American Railroads.

Mr. BREITHAUPT. Mr. Chairman, Senator Pearson, Senator Moss, I have a very brief prepared statement. Mr. Chairman, with your permission I would just like to read it.

STATEMENT OF HARRY J. BREITHAUPT, JR., GENERAL SOLICITOR, ASSOCIATION OF AMERICAN RAILROADS, WASHINGTON, D.C.

Mr. BREITHAUPT. My name is Harry J. Breithaupt, Jr. I am general solicitor of the Association of American Railroads, with offices at Washington, D.C. My appearance here today is for the purpose of expressing the support of the Association of American Railroads for S. 2687.

This bill, introduced at the instance of the Interstate Commerce Commission, would amend section 17 of the Interstate Commerce Act in such a way as to provide a new procedure and method for the judicial review of that Commission's orders. It would make ICC orders reviewable in the same general manner as the orders of other principal Federal regulatory agencies—Civil Aeronautics Board, Federal Communications Commission, Federal Maritime Commission, Federal Power Commission, Federal Trade Commission, and so forth.

Under present law, judicial review of orders of the Interstate Commerce Commission is unique in that such orders are reviewable by special statutory three-judge U.S. District Courts. The decisions of those courts with respect to ICC orders are then reviewable, in turn, in the Supreme Court by appeal—not by way of petition for writ of certiorari. The proposal here is to have the Commission's orders judicially reviewed in the U.S. courts of appeals, with Supreme Court review only by the discretionary writ of certiorari.

We favor this proposal. We believe that the courts of appeals would, on the whole, constitute a more satisfactory forum for reviewing ICC orders than is provided by three-judge district courts. The courts of appeals are accustomed to the review of orders of Federal agencies, and have a background for that type of case. Most district judges, on the other hand, are confronted only infrequently—if at all—with such cases.

Moreover, the courts of appeals have rules applicable to judicial review proceedings. There are no such rules in the case of three-judge district courts. Each case in these special courts develops its own rules,

so to speak. This, understandably, leads to a certain amount of uncertainty and even confusion.

S. 2687 is a comprehensive measure that would make the changes I have already mentioned and that would, at the same time, deal in what seems to us to be a sound and constructive way with such important related matters as venue, limitations, the record on review, stays, interlocutory injunctions, and so forth. The Association of American Railroads supports the bill and urges its favorable consideration.

Senator LAUSCHE. Mr. Moss?

Senator Moss. I don't believe I have any questions, Mr. Chairman. You are predicating your endorsement on the basis of uniformity in appeals from other regulatory bodies of the United States and that there is a regular channel for doing this that you think ought——

Mr. BREITHAUPT. Not on the ground of uniformity alone. I don't believe that uniformity alone should be considered a sufficient basis to change a law that is operating satisfactorily.

But, on balance and in light of the considerations that have been mentioned by Judge Biggs and by the chairman of the Commission before you came in, and with the sincere feeling that a more appropriate way to accomplish judicial review of these orders would be in the way that it's already done with regard to the orders of other agencies, we support it.

Senator Moss. Thank you.

Senator LAUSCHE. I have no questions.

Next is Vernon Baker, chairman of the legislative committee of the Motor Carrier Lawyers Association.

Mr. Baker.

Mr. BAKER. Thank you, Mr. Chairman.

STATEMENT OF VERNON V. BAKER, CHAIRMAN, LEGISLATIVE COMMITTEE, MOTOR CARRIER LAWYERS ASSOCIATION, WASHINGTON, D.C.

Mr. BAKER. Mr. Chairman, Senator Moss, my name is Vernon V. Baker. I am a member of the law firm of Baker & Raley with offices in this city; and I am appearing here in behalf of the Motor Carrier Lawyers Association. The association is grateful for the opportunity of presenting its views to this subcommittee.

The Motor Carrier Lawyers Association, founded shortly after enactment of part II of the Interstate Commerce Act, has more than 450 members, domiciled throughout the United States and Canada and specializing in practice before the Interstate Commerce Commission. As the name of the association implies, the major interest of most of the members of the association is in the representation of motor carriers.

At its annual conference in Detroit, Mich., held in May of this year, the membership devoted much time to an analysis and discussion of S. 2687 and the companion House bill H.R. 13927. After thorough discussion, the association voted to oppose these bills, and I have been directed to present its views to your subcommittee.

I am certain that the witnesses who preceded me will have discussed in detail the changes in procedure which would be effected by enact-

ment of S. 2687. Thus, I will not burden you with repetition concerning the details of the bill.

The most important and basic change which is proposed in the bill is the transference of jurisdiction in respect of judicial review of ICC orders—excepting those involving only the payment of money—from a three-judge district court to the U.S. courts of appeal.

The existing procedure for review by three-judge courts has been followed since 1913. The members of my association are of the view that this procedure has worked well. We are aware of no substantial complaints concerning this basic procedure.

Presently, a party dissatisfied with a Commission order may bring an action to set it aside in the district court for the district in which he resides. Not only are these courts generally nearer the home of the complaining party and the office of his counsel, but also proceedings therein are relatively inexpensive. Transference of jurisdiction to the courts of appeal will necessitate in many more cases the retention of additional counsel, and will entail substantial additional costs resulting from the necessity of printing briefs and appendixes containing pertinent portions of the record made before the Interstate Commerce Commission. Such printing is not generally required in the district courts.

The matter of expense is an important factor when the average motor carrier is concerned. As of June 30, 1967, there were subject to the jurisdiction of the Interstate Commerce Commission more than 16,000 motor carriers, scattered throughout the United States. Of these, less than 1,700 are class I carriers; that is, carriers having annual operating revenues of $1 million or more. About 11,500 have annual operating revenues of less than $200,000. With businesses of this size, it is apparent that many will be unable to afford to undertake the more expensive procedure provided for in this bill—even though they may have a legitimate grievance which merits judicial review. So far as members of my association are concerned, I am sure that we would encounter many instances wherein we would have to advise our clients against an appeal because of the costs involved, even though we might feel optimistic about the chances of success.

The association also is concerned about the proposed change in procedure in respect of temporary restraining orders. Under existing law (28 U.S.C., sec. 2284), a district judge may grant a temporary restraining order to prevent irreparable damage. When necessary, upon proper showing, such an order may be obtained very quickly. In the subject bill, no provision is made for the granting of such a restraining order by a single judge. Such action would have to be taken by the Court, and a formal hearing would be required, after the giving of reasonable notice to the Commission and the Attorney General. There are occasions when orders of the Commission are made effective immediately and where appropriate protection of a litigant requires most prompt action. It is questionable whether under the provisions of this bill adequate remedy would be afforded in such emergency situations.

In conclusion, it is the position of the Motor Carrier Lawyers Association that enactment of S. 2687 would make more cumbersome, rather than simplify, the judicial review of orders of the Interstate Commerce Commission; that it would add unnecessarily to the expense of

obtaining judicial review and, thus, in many cases make the seeking of judicial review prohibitive, regardless of the merits in particular cases.

That concludes my prepared statement.

Senator LAUSCHE. Senator Moss?

Senator Moss. Thank you, Mr. Chairman.

Mr. Baker, you are here, of course, representing the Motor Carrier Lawyers Association. Would your arguments also apply, do you think, for someone representing the air carriers or TV and radio producers? Would they be better off going back to this type of court?

Mr. BAKER. I don't believe the element of expense would be so important when you are dealing with large businesses like railroads and air carriers. Respecting motor carriers, as I indicated, a great many of them are really small businesses.

Senator Moss. You make your point very well, although I'm sure there are many relatively small railroads too, and there are certainly small radio stations. That is why I asked if you thought the same principle would apply.

Mr. BAKER. It would apply with respect to small ones; yes.

Senator Moss. Thank you.

Senator LAUSCHE. In the testimony of Mr. Tierney, he stated this bill also changes existing case law with regard to the submission of the complete record of proceeding before the Commission to a reviewing court.

Under existing practice, the person seeking the review has the burden of filing a certified copy of the record with the reviewing court. Under S. 2687, the Commission would be required to file the record with the clerk. Then he goes on to the statement, "Under our present review procedure, the plaintiff bears the burden of filing with the three-judge court a certified copy of the record before the Commission. Although this change may impose some additional burdens on the Commission, it will bring itself practically into line with present procedures for the review of all other Federal agency orders."

Will not this bill, in a measure, relieve the complainant of a burden inasmuch as the bill provides that the Commission will have to do what up until now had to be done by the person complaining?

Mr. BAKER. To a small extent. Actually, ordinarily, it is not a great burden for the plaintiff to supply to the Commission a copy of the record for certification. Generally the plaintiff has in his file copies of the record. The practice is to take those to the Commission, have them certified, and then they are introduced into evidence before the three-judge court.

It is not expensive unless he doesn't have copies and has to duplicate them. Ordinarily he does have the copies. I understand that the practice in the other agencies where the appeal is to the courts of appeal, that the Commission does not actually supply the entire record. It supplies a list of the pertinent parts of the record. It will then be incumbent upon the parties to have printed for the use of the court of appeals, so-called joint appendixes which must contain the portions of the record which are relied upon to support their position.

That can entail quite heavy expense in a proceeding in which there is a large record before the Commission.

Senator LAUSCHE. The opposition of your association then is based upon the expenses that will be incurred in the printing of the record,

probably the necessity of traveling to some distant point to make the presentation as distinguished from the convenience of having the hearing in the immediate domicile or home of the complainant, and third, the probability that you will have to have additional counsel, not only the local counsel, but some counsel at the circuit court of appeals——

Mr. BAKER. That is the primary objection.

Senator LAUSCHE. Any further questions? All right, thank you very much.

We have one more witness. That is Richard Sigmon, president of the Association of Interstate Commerce Commission Practitioners. Mr. Sigmon.

STATEMENT OF RICHARD R. SIGMON, PRESIDENT OF THE ASSOCIATION OF INTERSTATE COMMERCE COMMISSION PRACTITIONERS

Mr. SIGMON. Mr. Chairman, Senator Moss, my name is Richard R. Sigmon. I am an attorney and currently the president of the Association of Interstate Commerce Commission Practitioners, an organization which is the Commission's bar and whose 3,400 members represent all phases of regulated surface transportation and shipper interests in proceedings before the Interstate Commerce Commission. I have been authorized by the association to appear and to testify today in general support of the provisions of S. 2687. However, the association would like to suggest to the subcommittee two modifications of S. 2687.

The first of these deals with the matter of venue. The bill provides for venue in the judicial circuit in which the residence or principal office of any of the parties filing the petition for review is located. The association believes that in addition, venue should lie in the District of Columbia Circuit. This would conform to other review statutes, such as the Federal Aviation Act 49 U.S.C. 1486. Under the proposed venue provision in the bill, few proceedings to review Commission decisions would come before the District of Columbia Court because so few carriers are domiciled in the District. Yet, often that court would be the most convenient forum for all parties, and that court probably has more experience than any other court of appeals in reviewing administrative proceedings. This change could be made by inserting a comma at the end of proposed subsection (10)(b), and adding the words "or in the District of Columbia."

The second amendment which the association proposes for the subcommittee's consideration relates to the 60-day time limit for filing petitions for review proposed in subsection (10)(c)(i). The association is in agreement with the principle of a limitation of the time within which Commission decisions may be appealed. However, we believe that there may arise situations where absolute foreclosure of an appeal because of the 60-day limitation could work an injustice.

The association suggests a provision for waiver of the 60-day time limit upon the showing of reasonable grounds for failing to file within 60 days. This could be accomplished by adding the following sentence at the end of subsection (10)(c)(i):

After the expiration of the said 60 days a petition may be filed only by leave of court upon a showing of reasonable ground for failure to file the petition theretofore.

The association favors the change in procedure for review of Interstate Commerce Commission orders embodied in S. 2687 and believes that the uniformity in review of agency proceedings which would result from its enactment will be beneficial.

In conclusion, I would like to thank the subcommittee for the opportunity to make this statement on behalf of the association.

Senator LAUSCHE. Senator Moss?

Senator Moss. I have no questions. Thank you.

Senator LAUSCHE. While the counsel for the Commission is here, would you want to express an opinion on the suggestion that venue be given to the Court of Appeals for the District of Columbia?

Mr. GINNANE. Mr. Chairman, I think it would result in quite a concentration of cases in the Court of Appeals for the District of Columbia. My personal feeling is that that would not be a particularly healthy thing.

I think there is a value in having cases filed in the circuit in which, generally speaking, the particular transportation problem geographically will be located. I think if the transportation problem is centered primarily, say, on the west coast, I think the judges of the Court of Appeals for the Ninth Circuit are apt to have a little feel for the geography involved, for the basic pattern, which would help them do a more realistic job.

Senator LAUSCHE. What about the argument that appeal is allowed to the district court from the orders of some of the present Commissions? Is that part of your argument?

Mr. SIGMON. Yes, sir; it is.

Mr. GINNANE. I think he is right. Some of the existing review provisions do allow such alternative venue, and I think some others do not. But there are some statutes which do allow such alternative venue in the District of Columbia circuit.

Senator LAUSCHE. Now, Mr. Sigmon, this provision allowing waiver by the court of the 60-day provision, would that create any danger that protracted delay may be at times indulged in and then petition made to the court that leave be granted?

Mr. SIGMON. Well, I would expect the courts—my experience has been that they pay heed to such terms as reasonable grounds and make you show some valid reason for having failed to file, and not merely—a delay will not usually be considered reasonable grounds for this.

Senator LAUSCHE. Fine. Thank you very much for the help of all of you.

There are no other witnesses listed for today. The hearings on this bill will be closed as of this time, and in due time the subcommittee will act on the bill.

Thank you very much. There will be inserted in the record at this point a letter in support of S. 2687 received from the National Industrial Traffic League.

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
June 27, 1968.

Hon. FRANK J. LAUSCHE,
Chairman, Surface Transportation Subcommittee,
Committee on Commerce,
U.S. Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: The National Industrial Traffic League appreciates this opportunity to present its views in support of S. 2687, a bill to amend Section

17 of the Interstate Commerce Act to provide for judicial review of orders of the Interstate Commerce Commission and for other purposes.

The National Industrial Traffic League is a voluntary organization of shippers, groups and associations of shippers, chambers of commerce and boards of trade. The League's membership includes shippers and receivers of all types—small, medium and large—which are located throughout the United States. The League has previously appeared before your subcommittee and other congressional committees and presented its views on pending legislation of particular interest to its membership.

S. 2687 was introduced November 22, 1967, upon the request of the Interstate Commerce Commission. Similar legislation has been requested by the I.C.C. in other sessions of Congress. However, final congressional action was never completed. The main objective of S. 2687 would be to provide for judicial review of I.C.C. orders by the U.S. Courts of Appeal. Presently, orders of the Interstate Commerce Commission are reviewed by three-judge courts specially constituted from the ranks of the U.S. District Courts and the U.S. Courts of Appeal. The changes proposed in S. 2687 would be beneficial to members of The National Industrial Traffic League and the shipping public at large in that it would enable them to avoid the extraordinary and unwieldly procedure presently in existence. Such procedure does not fit in with the normal business of the District Courts and the Courts of Appeal. Additionally, the present procedure involves difficulty and delay in convening special courts and is not conducive to efficient administration. On the other hand, the several U.S. Courts of Appeal are intimately familiar with the basic process of judicial review.

In making these observations, we wish to make it clear that the League is in no sense being critical of the substantive decisions of the present three-judge statutory U.S. District Courts.

The National Industrial Traffic League's policy on judicial review provides: "The Courts of Appeal should be given exclusive jurisdiction to review Commission orders." This policy is designated as B–17(e) of our current policy pamphlet and has been in effect since 1961.

Uniformity is an additional important benefit which would result from enactment of S. 2687. Orders of the other Federal regulatory agencies including the Federal Maritime Commission and the Civil Aeronautics Board are presently subject to review by the U.S. Courts of Appeal. The Courts of Appeal also have jurisdiction under the prevailing statutes over the other federal regulatory agencies. It is the League's view that uniformity on this subject would be most desirable. According exclusive jurisdiction to the Courts of Appeal initially to review orders of the Interstate Commerce Commission would permit adequate and reasonably expeditious review, and would eliminate the unwieldly and less efficient procedure now provided.

There are several other provisions of S. 2687 which will be beneficial to shippers. These include: (1) naming the Commission as respondent in the proceeding; (2) serving notice of appeal on all parties; (3) limiting the time for serving the notice of appeal; (4) providing for combining all appeals in one court; (5) preserving the right of intervention; and (6) empowering the court to stay the order under review upon reasonable notice and pending hearing pursuant to the rules of the court.

In behalf of The National Industrial Traffic League, I appreciate this opportunity to present the views of the League in support of S. 2687 and urge that the legislation be favorably considered by your subcommittee.

Very truly yours,

SAM HALL FLINT,
Chairman, Legislative Committee.

(Whereupon, at 10:20 o'clock a.m., the hearing was closed.)

THE FEDERAL BAR ASSOCIATION,
Washington, D.C., July 24, 1968.

Hon. WARREN G. MAGNUSON,
Chairman, Senate Commerce Committee,
U.S. Senate,
Washington, D.C.

MY DEAR MR. CHAIRMAN: The Federal Bar Association, with a membership of over 13,000 present and former attorneys for the Federal Government, endorses and recommends passage of S. 2687. This bill would put judicial review of decisions of the Interstate Commerce Commission on the same footing as orders

of other federal administrative agencies. In lieu of the present cumbersome and inefficient procedure, whereby three judge district courts must be convened in an anomalous half trial-half appeal review of ICC decisions, the described bill would substitute appeal on the record directly to courts of appeals which, unlike the district courts, are designed and equipped to consider such matters.

This position of the Federal Bar Association was determined after an almost unanimous vote in favor of the bill by our Committee on Administrative Law and Procedure. The vote of that Committee, which comprises over 350 lawyers scattered throughout the country, was taken only following careful review and consideration of all aspects of the bill vis-a-vis the present technique for review of ICC decisions. That review indicated that the proposed bill provided for more efficient, more rapid review of Commission decisions redounding to the benefit of all parties concerned. We endorse it as a consistent extension of the ideal concept of administrative procedure as providing rapid and relatively inexpensive justice.

Should you consider it necessary or desirable, we should be pleased to provide personnel of our Committee on Administrative Law and Procedure to testify before your Committee in support of the bill.

Respectfully submitted.

JAMES MCI. HENDERSON, *President.*

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